KEY TITLES

Give the formal parts of pleadings in each particular jurisdiction, furnishing the method of making the forms in the other titles of general application. Thus, to adapt the New York complaint, Form No. 4999, to use in California, turn to the Key Title COMPLAINTS, and substitute the formal parts of the California complaint as given in Form No. 5910 for the formal parts in Form No. 4999, and the complaint becomes good for California. In the same manner, this form may be used in other jurisdictions. Again, take the Michigan bill, Form No. 5638; to adapt this bill to use in another jurisdiction, as for example in the District of Columbia, turn to Form No. 4268 in the Key Title BILLS IN EQUITY and substitute the formal parts there given for the formal parts in Form No. 5638. In like manner, any declaration, as for instance the Illinois precedent, Form No. 6875, may readily be transformed into a declaration for use in another jurisdiction by referring to the Key Title DECLARATIONS for the formal parts. The Key Titles in the first fifteen volumes are AFFIDAVITS, ANSWERS, BILLS IN EQUITY, COMPLAINTS, CRIMINAL COMPLAINTS, DECLARATIONS, DEMURRERS, INDICTMENTS, INFORMATIONS IN CRIMINAL CASES, JUDGMENTS AND DECREES, MOTIONS, NOTICES, ORDERS, PETITIONS, PLEAS.

ENCYCLOPÆDIA

OF

FORMS AND PRECEDENTS

FOR

PLEADING AND PRACTICE, AT COMMON LAW, IN EQUITY, AND UNDER THE VARIOUS CODES AND PRACTICE ACTS.

EDITED BY

THOMAS E. O'BRIEN

UNDER THE SUPERVISION OF

JAMES COCKCROFT,

AUTHOR OF

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PUBLICATION.

By Harold N. Eldridge.

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For Forms relating to Publication in Attachment Proceedings, see the title ATTACHMENT, GARNISHMENT, TRUSTEE PROCESS, FACTORIZING, vol. 2, *Form No. 2858 et seq.*
For Form of Notice of Assessment of Damages in Eminent Domain Proceedings, see the title EMINENT DOMAIN, vol. 7, *Form No. 8346.*
For Form of Summons by Publication in Proceedings to Foreclose Mortgage, see the title MORTGAGES, vol. 12, *Form No. 13977.*
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For Forms relating to Publication in Proceedings for Probate and Administration, see the title PROBATE AND ADMINISTRATION, vol. 14, p. 238.
See also the GENERAL INDEX to this work.

I. AFFIDAVIT FOR PUBLICATION.[1]

1. Service by Publication. — There are two modes of obtaining jurisdiction over the person of the defendant: (1) by personal service of the summons with a copy of the complaint; (2) by constructive service, or what is commonly designated publication of summons. Hahn *v.* Kelly, 34 Cal. 391. Service by publication is of comparatively recent origin and was unknown to the common law. At common law, an absent defendant was compelled to appear by means of a writ of distringas, requiring the sheriff to seize a certain quantity of his property, and this was repeated again and again, even to the extent of outlawry, if necessary. Hartzell *v.* Vigen, 6 N. Dak. 117.

Statutes relating to publication exist in the following states, to wit:

Alabama. — Civ. Code (1896), §§ 686 *et seq.*, 3276, 3278; Ch. Ct. Rules, § 22.
Arizona. — Rev. Stat. (1887), § 712 *et seq.*
Arkansas. — Sand. & H. Dig. (1894), §§ 4680 *et seq.*, 5679 *et seq.*
California. — Code Civ. Proc. (1897), §§ 749, 412 *et seq.*
Colorado. — Mills' Anno. Code (1896), § 41 *et seq.*
Delaware. — Rev. Stat. (1893), p. 705, c. 95, § 5.
Florida. — Rev. Stat. (1892), § 1413.
Georgia. — 2 Code (1895), § 4975 *et seq.*
Idaho. — Rev. Stat. (1887), § 4145 *et seq.*
Illinois. — Starr & C. Anno. Stat. (1896), c. 22, par. 12 *et seq.*
Indiana. — Horner's Stat. (1896), §§ 318 *et seq.*, 481.
Iowa. — Code (1897), §§ 3534 *et seq.*, 4680, 4681.
Kansas. — Gen. Stat. (1897), c. 95, § 72 *et seq.*
Maine. — Rev. Stat. (1883), c. 104, §§ 47, 48.
Maryland. — Laws (1896), c. 38; Laws (1892), c. 637; Pub. Gen. Laws (1888), art. 16, § 105 *et seq.*
Massachusetts. — Pub. Stat. (1882), c. 164.
Michigan. — Comp. Laws (1897), § 485 *et seq.*

1. In General.[1]

Minnesota.— Laws (1901), c. 349; Stat. (1894), §§ 1157, 4968, 4969, 5055 *et seq.*, 5204, 5205.

Mississippi.— Anno. Code (1892), §§ 1803, 1804, 3421 *et seq.*

Missouri.— Rev. Stat. (1899), § 575 *et seq.*

Montana. — Code Civ. Proc. (1895), § 637 *et seq.*

Nebraska. — Comp. Stat. (1899), § 5669 *et seq.*

Nevada. — Comp. Laws (1900), §§ 3125, 3126.

New Hampshire. — Pub. Stat. (1891), c. 219, § 9.

New Jersey. — Gen. Stat. (1895), p. 405, § 172.

New Mexico. — Comp. Laws (1897), § 2685, subs. 24 *et seq.*

New York. — Code Civ. Proc., § 438 *et seq.*

North Carolina. — Code Civ. Proc, (1900), § 218 *et seq.*

North Dakota. — Rev. Codes (1895), § 5253 *et seq.*

Ohio. — Laws (1900), p. 274, § 5045 *et seq.*; Bates' Anno. Stat. (1897), § 5048 *et seq.*

Oklahoma. — Stat. (1893), § 3950 *et seq.*

Oregon. — Hill's Anno. Laws (1892), § 56 *et seq.*

South Carolina. — Code Civ. Proc. (1893), § 159 *et seq.*

South Dakota. — Dak. Comp. Laws (1887), § 4900 *et seq.*

Tennessee. — Code (1896), § 6162 *et seq.*

Utah. — Rev. Stat. (1898), §§ 2949 *et seq.*, 3443.

Vermont. — Stat. (1894), §§ 921 *et seq.*, 1641 *et seq.*

Virginia. — Code (1887), § 3230 *et seq.*

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 4877 *et seq.*

West Virginia. — Code (1899), c. 124, § 11 *et seq.*

Wisconsin.— Stat. (1898), § 2639 *et seq.*

Wyoming.—Rev. Stat. (1887), § 2435 *et seq.*, as *amended* Laws (1895), c. 71.

1. Strict Compliance with the Statute is Necessary. — The requirements of the statute relating to service by publication must be strictly complied with in order to give the court jurisdiction over the person of the defendant. Paulling *v.* Creagh, 63 Ala. 398; Baker *v.* York, 65 Ark. 142; Crudup *v.* Richardson, 61 Ark. 259; Gibney *v.* Crawford, 51 Ark. 34; Lusk *v.* Perkins, 48 Ark. 238; Felkner *v.* Tighe, 39 Ark. 357; Lawrence *v.* State, 30 Ark. 719; Turnage *v.* Fisk, 22 Ark. 286; Saffold *v.* Saffold, 14 Ark. 408; Clarke *v.* Strong, 13 Ark. 491; Brodie *v.* Skelton, 11 Ark. 120; People *v.* Applegarth, 64 Cal. 229; Cohn *v.* Kember, 47 Cal. 144; Braly *v.* Seaman, 30 Cal. 610; McMinn *v.* Whelan, 27 Cal. 300; Ricketson *v.* Richardson, 26 Cal. 149; People *v.* Huber, 20 Cal. 81; Jordan *v.* Giblin, 12 Cal. 100; Frybarger *v.* McMillen, 15 Colo. 349; Beckett *v.* Cuenin, 15 Colo. 281; O'Rear *v.* Lazarus, 8 Colo. 608; Brown *v.* Tucker, 7 Colo. 30; Clayton *v.* Clayton, 4 Colo. 410; Shrader *v.* Shrader, 36 Fla. 502; Strode *v.* Strode, (Idaho, 1898) 52 Pac. Rep. 161; McChesney *v.* People, 145 Ill. 614; Haywood *v.* Collins, 60 Ill. 328; Haywood *v.* McCrory, 33 Ill. 459; Baldwin *v.* Ferguson, 35 Ill. App. 393; Vizzard *v.* Taylor, 97 Ind. 90; Guise *v.* Early, 72 Iowa 283; Miller *v.* Corbin, 46 Iowa 150; Bradley *v.* Jamison, 46 Iowa 68; Abell *v.* Cross; 17 Iowa 171; Tunis *v.* Withrow, 10 Iowa 305; Trask *v.* Key, 4 Greene (Iowa) 372; Pinkney *v.* Pinkney, 4 Greene (Iowa) 324; Broghill *v.* Lash, 3 Greene (Iowa) 357; Carr *v.* Carr, 92 Ky. 552; Brownfield *v.* Dyer, 7 Bush (Ky.) 505; Grigsby *v.* Barr, 14 Bush (Ky.) 330; Green *v.* Breckinridge, 4 T. B. Mon. (Ky.) 541; Lawlins *v.* Lackey, 6 T. B. Mon. (Ky.) 70; Botts *v.* New Orleans, 9 La. Ann. 233; New Orleans *v.* Cochrane, 8 La. Ann. 365; Hardester *v.* Sharretts, 84 Md. 146; Adams *v.* Hosmer, 98 Mich. 51; Colton *v.* Rupert, 60 Mich. 318; Corson *v.* Shoemaker, 55 Minn. 386; Ware *v.* Easton, 46 Minn. 180; Brown *v.* St. Paul, etc., R. Co., 38 Minn. 506; Barber *v.* Morris, 37 Minn. 194; Moore *v.* Williams, 44 Miss. 61; Foster *v.* Simmons, 40 Miss. 585; Harness *v.* Cravens. 126 Mo. 233; Myers *v.* McRay, 114 Mo. 377; Charles *v.* Morrow, 99 Mo. 638; Quigley *v.* Mexico Southern Bank, 80 Mo. 289; State *v.* Horine, 63 Mo. App. 1; Palmer *v.* McMaster, 8 Mont. 186; Frazier *v.* Miles, 10 Neb. 109; Atkins *v.* Atkins, 9 Neb. 191; Coffin *v.* Bell, 22 Nev. 169; Victor Mill, etc., Co. *v.* Justice Ct., 18 Nev. 21; Little *v.* Currie, 5 Nev. 90; Thompson *v.* Carroll, 36 N. H. 21; Wortman *v.* Wortman, (Supreme Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 66; Kendall *v.* Washburn, (Supreme Ct. Spec. T.) 14 How. Pr. (N. Y.) 380; Hallett *v.* Righters, (Supreme Ct. Spec. T.)

a. By Agent of Complainant or Plaintiff.

13 How. Pr. (N. Y.) 43; Bacon *v.* Johnson, 110 N. Car. 114; Spillman *v.* Williams, 91 N. Car. 483; Faulk *v.* Smith, 84 N. Car. 501; Wheeler *v.* Cobb, 75 N. Car. 21; Northcut *v.* Lemery, 8 Oregon 316; Bleidorn *v.* Pilot Mountain Coal, etc., Co., 89 Tenn. 166; Byrnes *v.* Sampson, 74 Tex. 79; Stewart *v.* Anderson, 70 Tex. 588; Stegall *v.* Huff, 54 Tex. 193; Garrison *v.* Cheeney, 1 Wash. Ter. 489; Beaupre *v.* Brigham, 79 Wis. 436; Frisk *v.* Reigelman, 75 Wis. 499; Likens *v.* McCormick, 39 Wis. 313; Hafern *v.* Davis, 10 Wis. 501; Cissell *v.* Pulaski County, 3 McCrary (U. S.) 446; Meyer *v.* Kuhn, 65 Fed. Rep. 705.

Necessity for Affidavit — *Generally.* — Filing of affidavit is necessary, it being the foundation for notice by publication, and without it the court has no jurisdiction. Gray *v.* Trapnall, 23 Ark. 510; Brodie *v.* Skelton, 11 Ark. 120; People *v.* Harrison, 107 Cal. 541; People *v.* Pearson, 76 Cal. 400; People *v.* Mullan, 65 Cal. 396; People *v.* Applegarth, 64 Cal. 229; Burke *v.* Donnovan, 60 Ill. App. 241; Fontaine *v.* Houston, 58 Ind. 316; Peoples *v.* Stanley, 6 Ind. 410; Mehrhoff *v.* Diffenbacher, 4 Ind. App. 447; Chase *v.* Kaynor, 78 Iowa 449; Bradley *v.* Jamison, 46 Iowa 68; Bardsley *v.* Hines, 33 Iowa 157; Patterson *v.* Patterson, 57 Kan. 275; Shields *v.* Miller, 9 Kan. 390; Chicago, etc., R. Co. *v.* Campbell, 5 Kan. App. 423; Newcomb *v.* Newcomb, 13 Bush (Ky.) 544; Thruston *v.* Masterson, 9 Dana (Ky.) 228; Jeffreys *v.* Hand, 7 Dana (Ky.) 89; Adams *v.* Hosmer, 98 Mich. 51; Platt *v.* Stewart, 10 Mich. 260; Brown *v.* St. Paul, etc., R. Co., 38 Minn. 506; Barber *v.* Morris, 37 Minn. 194; Murdock *v.* Hillyer, 45 Mo. App. 287; Palmer *v.* McMaster, 8 Mont. 186; Rowe *v.* Griffiths, 57 Neb. 488; Scarborough *v.* Myrick, 47 Neb. 794; Murphy *v.* Lyons, 19 Neb. 689; McGavock *v.* Pollack, 13 Neb. 535; Bryan *v.* University Pub. Co., 112 N. Y. 382.

Verified Petition. — In some jurisdictions, where the facts showing the necessity for publication are set out in the petition and sworn to by the plaintiff, it is sufficient, and a separate affidavit is not required. Wilson *v.* Teague, 95 Ky. 47; Schell *v.* Leland, 45 Mo. 289.

Requisites of Affidavit, Generally. — For the formal parts of an affidavit in a particular jurisdiction consult the title AFFIDAVITS, vol. 1, p. 548.

No particular form of affidavit is required: if it states the necessary facts and is filed in the cause, it is sufficient. Harris *v.* Lester, 80 Ill. 307.

Entitling. — The affidavit need not be entitled in the cause. Harris *v.* Lester, 80 Ill. 307. If affidavit is entitled, it may be in a cause not yet commenced. Crombie *v.* Little, 47 Minn. 581.

Statutory Requisites must be Complied with. — Yolo County *v.* Knight, 70 Cal. 431; Braly *v.* Seaman, 30 Cal. 610; Ricketson *v.* Richardson, 26 Cal. 149; Hartung *v.* Hartung, 8 Ill. App. 156; Pitts *v.* Jackson, 135 Ind. 211; Dowell *v.* Lahr, 97 Ind. 146; Fontaine *v.* Houston, 58 Ind. 316; Pierce *v.* Butters, 21 Kan. 124; Colton *v.* Rupert, 60 Mich. 318; O'Connell *v.* O'Connell, 10 Neb. 390; Atkins *v.* Atkins, 9 Neb. 191; Easterbrook *v.* Easterbrook, 64 Barb. (N. Y.) 421; Young *v.* Fowler, 73 Hun (N. Y.) 179; Jewitt *v.* Jewitt, (Supreme Ct. Spec. T.) 2 N. Y. Supp. 250; Wheeler *v.* Cobb, 75 N. Car. 21; Roosevelt *v.* Ulmer, 98 Wis. 356; Cissell *v.* Pulaski County, 3 McCrary (U. S.) 446. Exact words of the statute need not, however, be followed in the affidavit. If enough is stated to show the existence of the facts necessary to be established by the affidavit, it is sufficient. McCormick *v.* Paddock, 20 Neb. 486.

Probative Facts — *Generally.* — The probative facts upon which the jurisdiction of the court depends must be stated in the affidavit. Kahn *v.* Matthai, 115 Cal. 689; Ligare *v.* California Southern R. Co., 76 Cal. 610; Yolo County *v.* Knight, 70 Cal. 431; Forbes *v.* Hyde, 31 Cal. 342; Ricketson *v.* Richardson, 26 Cal. 149; Little *v.* Chambers, 27 Iowa 522; Thompson *v.* Shiawassee Circuit Judge, 54 Mich. 236; Harrington *v.* Loomis, 10 Minn. 366; Mackubin *v.* Smith, 5 Minn. 367; Palmer *v.* McMaster, 8 Mont. 186; Alderson *v.* Marshall, 7 Mont. 288; Victor Mill, etc., Co. *v.* Justice Ct., 18 Nev. 21; Roy *v.* Whitford, 9 Nev. 370; Little *v.* Currie, 5 Nev. 90; McCracken *v.* Flanagan, 127 N. Y. 493; Carleton *v.* Carleton, 85 N. Y. 313; McLeod *v.* Moore, (Supreme Ct. Spec. T.) 15 Civ. Proc. (N. Y.) 77; Easterbrook *v.* Easterbrook, 64 Barb. (N. Y.) 421; Waffle *v.* Goble, 53 Barb. (N. Y.) 517; Stow *v.* Chapin, (Supreme Ct. Gen. T.) 4 N.

Y. Supp. 496; Hyatt *v.* Swivel, 52 N. Y. Super. Ct. 1; Bacon *v.* Johnson, 110 N. Car. 114; Faulk *v.* Smith, 84 N. Car. 501; De Corvet *v.* Dolan, 7 Wash. 365; McDonald *v.* Cooper, 32 Fed. Rep. 745.

Reference to Complaint. — A complaint may be read with an affidavit and made a part of it for the purpose of aiding the latter. Goodale *v.* Coffee, 24 Oregon 346; Victor Mill, etc., Co. *v.* Justice Ct., 18 Nev. 21.

Legal Conclusions. — Where the affidavit states legal conclusions simply, it is insufficient. Yolo County *v.* Knight, 70 Cal. 431; Palmer *v.* McMaster, 8 Mont. 186; Alderson *v.* Marshall, 7 Mont. 288; Victor Mill, etc., Co. *v.* Justice Ct., 18 Nev. 21; Roy *v.* Whitford, 9 Nev. 370.

In Language of Statute. — Where the affidavit merely repeats the language of the statute, it is not sufficient. Ricketson *v.* Richardson, 26 Cal. 149.

In *Montana*, where it is a ministerial act for the clerk to cause summons to be served by publication, and in the performance of the act the clerk is a ministerial officer, it is held that probative facts need not be set forth in the affidavit, but that the ultimate facts are sufficient; that if an affidavit sets forth, substantially in the language of the statute, enough of the ultimate facts recited in the statute as reason for publication of the summons, it is sufficient. Erbin *v.* Milne, 17 Mont. 494.

Information and Belief. — It has been held that where some of the averments are made upon information and belief of the affiant the affidavit is sufficient. Malaer *v.* Damron, 31 Ill. App. 572; Bonsell *v.* Bonsell, 41 Ind. 476; Trew *v.* Gaskill, 10 Ind. 265; Colton *v.* Rupert, 60 Mich. 318; Pettiford *v.* Zoellner, 45 Mich. 358; Coombs *v.* Crabtree, 105 Mo. 292; Allen *v.* Ray, 96 Mo. 542; Belmont *v.* Cornen, 82 N. Y. 256; Seiler *v.* Wilson, 43 Hun (N. Y.) 629; Wunnenberg *v.* Gearty, 36 Hun (N. Y.) 243; Chase *v.* Lawson, 36 Hun (N. Y.) 221; Storm *v.* Adams, 56 Wis. 137; Farmer's, etc., Bank *v.* Eldred, 20 Wis. 196. And the source of affiant's information need not necessarily be stated. Colton *v.* Rupert, 60 Mich. 318. But see, to the effect that where the affidavit is wholly on information and belief, and the grounds of such information are not stated, it is insufficient. Waggoner *v.* Fogleman, 53 Ark. 181; Turnage *v.* Fisk, 22 Ark. 286; Harrison *v.* Beard, 30 Kan. 532; Corson *v.* Shoemaker, 55 Minn. 386; Feikert *v.* Wilson, 38 Minn. 341.

Cause of Action Against Defendant — *Generally.* — That cause of action exists against defendant must be shown by the affidavit. Yolo County *v.* Knight, 70 Cal. 431; Forbes *v.* Hyde, 31 Cal. 342; Ricketson *v.* Richardson, 26 Cal. 149; Beckett *v.* Cuenin, 15 Colo. 281; Frybarger *v.* McMillen, 15 Colo. 349; Dowell *v.* Lahr, 97 Ind. 146; Fontaine *v.* Houston, 58 Ind. 316; Palmer *v.* McMaster, 8 Mont. 186; Victor Mill, etc., Co. *v.* Justice Ct., 18 Nev. 21; Little *v.* Currie, 5 Nev. 90; Bacon *v.* Johnson, 110 N. Car. 114; Gibson *v.* Everett, 41 S. Car. 22; National Exch. Bank *v.* Stelling, 31 S. Car. 360; Yates *v.* Gridley, 16 S. Car. 496; Nelson *v.* Rountree, 23 Wis. 367; Rankin *v.* Adams, 18 Wis. 292; Slocum *v.* Slocum, 17 Wis. 150. *Contra*, that it is not necessary that a cause of action shall be shown to exist in the affidavit against the defendant, Bogle *v.* Gordon, 39 Kan. 31; Gillespie *v.* Thomas, 23 Kan. 138; Scarborough *v.* Myrick, 47 Neb. 794; Grebe *v.* Jones, 15 Neb. 312. It is sufficient if the affidavit show that the nature of suit is one in which the statute authorizes service by publication. Pitts *v.* Jackson, 135 Ind. 211; Field *v.* Malone, 102 Ind. 251; Douglas *v.* Lieberman, 9 Kan. App. 45; Leavenworth, etc., R. Co. *v.* Stone, 60 Kan. 57; Patterson *v.* Patterson, 57 Kan. 275; Zimmerman *v.* Barnes, 56 Kan. 419; Grouch *v.* Martin, 47 Kan. 313; Shippen *v.* Kimball, 47 Kan. 173; Harris *v.* Claflin, 36 Kan. 543; Claypoole *v.* Houston, 12 Kan. 324; Ogden *v.* Walters, 12 Kan. 282; Scarborough *v.* Myrick, 47 Neb. 794; Majors *v.* Edwards, 36 Neb. 56; Fulton *v.* Levy, 21 Neb. 478; Shedenhelm *v.* Shedenhelm, 21 Neb. 387; Grebe *v.* Jones, 15 Neb. 312; Atkins *v.* Atkins, 9 Neb. 191; Blair *v.* West Point Mfg. Co., 7 Neb. 146. And it is not necessary to refer to the statute. Britton *v.* Larson, 23 Neb. 806; Grebe *v.* Jones, 15 Neb. 312.

Where the affidavit states that service of summons cannot be made within the state on the defendant, it is sufficient. Grebe *v.* Jones, 15 Neb. 312.

That the action is one "to quiet title to real estate, as provided by section 72 of the Code of Civil Procedure," is not sufficient. It is a mere statement by the defendant of the character of his

action, and is not, as required by the statute, "a showing that the cause is one of those mentioned" by section 72. Leavenworth, etc., R. Co. *v.* Stone, 60 Kan. 57. That the above entitled cause is "one of those mentioned in section 72 of the Code of Civil Procedure of the state of Kansas, and that the said action relates to real estate in this state," is not sufficient. It does not show by sufficient facts that the cause is one of those mentioned in section 72. Claypoole *v.* Houston, 12 Kan. 324. The mere stating as a conclusion "that this is one of the cases mentioned in section 72 of the Code of Civil Procedure in the laws of the state of Kansas" is insufficient. Douglas *v.* Lieberman, 9 Kan. App. 45. An affidavit "that this is one of the cases provided for by the code of Nebraska, when service by summons may be had by publication," is not sufficient, for the reason that it states no fact as to the cause of action, or otherwise, whereby the court can ascertain whether or not the cause is one of those in which service can be made by publication. Holmes *v.* Holmes, 15 Neb. 615.

Facts showing cause of action must be stated in the affidavit. Yolo County *v.* Knight, 70 Cal. 431; Forbes *v.* Hyde, 31 Cal. 342; Ricketson *v.* Richardson, 26 Cal. 149; Victor Mill, etc., Co. *v.* Justice Ct., 18 Nev. 21; Bacon *v.* Johnson, 110 N. Car. 114. But where the cause of action is stated in the verified complaint it need not be repeated in the affidavit. Yolo County *v.* Knight, 70 Cal. 431; Ligare *v.* California Southern R. Co., 76 Cal. 610.

Information and Belief.—A statement that the plaintiff has a good cause of action against the defendant is a statement of information and belief and not of facts, and is not sufficient. Yolo County *v.* Knight, 79 Cal. 431. See, to the same effect, Forbes *v.* Hyde, 31 Cal. 342.

Inability to Make Personal Service — *Generally.* — The affidavit must show inability on the part of the plaintiff to make personal service on the defendant within the jurisdiction. Carnes *v.* Mitchell, 82 Iowa 601; Chase *v.* Kaynor, 78 Iowa 449; Grouch *v.* Martin, 47 Kan. 313; Pierce *v.* Butters, 21 Kan. 124; Shields *v.* Miller, 9 Kan. 390; McCormick *v.* Paddock, 20 Neb. 486; Murphy *v.* Lyons, 19 Neb. 689; Blair *v.* West Point Mfg. Co., 7 Neb. 146; Reynolds *v.* Cleary, 61 Hun (N. Y.) 590; Fetes *v.* Volmer, (Supreme Ct. Gen. T.) 8 N. Y. Supp. 294; Luttrell *v.* Martin, 112 N. Car. 593; Faulk *v.* Smith, 84 N. Car. 501; Wheeler *v.* Cobb, 75 N. Car. 21. And this requirement is not satisfied by an allegation that none of the defendants are residents of the state. Carnes *v.* Mitchell, 82 Iowa 601.

Due Diligence. — Facts showing that due diligence was used to make personal service, and unsuccessfully, must be shown by the affidavit. Kahn *v.* Matthai, 115 Cal. 689; Braly *v.* Seaman, 30 Cal. 610; Ricketson *v.* Richardson, 26 Cal. 149; Beach *v.* Beach, 6 Dak. 371; Little *v.* Chambers, 27 Iowa 522; Thompson *v.* Shiawassee Circuit Judge, 54 Mich. 236; Harrington *v.* Loomis, 10 Minn. 366; Mackubin *v.* Smith, 5 Minn. 367; Alderson *v.* Marshall, 7 Mont. 288; Victor Mill, etc., Co. *v.* Justice Ct., 18 Nev. 21; McCracken *v.* Flanagan, 127 N. Y. 493; Easterbrook *v.* Easterbrook, 64 Barb. (N. Y.) 421; Waffle *v.* Goble, 53 Barb. (N. Y.) 517; Orr *v.* Currie, (Supreme Ct. Spec. T.) 25 Civ. Proc. (N. Y.) 16; Faulk *v.* Smith, 84 N. Car. 501; Gibson *v.* Everett, 41 S. Car. 22; National Exch. Bank *v.* Stelling, 31 S. Car. 360; Yates *v.* Gridley, 16 S. Car. 496; Bothell *v.* Hoellwarth, 10 S. Dak. 491; McDonald *v.* Cooper, 32 Fed. Rep. 745. But see, to the effect that a general averment of due diligence in the language of the statute is sufficient, Hartung *v.* Hartung, 8 Ill. App. 156; Erbin *v.* Milne, 17 Mont. 494; Young *v.* Schenck, 22 Wis. 556; Sueterlee *v.* Sir, 25 Wis. 357. And that the facts and circumstances showing what kind of diligence was used to find the defendant need not be set forth. Young *v.* Schenck, 22 Wis. 556; Sueterlee *v.* Sir, 25 Wis. 357. But if there is no general allegation of due diligence, the affidavit should give such facts and circumstances. Hartung *v.* Hartung, 8 Ill. App. 156.

Not Rewarded with Discovery. — Affidavit must show not only due diligence to find the defendant, but it must appear therefrom that the diligence used has not been rewarded with the discovery of the sought-for defendant. The object of due diligence in searching for defendant is supposed to be to find him, and it is necessary to show by the affidavit that he cannot, after the exercise of due diligence, be found within the state. Braly *v.* Seaman, 30 Cal. 610.

Sufficient Allegations. — An affidavit is sufficient which states "that *Z. Darius*

Geddes, *Sampson G. Paschael*, *E. E. Paschael* and *M. P. Harlow*, *four* of the defendants in the above entitled cause, on due inquiry cannot be found, so that process can be served upon them, and that upon diligent inquiry the place of residence of said *four* last named defendants cannot be ascertained, nor can the place of residence of any of said *four* defendants be ascertained upon diligent inquiry." Johnson *v.* Gibson, 116 Ill. 294.

In Wunnenberg *v.* Gearty, 36 Hun (N. Y.) 243, the affidavit of the plaintiff stated "that since the commencement of this action, he has made and caused to be made inquiries as to the residences of the said defendants; * * * that said defendants *Elizabeth Boylan*, *Catharine Boylan* and *John Boylan* are each nonresidents of the State of *New York*, and that said defendants each reside at *Ballybag*, County *Monaghan*, *Ireland*; that the said defendant *Elizabeth Boylan* is of full age, and that the defendants *Catharine Boylan* and *John Boylan* are each infants over the age of *fourteen* years. Deponent further says that, as he is informed and believes, the summons herein cannot, after due diligence, be served on said defendants or either of them, and that it is necessary to serve the summons on them by due publication thereof." There was also presented an affidavit, by a person employed by the attorneys for the plaintiff to make service on defendants, wherein it was stated that "he was directed by the plaintiff's attorneys to serve the summons herein on the defendants herein, and for that purpose received copies of said summons; * * * that deponent has served said summons upon a number of the defendants herein; * * * that the plaintiff has been unable, with due diligence, to make personal service of the summons herein on the defendants *Elizabeth Boylan*, *Catharine Boylan* and *John Boylan*, or either of them, and that deponent cannot, after due diligence, serve the same upon said defendants, or either of them. Deponent further says that said defendants *Elizabeth Boylan*, *Catharine Boylan* and *John Boylan* are nonresidents of the State of *New York*, and that each resides at *Ballybag*, County *Monaghan*, *Ireland*." It was held that these affidavits showed sufficiently that the plaintiff had been unable with due diligence to make personal service.

Insufficient Allegations. — An affidavit for publication which states that defendant Chase could not, after due diligence, be found in the county of Contra Costa; that affiant had inquired of one Fogg, who was an intimate friend of Chase, as to his whereabouts; that Fogg was unable to inform him; and that affiant did not know where Chase could be found within the state, is not sufficient to show due diligence and does not authorize an order of publication. Swain *v.* Chase, 12 Cal. 283.

In Reedy *v.* Camfield, 159 Ill. 254, the defect charged against the affidavit was that the affiant stated that he made diligent inquiry as to the whereabouts of defendant, and upon due inquiry he could not be found, so that process could be served upon him, and that his place of residence was unknown to the affiant; whereas the affidavit should have stated, in the language of the statute, "that upon diligent inquiry his place of residence cannot be ascertained." The court held that if this were a direct proceeding it would be inclined to hold that the defect pointed out was sufficient to authorize a reversal of the decree in the case.

Concealment of Defendant. — In Bradford *v.* McAvoy, 99 Cal. 324, the affidavit stated that at or about the time of the commencement of the action, the defendant, McAvoy, resided and was in the city and county of San Francisco, and had an office or headquarters at No. 425 Montgomery street; that at or about said time he disappeared from his office and could not be found in said city and county; that thereafter affiant made inquiries for defendant at various places, including 425 Montgomery street, and of various persons who knew him and would be likely to know of his whereabouts, but was unable to find him; that eight new summonses had been issued in the action, and that since the issuance of the first summons four different competent persons had been employed to obtain service upon defendant, but without success; and that ever since such first issuance a continued and constant effort had been made to secure personal service of the summons upon defendant; "that since the commencement of this suit, defendant *McAvoy* has not been in his accustomed places and resorts, but has left an agent in this city, who is using persistent efforts to continue to

collect the rents of the premises sought to be recovered herein, which premises are occupied by several subtenants; that affiant does not know the whereabouts of defendant *McAvoy*, and verily believes that he conceals himself to avoid the service of said summons." It was held that from this affidavit it evidently appeared to the satisfaction of the judge who made the order for publication that the defendant was concealing himself to avoid the service of summons and the order so recited, and that while it was true that the affidavit did not state that the affiant had made inquiry of defendant's agent, in view of the other facts stated it could not be said that the conclusion reached by the judge was not justified.

Nonresidence of Defendant—*Generally.*— Nonresidence of the defendant must, as a general rule, be stated in the affidavit, where that is the ground upon which constructive service is sought. Allen *v.* Chicago, 176 Ill. 113; Dowell *v.* Lahr, 97 Ind. 146; Johnson *v.* Patterson, 12 Ind. 471; Pierce *v.* Butters, 21 Kan. 124; Ogden *v.* Walters, 12 Kan. 282; Platt *v.* Stewart, 10 Mich. 260; Brown *v.* St. Paul, etc., R. Co., 38 Minn. 506; Barber *v.* Morris, 37 Minn. 194; McKiernan *v.* Massingill, 6 Smed. & M. (Miss.) 375; McGavock *v.* Pollack, 13 Neb. 535; Little *v.* Currie, 5 Nev. 90; Bryan *v.* University Pub. Co., 112 N. Y. 382. And this allegation should be made directly and not left to inference. Allen *v.* Chicago, 176 Ill. 113. And an allegation that defendant is a citizen of a different state is not a substitute. McKiernan *v.* Massingill, 6 Smed. & M. (Miss.) 375.

In *Iowa*, however, under the statute, nonresidence of defendant need not be stated. Taylor *v.* Ormsby, 66 Iowa 109.

In Language of Statute. — The averment may be in the identical language of the statute, as a statement that the defendant resides out of the state is a statement of fact. De Corvet *v.* Dolan, 7 Wash. 365.

Information and Belief. — In some jurisdictions, it is held that the nonresidence of defendant may be stated upon information and belief. Feikert *v.* Wilson, 38 Minn. 341; Belmont *v.* Cornen, 82 N. Y. 256; Seiler *v.* Wilson, 43 Hun (N. Y.) 629; Steinle *v.* Bell. (C. Pl. Spec. T.) 12 Abb. Pr. N. S. (N. Y.) 171; Van Wyck *v.* Hardy, (Supreme Ct. Gen. T.) 11 Abb. Pr. (N. Y.) 473.

Where the affidavit is, however, wholly on information and belief as to the nonresidence of defendant, and it states no grounds of deponent's information, it is insufficient. Lyon *v.* Baxter, (Supreme Ct. Gen. T.) 64 How. Pr. (N. Y.) 426. And see, to the effect that the affidavit must state the fact of defendant's nonresidence, and not the belief of the fact only, Waggoner *v.* Fogleman, 53 Ark. 181; Turnage *v.* Fisk, 22 Ark. 286; Ogden *v.* Walters, 12 Kan. 282; Romig *v.* Gillett, (Okla. 1900) 62 Pac. Rep. 805; Hafern *v.* Davis, 10 Wis. 501.

Sufficient Allegations. — Where the affidavit states that the defendant resides out of the state and is a nonresident thereof, it is sufficient. Bogle *v.* Gordon, 39 Kan. 31; Gillespie *v.* Thomas, 23 Kan. 138; Scarborough *v.* Myrick, 47 Neb. 794.

In Gillespie *v.* Thomas, 23 Kan. 138, the affidavit was as follows:

"*William Thomson*, of lawful age, being first duly sworn, doth upon his oath depose and say that he is one of the attorneys in the above-entitled cause for said plaintiff; that said defendant is a nonresident of the state of *Kansas*, and that service of summons cannot be had in said action upon said defendant within said state of *Kansas*; that said action relates to real property in said county of *Osage*, in the state of *Kansas*, in which property said defendant claims and has an interest; that the relief demanded, among other things, is the exclusion of said defendant from his interest to said real property. And further deponent saith not.

William Thomson."

It was held that this affidavit, though not fatally defective, should have stated plaintiff's cause of action more specifically and correctly.

"That the said defendant is a nonresident of this state, and now absent therefrom, and that service of summons in this action can only properly be made by publication, which service this deponent desires to make, and hence this affidavit, the sheriff having returned upon the summons herein issued that said defendant cannot be found in this bailiwick, the said *Douglas* county, after diligent search; and, further, deponent says that he has no knowledge of the residence or the whereabouts of said defendant at this time, nor has he known for several years last past where she was to be found during said time," shows suf-

ficiently that "service of summons cannot be made within this state." McCormick *v.* Paddock, 20 Neb. 486.

"That said defendant, *John Little*, resides out of the state of *Nevada*, to wit, in *Meadow Lake City*, *Nevada* county, state of *California*," has been held to state the fact of nonresidence clearly. Little *v.* Currie, 5 Nev. 90.

In Andrews *v.* Borland, (Supreme Ct. Gen. T.) 10 N. Y. St. Rep. 396, an affidavit was held to be sufficient which stated "that the defendant is not a resident of the state, but resides in the city of *Portland*, in the state of *Oregon*, as deponent is informed by making inquiries of one *William McLaughlin*, at No. *330 West Thirty-eighth* street, in the city of *New York*, a friend or relative of said *John Mullarky*."

In De Corvet *v.* Dolan, 7 Wash. 365, the affidavit, omitting formal parts, was as follows: "*George Cook*, being duly sworn, says that he is the plaintiff in the above described action; that the defendants reside out of this territory; he therefore asks that summons be served on the defendants by publication." It was held that this affidavit was sufficient, and that the statement that the defendants resided out of the territory was a statement of fact.

Facts showing that due diligence has been used to find defendant must be stated. Victor Mill, etc., Co. *v.* Justice Ct., 18 Nev. 21; McCracken *v.* Flanagan, 127 N. Y. 493; Carleton *v.* Carleton, 85 N. Y. 313; Kennedy *v.* New York L. Ins., etc., Co., 32 Hun (N. Y.) 35; McLeod *v.* Moore, (Supreme Ct. Spec. T.) 15 Civ. Proc. (N. Y.) 77; Hyatt *v.* Swivel, 52 N. Y. Super. Ct. 1; Bixby *v.* Smith, 3 Hun (N. Y.) 60; Odell *v.* Campbell, 9 Oregon 298; McDonald *v.* Cooper, 32 Fed. Rep. 745; Bothell *v.* Hoellwarth, 10 S. Dak. 491.

In *California*, where a statute provides that service may be made by publication when the person on whom it is to be made "resides out of the state, or has departed from the state, or cannot with due diligence be found within the state, or conceals himself to avoid the service of summons," etc., if the defendant is shown to be a nonresident, no showing of diligence is necessary, as the statutory conditions are in the disjunctive, and if any one of the conditions exists in the affidavit it is sufficient. Furnish *v.* Mullan, 76 Cal. 646; Anderson *v.* Goff, 72 Cal. 65; Ligare *v.* California Southern R. Co., 76 Cal. 610.

In *Kansas*, under a statute which provides for an affidavit "stating that the plaintiff, with due diligence, is unable to make service of the summons upon the defendant," an affidavit wherein affiant stated positively that "the defendants are nonresidents of this state and service cannot be had upon them within this state" was held sufficient. The court said: "If service could have been made by due diligence, then the affiant's affidavit could not have stated that service could not be made within the state." Washburn *v.* Buchanan, 52 Kan. 417.

Sufficient Allegations. — In Hannas *v.* Hannas, 110 Ill. 53, the affidavit alleged that complainant "has made due inquiry to learn the place of residence of the defendant, *John C. Hannas*, and is unable to ascertain the same; that his last known place of residence, so far as her personal knowledge goes, was the city of *Chicago*, in this state, which place he left about *six* years ago, and, as she is informed and believes, he went to *California*, and about *two* years ago she was informed he was in *San Francisco*, in the state of *California*, since which time she has, upon due inquiry, been unable to find where he is residing." This was held sufficient.

An affidavit that the defendants "cannot after due diligence be found within the state," they being residents of other specified states; "that the summons herein was duly issued to said defendants, but cannot be served personally on them by reason of such nonresidence," sufficiently shows due diligence. The statement as to due diligence is not absolutely an allegation of a conclusion of law or an opinion, but, in connection with what follows, a statement of facts which tend to establish that due diligence has been used. Kennedy *v.* New York L. Ins., etc., Co., 101 N. Y. 487.

Where it is shown that the defendants are not only nonresidents of the state, but are residents of another state and are actually located and living there, the affidavit shows sufficiently that the defendants could not, after due diligence, be found within the state, and the fact that the defendants to be served are at the time at their respective places of residence out of the state may be stated on information and belief. Chase *v.* Lawson, 36 Hun (N. Y.) 221.

In Jerome *v.* Flagg, 48 Hun (N. Y.) 351, it was held that an affidavit which stated "that the defendant * * * is not a resident of the state of *New York*, but now resides in the city of *Denver*, in the state of *Colorado*, which is his post-office address; that his place of business is No. *19 Times Building*, city of *Denver*, state of *Colorado*; that said defendant cannot with due diligence be served personally within the state of *New York*, as he is now, and has been, for some time, a resident of the city of *Denver*," was sufficient to show due diligence.

An affidavit which positively states that defendant now is and long has been a resident of the city of Baltimore, and that deponent was informed by one Sterling that defendant was there a day or two before the time of making the affidavit, is sufficient to establish the fact that after due diligence the defendant could not be found within the state. The court says, however, that "under the authority of Carlton *v.* Carlton, 85 N. Y. 313, it is probable that mere proof that defendant was a resident of the city of Baltimore at the time would not satisfy the provisions of the code, but the proof here shows that he was actually there at the time. Where a party is shown to be actually at a certain place out of the state, it follows that he cannot, with any amount of diligence, be found within the state." Lockwood *v.* Brantly, 31 Hun (N. Y.) 155

"That said defendants reside at *Walla Walla*, in the territory of *Washington*, which is their post-office address; that personal service cannot be made on said defendants or either of them, for the reason that said defendants have departed from the state and remained absent therefrom for more than *six* consecutive weeks, and now reside at *Walla Walla*," has been held sufficient. Pike *v.* Kennedy, 15 Oregon 420.

In Woods *v.* Pollard, (S. Dak. 1900) 84 N. W. Rep. 214, the affidavit was substantially as follows: That the defendant, after due diligence, cannot be found within the state of South Dakota, and personal service of the summons in this action cannot be made upon him. That the diligence used to find the defendant consisted of the following acts: That the summons in this action was placed in the hands of the sheriff for service, and the return of said sheriff, in the form of an affidavit, is referred to. That affiant has known the defendant for a number of years, he having resided at Mitchell, where the affiant resides, for that period. That said defendant sold the residence owned by him in that city, in August, 1899, and severed his business connections, and removed his family to Battle Lake, Minn., where he is now present, as affiant is informed by various persons. That affiant was shown a letter in the handwriting of said defendant, written to one Patton, the successor of the defendant as secretary of the Monmouth Merchant Mills, a corporation doing business in the city of Mitchell, and the same was written within the week preceding the making of the affidavit. It was held that this affidavit stated sufficient probative facts to show diligence.

Insufficient Allegations. — That defendant is a nonresident and cannot be found within the state are insufficient averments to satisfy a statute which provides for publication where the defendant cannot be found within the state after due diligence. Such averments do not imply that any diligence has been exercised to find and serve the defendant personally with process. McCracken *v.* Flanagan, 127 N. Y. 493.

"That defendant has not resided in the state of *New York* since *March*, 1887, and deponent is advised and believes is now a resident of *San Francisco, California*," is not sufficient. Carleton *v.* Carleton, 85 N. Y. 313. "That the defendant resides at *Norwalk*, in the state of *Connecticut*, as deponent is informed and believes to be true, and has not been a resident of this state for more than *eighteen* months; that by reason of such nonresidence deponent cannot have the summons and complaint served on her within the state," is insufficient. Wortman *v.* Wortman, (Supreme Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 66. "That defendant resides at *440 Maple Avenue, Elizabeth, N. J.*, is of full age, and that plaintiff will be unable to make personal service of the summons upon said defendant," is not sufficient. Orr *v.* Currie, (Supreme Ct.) 14 Misc. (N. Y.) 74.

Place of Residence — *Generally.* — The place of residence of a nonresident defendant should be stated, if known. Ligare *v.* California Southern R. Co.,

76 Cal. 610; Braly *v.* Seaman, 30 Cal. 610; Ricketson *v.* Richardson, 26 Cal. 149; Schaefer *v.* Kienzel, 123 Ill. 430; Winston *v.* McLendon, 43 Miss. 254; Foster *v.* Simmons, 40 Miss. 585; Victor Mill, etc., Co. *v.* Justice Ct., 18 Nev. 21; Evarts *v.* Becker, 8 Paige (N. Y.) 506; Gibson *v.* Everett, 41 S. Car. 22; National Exch. Bank *v.* Stelling, 31 S. Car. 360; Yates *v.* Gridley, 16 S. Car. 496. Or that plaintiff, after due diligence, has been unable to discover the residence of defendant. Turnage *v.* Fisk, 22 Ark. 286; Braly *v.* Seaman, 30 Cal. 610; Ricketson *v.* Richardson, 26 Cal. 149; Malaer *v.* Damron, 31 Ill. App. 572; Hartung *v.* Hartung, 8 Ill. App. 156; Foster *v.* Simmons, 40 Miss. 585; Piser *v.* Lockwood, 30 Hun (N. Y.) 6. And an allegation that affiant is ignorant of place of residence of defendant is not sufficient. Turnage *v.* Fisk, 22 Ark. 286. Or that defendant's place of residence is unknown. Malaer *v.* Damron, 31 Ill. App. 572; Hartung *v.* Hartung, 8 Ill. App. 156.

Information and Belief. — The allegation of residence of defendant may, however, be made upon information and belief. Malaer *v.* Damron, 31 Ill. App. 572; Howe Mach. Co. *v.* Pettibone, 74 N. Y. 68; Van Wyck *v.* Hardy, (Ct. App.) 39 How. Pr. (N. Y.) 394.

Street and Number. — It is not necessary to state the street and number of defendant's residence, and an allegation that defendant resides at "*St. Louis, Missouri*," or "at *San Francisco, California*," is sufficient. Burke *v.* Donnovan, 60 Ill. App. 241.

Post-office Address. — It is sufficient to give the post-office address of the defendant without following literally the statute, that the affidavit shall state "the name and place wherein a post-office is kept nearest to the place where defendant resides or may be found." Perkins *v.* McCarley, 97 Ky. 43.

That defendants "cannot be found in the state of *Oregon*, but both reside in *San Jose*, *Cal.*, and that is their post-office address, is insufficient. It does not appear that they were then actually living at San Jose. McDonald *v.* Cooper, 32 Fed. Rep. 745.

That defendant could not, after due diligence, be found in the state, should be stated in the affidavit. Luttrel *v.* Martin, 112 N. Car. 593; Sheldon *v.* Kivett, 110 N. Car. 408; Wheeler *v.* Cobb, 75 N. Car. 21.

In *Iowa*, under a statute which authorizes publication in certain cases when defendants "cannot be found within the state," as, for instance, when the defendant is "a nonresident of the state, but has property therein, and the action arises upon contract, and the court has jurisdiction of the subject-matter," it is not necessary to state that defendant "cannot be found within the state." It is enough that such fact be made to appear by affidavit, as "that the defendant is not a resident of the state of *Iowa*." Byrne *v.* Roberts, 31 Iowa 319.

That affiant believes defendant to be absent from the state must be averred in an affidavit drawn under a statute authorizing the clerk to make a warning order when the defendant is a nonresident of the state and believed to be absent therefrom. Redwine *v.* Underwood, 101 Ky. 190. And this is true notwithstanding the fact that nonresidence of defendant is stated, as both allegations are necessary. Arthurs *v.* Harlan, 78 Ky. 138.

That defendant has property within the state is sometimes a necessary allegation. Zimmerman *v.* Barnes, 56 Kan. 419; Repine *v.* McPherson, 2 Kan. 340; Spiers *v.* Halstead, 71 N. Car. 209; Colburn *v.* Barrett, 21 Oregon 27; Gibson *v.* Everett, 41 S. Car. 22; National Exch. Bank *v.* Stelling, 31 S. Car. 360; Yates *v.* Gridley, 16 S. Car. 496; Manning *v.* Heady, 64 Wis. 630. And it must be stated unqualifiedly that the defendant possesses such property. An affidavit which states "that the said defendant had property in this county and state, as this deponent is informed and believes, to wit, (*describing certain real estate*); that such information and belief of affiant is founded upon information derived from *Charles H. Haynes*, as register of deeds for said county of *St. Louis*," is insufficient. Feikert *v.* Wilson, 38 Minn. 341.

Where action concerns real property, the affidavit must specify the property. Leavenworth, etc., R. Co. *v.* Stone, 60 Kan. 57; McDonald *v.* Cooper, 32 Fed. Rep. 745.

Unknown Parties. — Where service by publication is desired in proceeding against unknown parties, ignorance as to the names of the parties should be stated in the affidavit. Unknown Heirs *v.* Kimball, 4 Ind. 546; Thruston *v.* Masterson, 9 Dana (Ky.) 228; Jeffreys *v.* Hand, 7 Dana (Ky.) 89; Benningfield *v.* Reed, 8 B. Mon. (Ky.) 102.

Precedents. — An affidavit that defendant, D. C. Seaver, was at the time a resident of the first township in the county of Contra Costa; that he had occupied a house on a tract of land claimed to be his own and which he had cultivated up to the commencement of the suit and for a long time previous; that on the twenty-second day of October, the day before the commencement of the suit, he left his residence informing his servant that he would be back that evening or the next day; that the summons in the suit was put into the hands of a proper constable, who made diligent search and was wholly unable to serve it; that Seaver had not returned to his residence, and that affiant believed that Seaver concealed himself for the purpose of avoiding the service of the summons, and that the claim sued on was a just debt, was held sufficient in Seaver *v.* Fitzgerald, 23 Cal. 85.

In Long *v.* Fife, 45 Kan. 271, is set out the following affidavit: "*J. O. Fife*, of lawful age, being by me first duly sworn according to law, upon his oath says that he is the plaintiff in the above-entitled cause; that defendant is the owner of lot number *6*, in block *79*, and lot number *42*, in block *49*, in the old city of *Wyandotte*, now *Kansas City*, *Wyandotte* county, *Kansas*; that this suit is brought for the purpose of recovering the sum of $*100* due affiant from defendant above named; that defendant is a nonresident of the state of *Kansas*, and that service of summons cannot be made on said defendant within the state of *Kansas*.

J. O. Fife.

Subscribed and sworn to before me this *1st* day of *September*, 1*886*.

L. C. Trickey, Clerk
District Court."

This affidavit was held defective because it did not state that the case commenced in the district court was one of those mentioned in section 72 of the civil code, but not so defective that the lower court erred in permitting an amended affidavit to be filed.

In Fulton *v.* Levy, 21 Neb. 478, is set out the following affidavit:

" State of *Nebraska*,
In *District* Court, *Douglas* County.

John H. Levy, plaintiff, vs. *Emma Williams*, *Eliza Whalen*, defendants. } Affidavit for Publication.

State of *Nebraska*, } ss.
Douglas County. }

Byron Reed, being first duly sworn, says he is agent for the plaintiff in the above entitled action, who is now absent from said *Douglas* County; that on the *29th* day of *August*, A. D. 1*876*, the said plaintiff commenced his civil action in said *District* Court for *Douglas* County, *Nebraska*, by filing therein his petition against the defendants above named, praying that certain lands situate in *Douglas* County, and, in said petition particularly described, may be decreed to be sold to satisfy certain mortgages given by the said *Emma Williams* to said plaintiff, to secure the payment of a certain sum of money therein named, and the said *Emma Williams* has since conveyed said premises to the said *Eliza Whalen*. And affiant further says that service of a summons cannot be made upon said *Emma Williams* and *Eliza Whalen* within said state of *Nebraska*, and that this affidavit is made for the purpose of obtaining service upon them by publication.

This case being one of those mentioned in section 77 of the Code of Civil Procedure of the General Statutes of *Nebraska*, to wit, being for the sale of real property under a mortgage.

And further affiant saith not.

Byron Reed.

Subscribed in my presence and sworn to before me this *29th* day of *August*, A. D. 1*876*.

Wm. H. Ijams, Clerk."

It was held that this affidavit stated the essential facts, although somewhat indefinitely.

In Majors *v.* Edwards, 36 Neb. 56, the affidavit, omitting caption and jurat, was as follows: "*Isaac Edwards*, being duly sworn, deposeth and saith that he is the attorney for said plaintiff; that said *John Edwards* is not in the state of *Nebraska*, and that said *Mary Majors* is a nonresident of said state of *Nebraska*, and is now absent from said state; that service of a summons cannot be made within the state of *Nebraska* on the said defendant to be served by publication, and that the case is one of those mentioned in the seventy-seventh section of the Code of Civil Procedure, and further saith not.

Isaac Edwards."

The court said of this affidavit that the nature of the cause of action was stated informally, " and it would have been much better to have stated directly

Form No. 16679.[1]

John Doe, complainant, against *Richard Roe*, defendant. } In *Chancery*. *Fifth* District, *Northwestern* Chancery Division at *Birmingham*, *Alabama*, *May* term, 1899.

The State of *Alabama*, *Jefferson* County. } Personally appeared before me, *Chas. A. Senn*, register in chancery in and for the *fifth* district of the *northwestern* chancery division of *Alabama*, *John White*, agent of complainant, who, being first duly sworn, deposes and says that he is informed and verily believes that *Richard Roe*, the defendant in the above-stated cause, is a nonresident of *Alabama*,[2] and resides in the town of *Huntington*, in the state of *New York*, and that said defendant is, in the belief of affiant, over *twenty-one* years of age.[3]

John White.

Sworn to and subscribed before me this *tenth* day of *May*, 1899.

Chas. A. Senn, Register.

b. By Attorney of Complainant or Plaintiff.[4]

Form No. 16680.[5]

(Sand. & H. Dig. Ark. (1894), p. 1618, No. 6.)

Sebastian Circuit Court, *Fort Smith* District.

Richard Roe, plaintiff, against *John Doe*, defendant. } Affidavit.

John Jones states that he is the attorney of the plaintiff, *Richard*

that the object of the action was to foreclose a mortgage upon real estate, but sufficient is shown to entitle the plaintiff to make service by publication."

Other precedents, which were held good on direct or collateral attack, are set out in these cases: Cole *v.* Hoeburg, 36 Kan. 263; Carey *v.* Reeves, 32 Kan. 718; McBride *v.* Hartwell, 2 Kan. 410; Weaver *v.* Lockwood, 2 Kan. App. 62; Crombie *v.* Little, 47 Minn. 581; Miller *v.* Eastman, 27 Neb. 408; Britton *v.* Larson, 23 Neb. 806; National Exch. Bank *v.* Stelling, 31 S. Car. 360; Davis *v.* Cook, 9 S. Dak. 319.

1. *Alabama.* — Civ. Code (1896), § 686; Ch. Ct. Rules, § 22.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

2. That defendant is a nonresident must be stated, where the order of publication is sought on that ground. Ala. Ch. Ct. Rules, § 22.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

3. Age of Defendant. — The affidavit must state the belief of the affiant as to the age of defendant being over or under twenty-one years, or a statement that his age is unknown. Ala. Ch. Ct. Rules, § 22.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

4. Affidavit of Attorney. — The affidavit of publication may be made by the attorney of complainant. Young *v.* Schenck, 22 Wis. 556.

See also list of statutes cited *supra*, note 1, p. 2.

Requisites of Affidavit, Generally. — See *supra*, note 1, p. 3.

Authority and capacity of attorney must be shown by the affidavit. Sylph Min., etc., Co. *v.* Williams, 4 Colo. App. 345.

Information and Belief. — The affidavit may be made by the attorney on information and belief. Sylph Min., etc., Co. *v.* Williams, 4 Colo. App. 345.

Reasons why principal did not make affidavit need not be stated. Sheldon *v.* Kivett, 110 N. Car. 408.

5. *Arkansas.* — Sand. & H. Dig. (1894), § 5679.

See, generally, *supra*, note 4, this page.

Roe, who is absent from *Sebastian* county, and that the defendant, *John Doe*, is a nonresident of this state.

John Jones.

Subscribed and sworn to before me this *tenth* day of *December*, 1894 *Calvin Clark*, Clerk.

Form No. 16681.[1]

(Precedent in Bickerdike *v.* Allen, 157 Ill. 105.)[2]

State of *Illinois*, } ss. In *Superior* Court, *Oct.* Term, 1891.
County of *Cook.* }

Mary C. Allen and *Edwin C. Allen, Jr.*, executors of the estate of *Edward C. Allen*, deceased, } *135,489.*

vs.

Joseph R. Bickerdike and *Zacharias I. Pratt.*

James J. Barbour, attorney for above named plaintiffs, on oath states that *Joseph R. Bickerdike*, one of the above named defendants, resides in the city of *Chicago*, in this state, and that he is concealed within this state, or has gone out of this state, so that process cannot be served upon him.[3] Affiant further states that he has made inquiries at the residence of said defendant as to his whereabouts, and the replies received from said defendant's wife were to the effect that he was away, and she could not tell when he would be home, and when asked where said defendant was she refused to state, and to every question put by this affiant she would make an evasive answer. Affiant further states that his inquiries of the person in charge of said defendant's office in the city of *Chicago*, in this state, failed to bring any information, further than that Mr. *Bickerdike* was away, and did not wish to have it known where he was. Affiant further states that said defendant's neighbors stated to this affiant that said defendant would conceal himself to avoid service should suit be brought against him, and affiant is utterly unable to find said *Bickerdike*. *James J. Barbour.*

Subscribed [and sworn to][4] before me this *6th* day of *October*, 1891.

(SEAL) *John M. Meyer*, Notary Public.

1. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 110. par. 27.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 4, p. 13.

2. An objection to the affidavit in this case on the ground that it was in the disjunctive was not sustained. The court said: "The material fact was, that [defendant,] being a resident of the state, could not be found in it, so that process could be served on him; and it could not be certainly known, as the facts set forth in the affidavit show, whether the impossibility of finding his whereabouts was due to his concealment within the state or to his departure from it."

3. That defendant resides out of the state, or has gone out of the state, or is concealed within the state, so that process cannot be served on him, must be shown in the affidavit. Starr & C. Anno. Stat. Ill. (1896), c. 110, par. 27.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

Place of residence of defendant must be stated, if known, or that on due inquiry his place of residence cannot be ascertained. Starr & C. Anno. Stat. Ill. (1896), c. 110, par. 27.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

4. The words within [ ] were omitted from the jurat.

Form No. 16682.[1]

(Bullitt's Civ. Code Ky. (1895), p. 593.)

(*Venue, title of court and cause as in Form No. 16690.*)

James White says that he is the attorney of the plaintiff, *John Doe*; that said *John Doe* is absent from *Henry* county, and that the defendant, *Richard Roe*, is a nonresident of *Kentucky*,[2] and, as affiant believes, is absent therefrom; and that the defendant resides in the state of *New York* and county of *Suffolk*,[3] but affiant does not know the name of the place where a post-office is kept nearest to the place where he resides or may be found (or *and that affiant does not know in what country the defendant resides*); and that, as the affiant believes, the plaintiff is ignorant of the fact (or *facts*) which is (or *are*) unknown to the affiant as above stated.[4]

James White.

(*Jurat as in Form No. 16690.*)

Form No. 16683.[5]

(Precedent in Ervin *v.* Milne, 17 Mont. 495.)[6]

[In the *District* Court of the *Second* Judicial District of the state of *Montana*, in and for the county of *Silver Bow*.

Arthur K. Ervin, plaintiff, against *James R. Milne*, defendant. } Affidavit for Publication of Summons.][7]

State of *Montana*, County of *Silver Bow*. } ss.

James M. Self, being duly sworn, says: That he is one of the counsel for the above-named plaintiff. That the complaint in the above-entitled action was duly filed with the clerk of this court on the *7th* day of *December*, 1891, and the summons was duly issued out of this court, and placed in the hands of the sheriff of *Silver Bow* county, *Montana*, with directions to serve the same upon said defendant

1. *Kentucky.* — Bullitt's Civ. Code (1895), §§ 57, 58.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 4, p. 13.

2. **That defendant is a nonresident** of the state and believed to be absent therefrom should be stated in the affidavit. Bullitt's Civ. Code Ky. (1895), §§ 57, 58.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

3. **Residence of defendant** or place where he may be found, and the name of the place wherein a post-office is kept nearest to the place where the defendant resides or may be found, shall be stated in the affidavit. Bullitt's Civ. Code Ky. (1895), §§ 57, 58.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

4. **That plaintiff is ignorant of facts unknown to affiant,** where affiant is agent of the plaintiff, must be stated on affiant's belief. Bullitt's Civ. Code Ky. (1895), §§ 57, 58.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 4, p. 13.

5. *Montana.* — Code Civ. Proc. (1895), § 637.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 4, p. 13.

6. The court said in this case: "An examination of the affidavit * * * makes it clear that sufficient of the ultimate facts cited in the statute were substantially set forth."

7. The matter enclosed by [ ] will not be found in the reported case.

James R. Milne, and the sheriff of said county has returned the same to the clerk of this court, with his return thereon indorsed, to the effect that the said defendant *James R. Milne* could not, after due and diligent search therefor, be found in the county of *Silver Bow*, *Montana*.[1] That the last known place of residence of said defendant *James R. Milne* was at *407 West Copper* street, *Butte City*, *Silver Bow* county, state of *Montana*, but now said defendant *James R. Milne* has departed from the state, and does not now reside in the state of *Montana*, but at what particular place deponent does not know, and has not been able, after diligent inquiry, to ascertain. That there is good cause of action against said defendant[2] *J. R. Milne* and in favor of said plaintiff, *Arthur K. Ervin*, as will fully appear by my verified complaint filed herein, to which reference is hereby made, and that said defendant *J. R. Milne* is a necessary and proper party defendant to this action. Since personal service of said summons cannot be made on said defendant *J. R. Milne*, I therefore ask that the clerk of this court cause the service of the same to be made by publication.

[*James M. Self.*

Subscribed and sworn to before me this *eighteenth* day of *December*, A. D. 19*00*.

Calvin Clark,
Clerk of the *District* Court for *Silver Bow* County.][3]

c. By Complainant or Plaintiff.

Form No. 16684.[4]

(Sand. & H. Dig. Ark. (1894), p. 1618, No. 5.)

Sebastian Circuit Court, *Fort Smith* District.

Richard Roe, plaintiff,
against
John Doe, defendant. } Affidavit.

The plaintiff, *Richard Roe*, states that the defendant, *John Doe*, is a nonresident of this state.[5]

Richard Roe.

Subscribed and sworn to before me this *tenth* day of *December*, 18*94*.

Calvin Clark, Clerk.

1. **That defendant cannot, after due diligence, be found** in the state is one of the facts upon which publication is authorized. This must appear in the affidavit. Mont. Code Civ. Proc. (1895), § 637.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

2. **That a cause of action exists** against the defendant in respect to whom the service of the summons was made, and that he or it is a necessary or proper party to the action, must be stated in the affidavit. Mont. Code Civ. Proc. (1895). § 637.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

3. The matter enclosed by [ ] will not be found in the reported case.

4. *Arkansas.* — Sand. & H. Dig. (1894), § 5679.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

5. **That defendant is a nonresident** of

Form No. 16685.[1]

In the *Superior* Court of the *City and* County of *San Francisco*, State of *California*.

John Doe, plaintiff, against *Richard Roe*, defendant. } Affidavit for Publication of Summons.

State of *California*, *City and* County of *San Francisco*. } ss.

John Doe, being duly sworn, says that he is the plaintiff in the above entitled action;

1. That the complaint in said action was filed with the clerk of said court on the *tenth* day of *June*, 1899, and summons thereupon issued on the *eleventh* day of *June*, 1899; that this action is brought for the purpose of (*Here state for what purpose brought*);

2. That the last known place of residence of said defendant upon whom the service of summons is to be made was *Northport, New York*;[2]

3. That said plaintiff has a just cause of action existing against said defendant,[3] and that said defendant is a necessary and proper party to this action; plaintiff alleges and this affiant, in support thereof, states the following facts and circumstances: (*Here state facts and circumstances*);

4. That personal service of summons cannot be made upon said *Richard Roe* in the state of *California*; affiant therefore prays that an order may be made that service of summons upon the said *Richard Roe* may be made by publication.

John Doe.

Subscribed and sworn to before me this *twentieth* day of *August*, 1899.

(SEAL) *Calvin Clark*, Notary Public.

Form No. 16686.[4]

John Doe against *Richard Roe*. } In *Chancery*. *Kent* County, ss.

State of *Delaware*, *Kent* County. } ss.

Be it remembered that on this *twentieth* day of *March*, A. D. 1901, before me, *Calvin Clark*, register in chancery of the state of *Dela-*

the state must be stated. Sand. & H. Dig. Ark. (1894), § 5679.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

1. *California.*—Code Civ. Proc. (1897), § 412.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

2. **That defendant is a nonresident** must be shown, where application for order of publication is based upon that ground. Cal. Code Civ. Proc. (1897), § 412.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

3. **That a cause of action exists** against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, must appear by the affidavit or by the verified complaint on file. Cal. Code Civ. Proc. (1897), § 412.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

4. *Delaware.* — Rev. Stat. (1893), p. 705, c. 95, § 5.

ware, in and for *Kent* county, personally comes *John Doe*, complainant, who, being by me duly sworn according to law, doth depose and say that *Richard Roe*, the defendant above named, resides out of the state of *Delaware*, to wit, at *Trenton*, in the state of *New Jersey* (or *that Richard Roe, the defendant above named, cannot be found to be served with process, and there is just ground to believe that he intentionally avoids such process*).

John Doe.

Sworn to and subscribed before me the day and year aforesaid.
Calvin Clark, Register.

Form No. 16687.[1]

In the *Circuit* Court, *Second* Judicial District, *Leon* County.

John Doe against *Richard Roe.* } In *Chancery.*

State of *Florida*, *Leon* County. }

Before me personally appeared *John Doe*, who, being duly sworn, says that he believes that the defendant *Richard Roe* is a resident of a state other than the state of *Florida*,[2] to wit, that he is a resident of the town of *Huntington*, in the county of *Suffolk*, in the state of *New York*, and that he is twenty-one years of age.[3]

John Doe.

Sworn to and subscribed before me this *twenty-first* day of *May*, 1900.
Calvin Clark, Clerk of the *Circuit* Court.

Form No. 16688.[4]

(Precedent in Figge *v.* Rowlen, 84 Ill. App. 242.)[5]

Robert Mehaffy vs. *C. Figge.* } Bill in *Chancery.*

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

1. *Florida.* — Rev. Stat. (1892), § 1413.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

2. **Nonresidence of Defendant.** — Where application for an order of publication is based upon nonresidence of the defendant, the affidavit must state the belief of the affiant that the defendant is a resident of a state or country other than this state, specifying as particularly as may be known to affiant such residence, or that his residence is unknown. Fla. Rev. Stat. (1892), § 1413.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

3. **Age of Defendant.** — That defendant is twenty-one years of age, or that his age is unknown, must be shown. Fla. Rev. Stat. (1892), § 1413; Shrader *v.* Shrader, 36 Fla. 502.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

4. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 22, par. 12.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

5. This affidavit was objected to because there was no certificate of the notary who administered the oath that under the laws of the state of Ohio he was authorized to administer the oath. It was held that a court cannot presume that a notary public of another state has authority in that state to adminis-

[State of *Ohio*, County of *Allen*. } ss.][1]

Robert Mehaffy, the above named complainant, on oath, states that the above named defendant, *C. Figge*, is not a resident of the state of *Illinois*.[2] Affiant further states that he has made diligent inquiry to learn the place of residence of said defendant, but has been unable to ascertain the same.[3] *R. Mehaffy.*

Subscribed and sworn to this *9th* day of *April*, 1891.

(SEAL) *W. H. Cunningham*,
Notary Public, *Allen* County, *Ohio.*

Form No. 16689.[4]

(Precedent in Snell *v.* Meservy, 91 Iowa 323.)[5]

[State of *Iowa*, *Hardin* County.][1] }

I, *A. N. Botsford*, do say, on oath, that personal service of the notice in the cause pending in the *district* court of *Hardin* county, entitled *A. C. Meservy* v. *Thomas Snell*, *Richard Snell*, and *B. F. Lindlay*, cannot be made in the state of *Iowa* upon the defendants *Thomas Snell* and *Richard Snell*, as they are nonresidents of the state of *Iowa*; and that *Eldora Ledger* is designated as the proper medium through which to make publication of the service upon said defendants.

A. N. Botsford.

Sworn before me, and subscribed in my presence, by the said *A. N. Botsford*, *August 27*, 1890.

D. J. Haines, Clerk of the
District Court of *Webster* County, *Iowa.*

Form No. 16690.[6]

(Bullitt's Civ. Code Ky. (1895), p. 593.)

Commonwealth of *Kentucky*, County of *Henry*. } In the *Henry* Circuit Court.

ter oaths, and the authority of the officer administering the oath must be shown in some way; yet there is no law requiring that fact to be shown to the court in any particular way, and the trial court having found in the decree that due notice of the pendency of the suit had been given by publication in accordance with the requirements of the statute, the presumption was that it was shown in some proper way.

1. The matter enclosed by [ ] will not be found in the reported case.

2. **Nonresidence of Defendant.** — Where an order is asked for on the ground that defendant resides out of the state, the fact that defendant resides out of the state must appear in the affidavit. Starr & C. Anno. Stat. Ill. (1896), c. 22, par. 12.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

3. **Place of residence of defendant,** if known, must be shown in the affidavit, and if not known it must be stated that upon diligent inquiry his place of residence cannot be ascertained. Starr & C. Anno. Stat. Ill. (1896), c. 22, par. 12.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

4. *Iowa.* — Anno. Code (1897), § 3534.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

5. In this case the petition was filed the day after the affidavit was verified. It was held that the effect of the affidavit was prospective and that it was not limited to the day of verification, but covered the whole period prescribed for service for the term of court intended for the suit.

6. *Kentucky.* — Bullitt's Civ. Code (1895), §§ 57, 58.

John Doe, plaintiff,
against
Richard Roe, defendant. } Affidavit for Warning Order.

The plaintiff, *John Doe*, says that the defendant, *Richard Roe*, is a nonresident of *Kentucky*,[1] and is, as affiant believes, absent therefrom, and that he resides in the state of *New York* and town of *Huntington*,[2] and that a post-office is kept in said town (or *that he resides in the state of New York and county of Suffolk, but affiant does not know the name of the place wherein a post-office is kept nearest to the place where he resides or may be found*, or *and that the plaintiff does not know in what country the defendant resides*).

John Doe.

Signed and sworn to by *John Doe*, this *tenth* day of *April*, 1900, before me,

Calvin Clark, Clerk of the *Henry* County *Circuit* Court.

Form No. 16691.[3]

In the *District* Court of the *First* Judicial District of the State of *Montana*, in and for the County of *Silver Bow*.

John Doe, plaintiff,
against
Richard Roe, defendant. } Affidavit for Publication of Summons.

State of *Montana*,
County of *Silver Bow*. } ss.

John Doe, being duly sworn, deposes and says as follows:

I. That he is the plaintiff in the above entitled action. The complaint in said action was duly filed with the clerk of this court on the *tenth* day of *May*, A. D. 1899, and summons thereupon issued; and the said action is brought for the purpose of (*Here state for what purpose action is brought*);

II. The defendant last resided at the city of *Butte City*, in the county of *Silver Bow*, state of *Montana*, but he departed from said state prior to the commencement of said action and now resides at *Los Angeles*, in the state of *California*;[4]

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

1. **Nonresidence of Defendant.** — That defendant is a nonresident of the state and believed to be absent therefrom must be stated in the affidavit. Bullitt's Civ. Code Ky. (1895), §§ 57, 58.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

2. **Country where defendant resides** or may be found, and the name of the place wherein a post-office is kept nearest to the place where the defendant resides or may be found, or the affiant's ignorance of such of these facts as he does not know, must be stated in the affidavit. Bullitt's Civ. Code Ky. (1895), §§ 57, 58.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

3. *Montana.* — Code Civ. Proc. (1895), § 637.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

4. **Where defendant has departed from the state** and an application is made for service by publication on that ground, it must be so stated in the affidavit. Mont. Code Civ. Proc. (1895), § 637.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

III. That a summons was duly issued out of this court to the sheriff of the county of *Silver Bow*, with directions to said sheriff to serve the same upon said defendant, and the said sheriff returned the same to the clerk of this court, with his return thereon indorsed, to the effect that the said defendant could not be found in his county;

IV. That deponent has fully and fairly stated the facts of the case to *Jeremiah Mason*, of the city of *Butte City*, his counsel, and deponent is by him informed, and he verily believes, that he has a good cause of action in this suit against the said defendant,[1] in respect to whom the service of the summons is to be made, and that he is a necessary and proper party to the action,[2] as will fully appear by deponent's verified complaint filed herein, to which reference is hereby made, as he is advised by his said counsel after such statement made, as aforesaid, and as he verily believes.

V. Personal service of said summons cannot be made on the said defendant, and deponent therefore demands an order that service of the same may be made by publication.

John Doe.

Subscribed and sworn to before me this *twentieth* day of *May*, A. D. 1899.

Calvin Clark, Clerk of the *District* Court
for *Silver Bow* County.

Form No. 16692.[3]

In the *Circuit* Court for the State of *Oregon*, County of *Multnomah*.

John Doe, plaintiff,
against
Richard Roe, defendant.

State of *Oregon*,
County of *Multnomah*. } ss.

John Doe, being first duly sworn, says:

1st. That he is the plaintiff in the above-entitled action; that the complaint in said action was filed with the clerk of said court on the *tenth* day of *May*, A. D. 1899, and summons thereupon issued; that said action is brought for the purpose of (*Here state for what purpose action is brought*);

2d. That said defendant is not a resident of this state and cannot, after due diligence, be found therein,[4] and this affiant, in support

1. **That a cause of action exists** against the defendant in respect to whom the service of the summons is to be made must be stated in the affidavit. Mont. Code Civ. Proc. (1895), § 637.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

2. **That defendant is a necessary or proper party** to the action must be stated in the affidavit. Mont. Code Civ. Proc. (1895), § 637.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

3. *Oregon.*— Hill's Anno. Laws (1892), § 56, subs. 3.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

4. **That defendant, after due diligence, cannot be found** within the state must appear in the affidavit to the satisfaction of the court or a judge thereof, or

thereof, states the following facts and circumstances: (*Here state facts and circumstances*);

3d. That affiant has a just cause of action existing against said defendant, and that the said defendant is a necessary and proper party to this action; affiant alleges in support thereof the following facts and circumstances: (*Here state facts and circumstances showing a cause of action and that affiant is a necessary party*);[1]

4th. That affiant has made diligent inquiry and search to find said defendant and cannot find him within this state.

5th. This defendant therefore says that personal service of this summons cannot be made upon said defendant, and therefore prays for an order that service of the same may be made by publication thereof.

John Doe.

Subscribed and sworn to before me this *tenth* day of *June*, A. D. 1899.
(SEAL) *Norton Porter*, Notary Public within and for the County of *Multnomah* in the State of *Oregon*.

Form No. 16693.[2]

State of *South Dakota*, } In *Justice* Court.
County of *Bon Homme*. } Before *Abraham Kent*, Justice of the Peace.

John Doe, plaintiff,
against
Richard Roe, defendant.

State of *South Dakota*,
County of *Bon Homme*.

John Doe, being duly sworn, deposes and says that he is the plaintiff in the above entitled action, and that plaintiff has a just cause of action against the defendant herein, to wit: (*Here state briefly the cause of action*),[3] and that the said defendant cannot, after due diligence, be found within the state of *South Dakota* (*Here state facts showing what efforts have been made to find defendant*),[4] and that the place of residence of said defendant is (*Here state place of residence*

of the justice of the peace in an action in a justice's court. Hill's Anno. Laws Oregon (1892), § 56.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

1. **That a cause of action exists** against the defendant, or that he is a proper party to an action relating to real property in this state, must be shown. Hill's Anno. Laws Oregon (1892), § 56.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

2. *South Dakota.* — Dak. Comp. Laws (1887), §§ 4900 *et seq.*, 6056.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

3. **That a cause of action exists** against the defendant in respect to whom the service is to be made, or that he is a proper party to an action relating to real property in this state, must be stated in the affidavit. Dak. (S. Dak.) Comp. Laws (1887), § 4900.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

4. **Due Diligence.** — That person on whom service of the summons is to be made cannot, after due diligence, be found within the state must appear by affidavit to the satisfaction of the court or a judge thereof or to a justice. Dak. (S. Dak.) Comp. Laws (1888), §§ 4900, 6056.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

or facts showing exercise of reasonable diligence and that residence cannot be ascertained).[1]

John Doe.

Subscribed and sworn to before me this *tenth* day of *May*, A. D. 1899.

Abraham Kent, Justice of the Peace.

Form No. 16694.[2]

State of *Texas*,
County of *Freestone*.

John Doe
against
Richard Roe.
} In the *District* Court of *Freestone* County.

Before me, *David Converse*, clerk of the *District* Court in and for said county, state of *Texas*, this day personally came and appeared *John Doe*, plaintiff in the above entitled cause, who, being duly sworn, says that *Richard Roe*, defendant therein, is a nonresident of this state[3] (or *is absent from the state* or *is a transient person* or *that the residence of Richard Roe, defendant therein, is unknown to the affiant*).

Wherefore he prays citation for service by publication.

John Doe.

(*Jurat as in Form No. 870.*)

Form No. 16695.[4]

In the Clerk's Office of the *Circuit* Court of the County of *Albemarle*.

John Doe, plaintiff,
against
Richard Roe, defendant.

Albemarle County, to wit:

This day *John Doe* personally appeared before me, *Calvin Clark*, clerk of the said court, and, being duly sworn, made oath that *Richard Roe*, defendant in the said suit, is not a resident of the state of *Virginia*,[5] (*or state any other statutory cause for the application*).

Given under my hand as clerk of the said court this *tenth* day of *May*, 1899.

Calvin Clark, Clerk.

1. **Place of residence** of defendant must be stated, or it should appear that such residence is not known to the party making the application nor can with reasonable diligence be ascertained by him. Dak. (S. Dak.) Comp. Laws (1888), § 4900, subs. 5.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

2. *Texas*. — Rev. Stat. (1895), art. 1235.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

3. **That defendant is a nonresident** of the state, or that he is absent from the state, or that he is a transient person, or that his residence is unknown to the affiant, must be shown. Tex. Rev. Stat. (1895), art. 1235.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

4. *Virginia*. — Code (1887), § 3230.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

5. **That defendant is a nonresident** of the state must be shown. Va. Code (1887), § 3230.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

Form No. 16696.[1]

Circuit Court, *Milwaukee* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

State of *Wisconsin*, } ss.
Milwaukee County. }

John Doe, being duly sworn, says that he is the plaintiff above named and makes this affidavit on his own behalf; that the above entitled action has been commenced and is now pending; that a summons has been issued therein, of which a copy is hereunto annexed; that the plaintiff's complaint herein is duly verified and has been filed with the clerk of the *Circuit* Court of *Milwaukee* county;[2] that a cause of action exists in favor of said plaintiff against the above named defendant, the grounds of which are (*Here set out facts showing a cause of action or refer to the verified complaint for such facts*);[3] * that said defendant is a nonresident of the state of *Wisconsin* (or *that said defendant's residence is unknown*, or *that said defendant is a resident of the state of Wisconsin and has departed from said state of Wisconsin with intent to defraud his creditors* or *with intent to avoid the service of summons*, or *that said defendant keeps himself concealed within the state of Wisconsin with intent to defraud his creditors* or *with intent to avoid the service of summons*); that said plaintiff is unable, after due diligence, to make service of the summons in said action upon the said defendant;[4] that the said defendant cannot be found within the state of *Wisconsin*, although diligent effort to find him and serve upon him the said summons has been made; that the said defendant's post-office address is *Milwaukee*, *Wisconsin*[5] (or *San Francisco*, *California*, if defendant is a nonresident), and that said defendant's residence is *Milwaukee*, *Wisconsin* (or *San Francisco*, *California*, if defendant is a nonresident, or *that the said plaintiff is unable to ascertain either the post-office address or the residence of said defendant, although the said plaintiff has made diligent effort to ascertain them*).

[If defendant is a nonresident or his residence is unknown, and he has property within the state, say, "that said defendant has property within the state of *Wisconsin*, to wit," (*describing property*); or, if

1. *Wisconsin.* — Stat. (1898), § 2639 *et seq.*

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

2. **Application shall be based upon complaint,** duly verified and filed, and an affidavit, showing together the facts required to exist. Wis. Stat. (1898), § 2640.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

3. **That a cause of action exists** against defendant must be shown. Wis. Stat. (1898), § 2639.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

4. **That plaintiff is unable, after due diligence, to make service** of the summons upon defendant in respect to whom the order of publication is applied for must be shown. Wis. Stat. (1898), § 2640.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

5. **Post-office address** of the defendant, or the fact that plaintiff is unable, after due diligence, to ascertain it, must be shown. Wis. Stat. (1898), § 2640.

defendant is a nonresident or his residence is unknown, and the cause of action arose in the state, say, "that the cause of action set out in said plaintiff's complaint herein arose within the state of *Wisconsin*, and that the above entitled court has jurisdiction of the subject of said action, as will appear from the said complaint and foregoing statement."]

John Doe.

Subscribed and sworn to before me this *tenth* day of *June*, A. D. 1900.

(SEAL) *Calvin Clark*, Notary Public.

d. By Sheriff.

Form No. 16697.[1]

State of *New Jersey*, } ss.
County of *Mercer*. }

John Lynch, being duly sworn according to law, on his oath says that he is the duly elected, qualified and acting sheriff of the said county of *Mercer*; that he has made due and diligent inquiry for *Richard Roe*, the defendant named in the within process, for the purpose of serving the said process upon him; that he has been unable to find the said *Richard Roe* in said county. And deponent further says that he is credibly informed and verily believes that the said *Richard Roe* is out of the state of *New Jersey* and resides in the town of *Huntington*, in the county of *Suffolk* and state of *New York* (or *that the said defendant Richard Roe cannot, on due inquiry, be found within the state of New Jersey*, or *that the said defendant Richard Roe conceals himself within the state of New Jersey*).

John Lynch.

Sworn to and subscribed at *Trenton*, this *first* day of *July*, A. D. 1900, before me,

Charles Chase, Master in Chancery.

2. For Service Upon Corporation.

a. Domestic, Without Proper Officers.

Form No. 16698.[2]

(*Commencing as in Form No. 16696, and continuing down to* *) that said defendant is a private corporation, organized and existing under and by virtue of the laws of the state of *Wisconsin*; that the proper officers of said corporation, upon whom to make service of the sum-

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

1. *New Jersey.* — Gen. Stat. (1895), p. 2599, § 376, provides that if a summons is issued in any case to the sheriff of any county, where the defendant is a nonresident of this state and the cause of action arose in this state, and is one denominated legal, and the sheriff shall return that the defendant cannot be found in his county, any justice of the supreme court may make an order of publication, upon proper affidavit.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

2. *Wisconsin.* — Service by publication is authorized when the action is against any private corporation organized under the laws of the state,

mons in said action, do not exist (or *cannot be found*); that diligent effort and inquiry have been made to find the president, chief officer, vice-president, secretary, cashier, treasurer, director or managing agent, or other agent, officer or servant of such corporation, upon whom by law service of the summons in said action can be made, and to serve upon him the summons in said action; that no such officer, agent or servant exists (or *that no such officer, agent or servant can be found*); that said defendant's general office, when last in existence, and the place where its books were kept, was in the city of *Milwaukee*, county of *Milwaukee* and state of *Wisconsin*, but that said defendant has now no general office or place where its books are kept; that said defendant's post-office address (*concluding as in Form No. 16696*).

b. Foreign.

Form No. 16699.[1]

(*Commencing as in Form No. 16696, and continuing down to* *) that said defendant is a foreign corporation, organized and existing under and by virtue of the laws of the state of *New York*; that the place of business and home office of said defendant is in the town of *Huntington*, county of *Suffolk* and state of *New York*; that the plaintiff is unable, with due diligence, to make service of the summons upon the defendant; that no officer or agent of said defendant, upon whom service of the summons in said action can by law be made, can, after due diligence, be found within the state of *Wisconsin*, although deponent has made diligent search and inquiry to find such an officer or agent of the defendant upon whom to serve the summons in this action; that said defendant's post-office address (*concluding as in Form No. 16696*).

3. In Proceedings for Attachment of Property.

Form No. 16700.[2]

(Precedent in Bogle *v.* Gordon, 39 Kan. 32.)[3]

[(*Title of court and cause as in Form No. 5917.*)][4]

and the proper officers on whom to make service do not exist or cannot be found. Stat. (1898), § 2639.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

1. *Wisconsin.* — Service by publication is authorized when defendant is a foreign corporation, and the defendant has property within the state, or the cause of action arose therein, and the court has jurisdiction of the subject of the action, whether the action be founded on contract or tort. Stat. (1898), § 2639.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

2. *Kansas.* — Gen. Stat. (1897), c. 95, § 73.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

3. Objections were made to the affidavit set out in this case on the ground that it did not show a proper case for service by publication and that it did not relate back to the commencement of the action. It was held that the affidavit did show a proper case within the statute and that it was not essential that it should relate back to the commencement of the action.

4. The matter to be supplied within [ ] will not be found in the reported case.

State of *Kansas*, } ss.
County of *Allen*. }

John C. Gordon, the plaintiff herein, being duly sworn, says: That *A. C. Bogle*, the defendant in the above-entitled action, resides out of the state of *Kansas* and is a nonresident thereof;[1] further says, service of a summons cannot be made on him within the state of *Kansas*, and that defendant has property within this state sought to be taken by attachment in this action, a provisional remedy.[2]

[*John C. Gordon.*

Subscribed and sworn to before me this *tenth* day of *April*, 1885.

Charles Sweet, Clerk *District* Court.][3]

Form No. 16701.[4]

(Precedent in Sheldon *v.* Kivett, 110 N. Car. 408.)[5]

[*North Carolina*, } In the *Superior* Court.
Granville County. }

Luther Sheldon }
against } Affidavit.
W. R. Kivett. }

North Carolina, } ss.][3]
Granville County. }

A. W. Graham, attorney for the plaintiff above named, being duly sworn, deposes and says:

1. That the defendant *W. R. Kivett* is indebted to the plaintiff in the sum of *two hundred* dollars, due by Justice's judgment.[6]

2. That the said defendant is not a resident of the State of *North Carolina*, and after due diligence cannot be found in *North Carolina*,[7] and has money, things of value and property in this State, and that he has a judgment to the amount of *one hundred and twenty-five* dollars

1. That defendant is a nonresident of the state, and that personal service of summons cannot be had upon defendant within the state, must be stated. Kan. Gen. Stat. (1897), c. 95, § 73.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

2. That the case is one in which publication is authorized must be stated. Kan. Gen. Stat. (1897), c. 95, § 73.

See also list of statutes cited *supra*, note 1. p. 2; and, generally, *supra*, note 1, p. 3.

3. The matter enclosed by [ ] will not be found in the reported case.

4. *North Carolina.* — Code Civ. Proc. (1900), § 218, provides for service by publication where defendant is not a resident of the state but has property therein, and the court has jurisdiction of the subject of the action.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

5. The affidavit in this case, which is set out in the text, is an amended one. As amended, it was held sufficient.

6. That a cause of action exists against the defendant, or that he is a proper party to an action relating to real property in the state, must appear by affidavit to the satisfaction of the court or a judge thereof. N. Car. Code Civ. Proc. (1900), § 218.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1. p. 3.

7. That defendant cannot, after due diligence, be found within the state must appear by the affidavit to the satisfaction of the court or a judge thereof. N. Car. Code Civ. Proc. (1900), § 218.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

against *B. H. Cozart*, recovered at *April* Term, 1891, of *Granville Superior* Court.

A. W. Graham, attorney and agent of *Luther Sheldon.*

[Subscribed and sworn to before me this *twentieth* day of *May*, 1891.
Calvin Clark, C. *S. C.*][1]

4. In Proceedings on Claim Against Property of Unknown Heirs.

Form No. 16702.[2]

(Precedent in Sloan *v.* Thompson, 4 Tex. Civ. App. 425.)[3]

Number *2721.* *Andrew Prather* v. *Heirs of David Sloan.*

This day personally appeared before me, *J. Rice*, agent of the plaintiff in the above entitled cause, who, being duly sworn, says, that the names and residences of the heirs, successors, or legal representatives of *David Sloan*, parties to said suit, are unknown to affiant.

J. Rice.

Sworn to and subscribed before me this the *29th* day of *March*, 1875.

(SEAL) *D. R. Gurley*,
Clerk *District* Court *McLennan* County.

5. In Proceedings for Divorce.[4]

1. The matter enclosed by [ ] will not be found in the reported case.

2. *Texas.* — Rev. Stat. (1895), art. 1236, provides that where any property of any kind in this state may have been granted or may have accrued to the heirs as such of any deceased person, any party having a claim against them relative to such property, if their names be unknown to him, may bring his action against them, their heirs or legal representatives, describing them as the heirs of such ancestor, naming him; and if the plaintiff, his agent or attorney, shall at the time of instituting the suit, or at any time during its progress, make oath that the names of the heirs are unknown to the affiant, the clerk shall issue a citation.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

3. The affidavit in this case was held to be in the terms of the statute.

Diligence Used. — Affidavit need not disclose what or that any diligence was used to ascertain the names and residences of the heirs. Sloan *v.* Thompson, 4 Tex. Civ. App. 419.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

4. **Precedent.** — In O'Connell *v.* O'Connell, 10 Neb. 390, is set out the following affidavit, which was held sufficient:

"*J. C. Watson*, being by me first duly sworn, says he is the duly authorized attorney of record of the plaintiff in the above entitled action named; that this case is one of those mentioned in section number ten, chapter 19, of the General Statutes of this state, viz.: that the above named defendant *Helen O'Connell* is a nonresident of the state of *Nebraska*, and that said plaintiff, on the *twenty-second* day of *February*, 1879, filed his petition in said cause against said defendant, charging the defendant with being willfully absent from said plaintiff for *two* years *last past*, without any cause or justification therefor, and of having disregarded her duties of a wife toward said plaintiff, and praying for a divorce from said defendant. Affiant further states that service of summons cannot be made on said defendant within this state," etc.

Form No. 16703.[1]

(Precedent in Strode *v.* Strode, (Idaho, 1898) 52 Pac. Rep. 161.)[2]

[(*Title of court and cause as in Form No. 5914.*)][3]

State of *Idaho*, } ss:
County of *Ada*. }

Flora A. Deeds, being first duly sworn, on her oath deposes and says that she is the plaintiff in the above-entitled action; that the complaint in said action was filed *February 2*, 1892, with the clerk of said court, and summons was thereupon issued; that said action is brought to dissolve the bonds of matrimony now existing between plaintiff and defendant; that the cause of action is fully set forth in plaintiff's verified complaint on file herein;[4] that said defendant is now out of this state, and cannot, after due diligence, be found therein;[5] that this affiant has inquired of the friends and acquaintances of the defendant, to wit, *Mrs. A. Jane Williams*, *Mr. Frank C. Bond*, *David Spiegel*, and *H. P. Nelson*, as to the whereabouts of the defendant, and none of them know his present place of residence, unless it be *Portland*, *Or.*; that when he (the defendant) left *Boise Valley* he stated to his said friends that he was going to *Portland*, *Or.*; that he went there, but as to whether he is there at the present time they have no knowledge, but that, if he had returned to this state, they, his friends, would have known of his return. This affiant therefore says that the defendant is not in this state, and that personal service of summons cannot be had on said defendant, *Rufus M. Deeds*, within this state, and prays for an order that service of the summons may be made by publication.

Flora A. Deeds.

Subscribed and sworn to before me this *18th* day of *February*, A. D. 1892. *Chas. A. Clark*, Notary Public.

Form No. 16704.[6]

(Precedent in Shedenhelm *v.* Shedenhelm, 21 Neb. 388.)[7]

In the *district* court of *Saline* county, *Nebraska*.

Nettie B Shedenhelm, plaintiff, }
v.
James Shedenhelm, defendant. }

1. *Idaho*. — Rev. Stat. (1887), § 4145.
See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

2. No objection was made to the form of the affidavit in this case.

3. The matter to be supplied within [] will not be found in the reported case.

4. **That a cause of action exists** against the defendant in respect to whom the service is to be made must appear by affidavit or by a verified complaint on file. Idaho Rev. Stat. (1887), § 4145.
See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

5. **That after due diligence defendant cannot be found** within the state must appear by affidavit to the satisfaction of the court. Idaho Rev. Stat. (1887), § 4145.
See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

6. *Nebraska*. — Comp. Stat. (1899), § 5670.
See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

7. The affidavit in this case was held sufficient.

State of *Nebraska*, } ss.
Saline County. }

Nettie B. Shedenhelm, plaintiff in the above action, being first duly sworn, on oath, says: She has this day caused a petition to be filed in said court against said defendant, the object and prayer of which are to obtain a divorce,[1] with alimony, from said defendant; that the defendant is a nonresident of the state of *Nebraska*, and that service of summons cannot be had on him in this state. Wherefore plaintiff prays for service upon said defendant by publication.

Nettie B. Shedenhelm.

Subscribed in my presence and sworn to before me this *9th* day of *September*, 1886.

(SEAL) *L. H. Dennison*, Notary Public.

6. In Proceedings to Enforce Specific Performance of Contract for Sale of Property.

Form No. 16705.[2]

(Precedent in Bantley *v.* Finney, 43 Neb. 798.)[3]

In the *District* Court of *Lancaster* County, *Nebraska*.

Richard C. McWilliams, plaintiff, }
v. } Affidavit.
Gottlieb Bantley, defendant. }

State of *Nebraska*, } ss.
Lancaster County. }

Joseph R. Webster, being first duly sworn, on his oath says: I am the attorney of record of *Richard C. McWilliams*, plaintiff in the above entitled cause. On the *19th* day of *July*, A. D. 1892, he filed a petition in the *district* court of *Lancaster* county against *Gottlieb Bantley*, the object and prayer of which is to enforce the specific performance of a written contract for the sale of certain premises[4] described as the southeast quarter of section *24*, township *10* north, of range *7* east, of sixth principal meridian, made and entered into by and between the said defendant as vendor by *J. P. Walton*, his agent, duly authorized in writing, and this plaintiff as vendee, on or about the *15th* day of *June*, A. D. 1882, for sale of said premises at the price of $*2,400*, exclusive of agent's commissions, $*800* payable in hand, $*533 1-3* on or before *two* years, and *two* like sums on or before *three* and *four* years, respectively, with interest at the rate of *seven* per

1. **Particular grounds upon which divorce is sought** need not be set forth in the affidavit, but if set forth the validity of the affidavit will not be thereby impaired. Shedenhelm *v.* Shedenhelm, 21 Neb. 387.

See, also, generally, *supra*, note 1, p. 3.

2. *Nebraska*. — Comp. Stat. (1899), § 5670.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

3. This affidavit was held to contain all the averments of fact necessary to authorize McWilliams to make service upon Bantley by publication.

4. **That the case is based on one of the statutory causes** authoriziug service by publication must be stated in the affidavit. Neb. Comp. Stat. (1899), § 5670.

See also list of statutes cited *supra*,

cent. per annum, to be secured by mortgage on said premises, and said plaintiff is absent from the county of *Lancaster*, and affiant makes this affidavit in his behalf for that reason. Said defendant is a nonresident and resides at *Johnstown*, in the state of *Pennsylvania*, and is absent from the state of *Nebraska*, and service of summons cannot be made within the state on him, wherefore the plaintiff prays for service by publication.[1]

J. R. Webster.

[Subscribed and sworn to before me this *tenth* day of *July*, 1882.
W. C. McBeech, Clerk.][2]

7. In Proceedings to Exclude Defendant from Any Lien on or Interest in Property.

Form No. 16706.[3]

(*Commencing as in Form No. 16696, and continuing down to* *) that the subject of said action is real (or *personal*) property in the state of *Wisconsin*, to wit, (*describing it*); that the relief demanded by the plaintiff in said action consists wholly (or *partially*) in excluding said defendant from any lien or interest in said property (or *that said defendant has or claims a lien or interest, actual or contingent, in said property, as follows, to wit*, specifying nature of lien or interest); that said plaintiff is unable, after due diligence, to make service of the summons in said action upon the said defendant; that the said defendant cannot be found within the state of *Wisconsin*, although diligent effort to find him and serve upon him the said summons has been made; that the said defendant's post-office address is (*stating post-office address*), and said defendant's residence is (*stating residence*) (or *that the said plaintiff is unable to ascertain either the post-office address or the residence of said defendant, although the said plaintiff has made diligent effort to ascertain them*).

John Doe.

Subscribed and sworn to before me this *tenth* day of *June*, A. D. 1900.

(SEAL) *Calvin Clark*, Notary Public.

note 1, p. 2; and, generally, *supra*, note 1, p. 3.

1. **That service of summons cannot be made within the state** must be set forth in the affidavit. Neb. Comp. Stat. (1899), § 5670.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

2. The affidavit was filed without jurat or certificate of the clerk, or any other officer authorized to administer oath, that the affidavit was sworn to by said Webster before such officer, though the evidence showed that the affidavit was in fact sworn to before the clerk of the district court. The omission is here supplied.

3. *Wisconsin.*—Stat. (1898), § 2639, provides for service of summons by publication upon a defendant against whom a cause of action appears to exist, when the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

8. In Proceedings for Foreclosure of Mortgage.[1]

Form No. 16707.[2]

(Precedent in Martin *v.* Pond, 30 Fed. Rep. 19.)[3]

[(*Title of court and cause, and venue as in Form No. 848.*)][4]

L. M. Stewart, being first duly sworn, says that he is attorney for the plaintiff in the above-entitled action; that he believes that the defendants are not residents of the state of *Minnesota*,[5] and cannot be found therein; that he has deposited copy of the summons in said action in the post-office at *Minneapolis*, *Minnesota*,[6] directed to each of said defendants, at *Osage Agency*, *Kansas*, their place of residence, and had prepaid the legal postage thereon; that the subject of this action is real property in the state of *Minnesota*,[7] to wit, for the foreclosure of a mortgage on real estate situated in the county of *Hennepin* aforesaid; and that the said defendants have, or claim to have,

1. **Precedent.** — In Fouts *v.* Mann, 15 Neb. 172, is set out the following affidavit, omitting venue and jurat, which was held sufficient:

"*Alfred Hazlett*, being first duly sworn, upon his oath says that he is one of the attorneys for plaintiff in the above entitled action, duly authorized in the premises; that on the *sixth* day of *February*, 18*78*, said plaintiff in the above case filed his petition in the said court against said defendants to recover the sum of $*142.90*, with interest at *10* per cent. from *fourth* of *July*, A. D. 18*78*, amount due on promissory note and interest as set forth in said plaintiff's petition, and asking that the mortgage described in plaintiff's petition be foreclosed, the said premises ordered sold, and the proceeds applied to the payment of said debt; said mortgage given on a certain plat or parcel of land containing *two* acres, more or less, described as follows: Commencing at the north-west corner of south-west quarter section *17*, town *2*, n., range 7 east, thence running east *17* rods, *22 1-5* links; thence south *17* rods, *22 1-5* links; thence west *17* rods, *22 1-5* links; thence north *17* rods, *22 1-5* links to place of beginning. The object of above action is to foreclose the above mortgage on above described real estate.

The defendants, *Henry P. Mann* and *Maria T. Mann*, are nonresidents of the state of *Nebraska*, and service of summons cannot be made upon them within the state of *Nebraska*, and plaintiff asks that service of publication may be had in above entitled cause, and for this purpose this affidavit is made by affiant. *Alfred Hazlett.*"

An objection to the affidavit because it did not appear that the land was situated in Gage county, as neither the principal meridian nor county was stated, was not sustained. The court said: "Land of the description here given is within Gage county, and where such is the case the presumption is that such is the land referred to."

2. *Minnesota.* — Stat. (1894), § 5204.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

3. The affidavit in this case was held to be "in form all that the statute requires."

4. The matter to be supplied within [ ] will not be found in the reported case.

5. **That affiant believes that defendant is not a resident** of the state, or cannot be found therein, must be stated in the affidavit. Minn. Stat. (1894), § 5204.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

6. **That a copy of the summons has been deposited in the post-office,** directed to the defendant at his place of residence, or hat his residence is not known to the affiant, must be stated in the affidavit. Minn. Stat. (1894), § 5204.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

7. **That one of the statutory causes authorizing service** by publication exists must be stated in the affidavit. Minn. Stat. (1894), § 5204.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

a lien upon or interest in said real estate, and the relief demanded in said action consists in excluding the said defendants from any interest or lien therein.

[*L. M. Stewart.*

Subscribed and sworn to before me this *eighteenth* day of *May*, 1886.

Calvin Clark, Clerk of *District* Court.][1]

Form No. 16708.[2]

(Precedent in Taylor *v.* Coots, 32 Neb. 34.)[3]

[(*Title of court and cause as in Form No. 5923.*)][4]

State of *Nebraska*, } ss.
Douglas County. }

Albert Swartzlander, being duly sworn, says that he is one of the attorneys for plaintiff in above petition; that the plaintiff and defendant is each a nonresident of and absent from this state; that said defendant cannot be served with summons therein;[5] that this action is brought to foreclose a mortgage and the sale of real estate in said county under mortgage.[6]

Albert Swartzlander.

Subscribed in my presence and sworn to before me this *6th* day of *January*, 1872.

George Armstrong, Clerk.

Form No. 16709.[7]

(*Commencing as in Form No. 16696, and continuing down to* *) that said action is brought to foreclose (or *to redeem from* or *to satisfy*) a mortgage upon real property, situated in *Milwaukee* county, in the state of *Wisconsin*, executed by the defendant *Richard Roe* and recorded in the office of the register of deeds of *Milwaukee* county, in the state

1. The matter enclosed by [ ] will not be found in the reported case.

2. *Nebraska.* — Comp. Stat. (1899), § 5670.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

3. The court in this case said: "It will be observed that it appears from the affidavit for publication that the action was brought to foreclose a mortgage on real estate in Douglas county, and that the defendant was a nonresident of and absent from the state and could not be served with a summons therein. This was sufficient to authorize service by publication."

4. The matter to be supplied within [ ] will not be found in the reported case.

5. **That service of summons cannot be made** within the state must be shown in the affidavit. Neb. Comp. Stat. (1899), § 5670.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

6. **That the case is based on one of the statutory causes** authorizing service by publication must be stated in the affidavit. Neb. Comp. Stat. (1899), § 5670.

See also list of statutes cited *supra*, note 1. p. 2; and, generally, *supra*, note 1, p. 3.

7. *Wisconsin.* — Stat. (1898), § 2639, provides for service of summons by publication upon the defendant against whom a cause of action appears to exist, when the cause of action is to foreclose, redeem from or satisfy a mortgage, claim or lien upon real estate, and the defendant is a proper party thereto.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

of *Wisconsin*, in volume *56* of mortgages, page *600*; that there is now due on said mortgage and the debts secured thereby the sum of *one thousand* dollars and upward; that said plaintiff is unable, after due diligence, to make service of the summons in said action upon the defendant *Richard Roe*; that the said defendant, *Richard Roe*, cannot be found within the state of *Wisconsin*, although diligent effort to find him and serve upon him the said summons has been made; that the post-office address of the said defendant, *Richard Roe*, is (*stating post-office address*), and that the residence of the said defendant, *Richard Roe*, is (*stating residence*) (or *that the said plaintiff is unable to ascertain either the post-office address or the residence of the said defendant, Richard Roe, although the said plaintiff has made diligent effort to ascertain them*); that the said defendant, *Richard Roe*, has or claims to have an interest in or lien by (*stating nature of interest or lien*) upon the premises described in said mortgage, which accrued subsequently to the mortgage of said plaintiff, and that the relief demanded in this action consists partially in excluding and foreclosing the said defendant of and from all interest or lien in the said mortgaged premises; and that the said defendant, *Richard Roe*, is a proper party to this action.

(*Signature and jurat as in Form No. 16696.*)

9. In Proceedings to Foreclose, to Redeem from or to Satisfy a Claim or Lien Upon Real Property.

Form No. 16710.[1]

(*Commencing as in Form No. 16696, and continuing down to* *) that said action is brought to foreclose (or *to redeem from* or *to satisfy*) a claim or lien upon certain real property situated in the county of *Milwaukee*, in said state of *Wisconsin*, of which the following is a description, to wit, (*describing it*); that said claim or lien is of the following nature or description (*stating nature or description of claim or lien*); that there is now due upon said claim or lien the sum of *one thousand* dollars and upward; that said plaintiff is unable, after due diligence, to make service of summons in said action upon the said defendant, *Richard Roe*; that the said defendant, *Richard Roe*, cannot be found within the state of *Wisconsin*, although diligent effort to find and serve upon him the said summons has been made; that the post-office address of the said defendant, *Richard Roe*, is (*stating post-office address*), and that the residence of the said defendant, *Richard Roe*, is (*stating residence*) (or *that the plaintiff is unable to ascertain either the post-office address or the residence of said defendant, Richard Roe, although the said plaintiff has made diligent effort to ascertain them*); that the said defendant, *Richard Roe*, has or claims to have an interest

1. *Wisconsin.* — Stat. (1898), § 2639, provides for service of summons by publication upon a defendant against whom a cause of action appears to exist, when the cause of action is to foreclose, redeem from or satisfy a mortgage, claim or lien upon real estate, and the defendant is a proper party thereto.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

in or lien upon the premises hereinbefore described, the nature and description of which interest or lien is as follows: (*stating nature of interest or lien*), which said interest or lien is subject to the claim or lien of said plaintiff; and that the relief demanded in this action consists partially in excluding and foreclosing the said defendant, *Richard Roe*, of and from all lien or interest in said premises heretofore described; and that the said defendant, *Richard Roe*, is a proper party to this action.

(*Signature and jurat as in Form No. 16696.*)

10. In Proceedings for Partition.

Form No. 16711.[1]

(Precedent in Yates *v.* Gridley, 16 S. Car. 498.)[2]

[(*Title of court and cause as in Form No. 5932.*)

State of *South Carolina*, }
Aiken County.][3] }

Personally appeared before me *Kate C. Yates*, who, being duly sworn, says that *Edward Gridley* and *Elisha Risley*, the above defendants, are nonresidents of this, but are residents of the State of *New York*, and that their post-office is unknown to deponent, and cannot be ascertained, notwithstanding due diligence has been employed, nor can they be found in this State after due search for them. That said defendants have property in this State, as deponent is informed and believes, as described in the complaint in this cause for a partition of the same.

[*Kate C. Yates.*

Subscribed and sworn to before me this *twentieth* day of *May*, 1880.

Calvin Clark,
Clerk of the Court *of Common Pleas.*][4]

II. ORDER OR CITATION FOR PUBLICATION.[5]

1. *South Carolina.* — Code Civ. Proc. (1893), § 156

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 3.

2. The affidavit in this case was upheld by the supreme court.

3. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

4. The matter enclosed by [ ] will not be found in the reported case.

5. **Requisites of Order, Generally.** — For the formal parts of an order in a particular jurisdiction consult the title ORDERS, vol. 13, p. 356.

Requisites of statute must be complied with in making order for publication. Cross *v.* Wilson, 52 Ark. 312; Lawrence *v.* State, 30 Ark. 719.

For statutory requisites as to orders see list of statutes cited *supra*, note 1, p. 2.

Jurisdictional facts proved by the affidavit on which the order is founded must be stated in the order. Ricketson *v.* Richardson, 26 Cal. 149; Little *v.* Currie, 5 Nev. 90; Green *v.* Squires, 20 Hun (N. Y.) 15.

In *Oregon*, the facts upon which the order is founded need not be set up. Goodale *v.* Coffee, 24 Oregon 346; Knapp *v.* King, 6 Oregon 243.

That satisfactory evidence was presented to court by affidavit of plaintiff need not necessarily be recited in the order, and an omission of such recital will not affect the validity of the order. Barnard *v.* Heydrick, 49 Barb. (N. Y.) 62.

Names of parties to be notified must be stated in the order. Saffold *v.* Saffold,

1. In General.

14 Ark. 408; Brodie *v.* Skelton, 11 Ark. 120; Hardester *v.* Sharretts, 84 Md. 146; Troyer *v.* Wood, 96 Mo. 478; Chamberlain *v.* Blodgett, 96 Mo. 482; Whelen *v.* Weaver, 93 Mo. 430; Skelton *v.* Sackett, 91 Mo. 377; McCully *v.* Heller, (Supreme Ct. Spec. T.) 66 How. Pr. (N. Y.) 468. But the name by which the party is usually known is sufficient. Steinmann *v.* Strimple, 29 Mo. App. 478.

Nature of action should be stated in the order. Saffold *v.* Saffold, 14 Ark. 408; Brodie *v.* Skelton, 11 Ark. 120; Simpson *v.* Watson, 15 Mo. App. 425.

Place where defendant is warned to appear should be stated in the order. Williams *v.* Ewing, 31 Ark. 229.

Time of appearance as required by statute must be directed by the order. Payne *v.* Hardesty, (Ky. 1890) 14 S. W. Rep. 348; Brownfield *v.* Dyer, 7 Bush (Ky.) 505.

In *Michigan*, where the statute provides that if the defendant is a resident of some other of the United States, the order shall require him to appear and answer in not less than four months, the order need not fix a specific date. Lewis *v.* Weidenfeld, 114 Mich. 581.

Newspaper in which notice is to be published must be designated in the order. Otis *v.* Epperson, 88 Mo. 131; Kane *v.* McCown, 55 Mo. 181.

Time of publication must be stated in the order. Park Higbee, 6 Utah 414; Roosevelt *v.* Ulmer, 98 Wis. 356.

Where an order does not designate how often per week publication is to be made, but directs publication to be made according to the statutes, and the statutes provide in terms that the publication in such a case shall be not less than twice a week, the order referring on its face to the statutes is substantially an order in the terms of the statute and is sufficient. McCrea *v.* Haraszthy, 51 Cal. 146.

Where the statute provides that the first publication must be made within three months from the date of such order, an order which requires that the first publication be made "three months from the date of the order" was held defective. Roosevelt *v.* Ulmer, 98 Wis. 356.

Length of time for publication must be specified, under a statute which provides that publication be made for a specified time. Park *v.* Higbee, 6 Utah 414.

That paper designated is most likely to give notice to the defendant need not be stated in the order. Seaver *v.* Fitzgerald, 23 Cal. 85; Green *v.* Squires, 20 Hun (N. Y.) 15.

Mailing Copies — *In General.* — The order must direct the transmission by mail of a copy of the publication addressed to the defendant at the place mentioned in the affidavit. Ingersoll *v.* Ingersoll, 42 Miss. 155; Victor Mill, etc., Co. *v.* Justice Ct., 18 Nev. 21; Reynolds *v.* Cleary, 61 Hun (N. Y.) 590; Odell *v.* Campbell, 9 Oregon 298; Park *v.* Higbee, 6 Utah 414; Beaupre *v.* Brigham, 79 Wis. 436. Or some reason for the omission must be given. Odell *v.* Campbell, 9 Oregon 298.

Where the statute provides that the order shall direct that a copy of the summons and complaint be deposited in the post-office, addressed to the defendant, or that such deposit may be omitted "because the defendant's post-office address cannot be ascertained," an order which does not direct that a copy of the summons and complaint shall be mailed or that such mailing may be omitted is insufficient, and it is immaterial that the affidavit for publication shows that defendant's post-office address cannot be ascertained. There must be a judicial finding of that fact in the order. O'Malley *v.* Fricke, 104 Wis. 280.

In Littlejohn *v.* Leffingwell, 34 N. Y. App. Div. 185, an order of publication which directed that "the plaintiff deposit in the post-office at the city of *Brooklyn* a set of copies of the summons and complaint in this action, and of this order, * * * directed to the said defendants, *Lucy A. Littlejohn Leffingwell* and *Elisha Dyer Leffingwell*, at *Cairo, Egypt*," was heid to satisfy a statute which prescribed that an order must contain a direction that "the plaintiff deposit in a specified post-office one or more sets of copies of the summons, complaint and order, * * * directed to the place specified in the order." The court said: "We think that the language of the order was in substantial compliance with the law. The direction was broad enough to authorize a set of copies of the papers to be sent to each of the absent defendants, and it seems that this was actually done."

Address of Defendant. — Proper address to which notice is to be sent must

be specified. Fetes *v.* Volmer, (Supreme Ct. Gen. T.), 8 N. Y. Supp. 294.

Where an order directed "that on or before the day of the first publication aforesaid, if service be made by publication, the plaintiffs deposit in the post-office in *New York City* a copy of the summons and complaint hereto annexed, and of this order, contained in a securely closed post-paid wrapper and addressed to —— at *Royesford, Pennsylvania*," it was held sufficient, although the name of the defendant was omitted, the name of the defendant and his place of residence having been stated in an early portion of the order. Brooke *v.* Saylor, 44 Hun (N. Y.) 554.

Where defendant's residence is unknown, an order that the notice be directed to defendant at the place where he had formerly resided, specifying it, is valid. Spaus *v.* Schaffner, (Supreme Ct. Spec. T.) 2 N. Y. Supp. 189.

Post-office in which copies are to be deposited must be specified. Eleventh Ward Bank *v.* Powers, 43 N. Y. App. Div. 178; Fetes *v.* Volmer, (Supreme Ct. Gen. T.) 8 N. Y. Supp. 294; McCool *v.* Boller, 14 Hun (N. Y.) 73; Walter *v.* DeGraaf, (N. Y. Super. Ct. Spec. T.) 19 Abb. N. Cas. (N. Y.) 406; Ver Planck *v.* Godfrey, (Supreme Ct. Spec. T.) 31 Misc. (N. Y.) 54.

In Ver Planck *v.* Godfrey, (Supreme Ct. Spec. T.) 31 Misc. (N. Y.) 54, it was held that an order entitled "*Supreme* Court, State of *New York*," and dated "*New York, December 31st, 1899*," and directing "that plaintiff deposit in the general post-office *three* sets of copies," was not sufficient; that the use of the words "general post-office" was not a sufficient compliance with the code, as the consolidated city of New York contains several general post-offices and no locality is designated by the order.

Time of Mailing. — Where the statute requires that the copies be mailed on or before the day of the first publication, the order must so direct. McCool *v.* Boller, 14 Hun (N. Y.) 73; Roosevelt *v.* Ulmer, 98 Wis. 356. And an order that the summons be mailed on or about the date of the first publication is not sufficient. Roosevelt *v.* Ulmer, 98 Wis 356.

"*Forthwith.*" — Where the statute provides that a copy of the complaint and summons be deposited in the post-office, addressed to the defendant, forthwith, an omission of the word "forthwith" in the order will not render it invalid, where the deposit appears to have been promptly made. Anderson *v.* Goff, 72 Cal. 65; Calvert *v.* Calvert, 15 Colo. 390. Especially against collateral attack. Colfax Bank *v.* Richardson, 34 Oregon 518. But where the statute provides that the order shall direct a copy of the summons to be forthwith deposited in the post-office, directed to the person to be served at his place of residence, an order providing for the "deposit of the summons and the copy of the complaint in this action, addressed to the several defendants severally at their last known place of residence as hereinbefore mentioned, and paying the postage thereon," is not a compliance with the statute, as it leaves the party at liberty to deposit in the post-office a copy of the summons and complaint, addressed to the defendants, at any time during publication. Reynolds *v.* Cleary, 61 Hun (N. Y.) 590.

Alternative Modes of Service. — Under a statute providing for service by publication, or, at the option of the plaintiff, for service without the state, upon the defendant personally, an order directing either mode alone, followed by due service in that manner, will be equally good with one which directs both with an option to pursue either. Matter of Field, 131 N. Y. 184 (*overruling* Ritten *v.* Griffith, 16 Hun (N. Y.) 454).

Precedents — *Generally.* — In Hogue *v.* Yeager, (Ky. 1900) 54 S. W. Rep. 961, is set out the following warning order: "It appearing from the within affidavit that defendants, *William Strange, Mary Elizabeth Strange, George Strange*, and the unknown heirs of *Mary Elizabeth Strange* and of *George Strange*, are nonresidents of *Kentucky*, they are hereby warned to appear within *sixty* days from this date. and defend the action herein; and *John L. Woodbury*, a practicing attorney of the *Jefferson circuit* court, is hereby appointed to correspond with and inform said defendants concerning the pendency and nature of this action."

In Phinney *v.* Broschell, 80 N. Y. 544, is set out the following order:

"At a *Special* Term of the *Supreme* Court of the State of *New York*, held at *Chambers* at the *New County Court House*, in the City of *New York*, on the *5th* day of *June*, A. D. 1879.

Present, *Hon. Abraham R. Lawrence*, Justice.

Edmund Phinney, Isaac Jackson, William H. Phinney and *Frank C. Crocker*, plaintiffs, agst. *Edmund Broschell, John Doe* and *Richard Roe*, whose real names are unknown, composing the firm of *Edmund Broschell & Company*, of *Havana, Cuba*, defendants.

The plaintiffs having presented to me the verified complaint in this action, hereto annexed, showing a cause of action for which judgment is therein demanded against the defendants *Edmund Broschell, John Doe* and *Richard Roe*, whose real names are unknown, composing the firm of *Edmund Broschell & Co.*, of *Havana, Cuba*, and having also by the annexed affidavit of *Emmett R. Olcott*, dated *June 5th*, A. D. 1879, made proof to my satisfaction that said defendants are not residents of this state, and that personal service cannot with due diligence be made upon them within the state, now, on motion of *Olcott & Mestre*, Esqs., attorneys for said plaintiffs, ordered * * *

Dated *New York, June 5*, 1879.

Enter: *A. R. L.*, J. *S.* C."

Upon an objection to this order on the ground that it was not made by a judge, but by the court at special term, and was therefore void, the court said: "It appears that the order was in fact made by Judge Lawrence out of court, in his private chambers. His name appears in the caption, and in the body of the order it purports to be made by a judge. It recites, 'the plaintiffs having presented to me,' etc., and 'having proved to my satisfaction,' etc., ordered, etc. It is signed by the judge with his initials, and his official title is abbreviated. The appellant relies on the fact that it has a caption, 'At a *Special* Term held at *Chambers*,' and that there is a direction to enter, but it does not appear to have been in fact entered as a court order. The general term held that it was good as a chamber order of the judge. The question is purely one of form and we are not inclined to differ with the court below on such a technical point of practice."

In Yates *v.* Gridley, 16 S. Car. 496, is set out the following order for publication: "After reading and filing the affidavit of *Kate C. Yates*, the above plaintiff, of the nonresidence of *Edward Gridley* and *Elisha Risley*, the above defendants, it is ordered that said defendants be served by publication in the '*Aiken Journal and Review*,' *once* a week for the period of *six* weeks."

In Akin *v.* Watson, (Tenn. Ch. 1899) 52 S. W. Rep. 905, is set out the following order:

"*A. N. Akin, C. & M.*, complainant, v. *W. P. Watson, et al.*, defendants. } Original Bill.

N. B. Shepherd and wife, complainants, v. *W. P. Watson, et al.*, defendants. } Cross Bill.

It appearing from affidavits filed in these causes that the defendant *W. P. Watson* is a nonresident of the state of *Tennessee*, it is therefore ordered that he enter his appearance herein, before or within the first *three* days of the next term of the *chancery* court, to be held at *Columbia* on the *first Monday* in *April next*, 1898, and plead, answer, or demur to complainants' bill and cross bill, or the same will be taken for confessed as to him, and set for hearing *ex parte*, and that a copy of this order be published in the '*Columbia Herald*.'

Attest:

A. N. Akin, Clerk and Master.

A Copy.

W. J. Webster and *Figures & Padgett*, Solicitors for Compl'ts."

In Justice's Court. — In Webster *v.* Daniel, 47 Ark. 131, the following order for publication, made by a justice of the peace, is set out:

"State of *Arkansas*, } In *Justice's* Court,
County of *Lonoke*. } *Lonoke* County.

Daniel, Straus & Co. vs. *Peter Webster.*

The defendant, *Peter Webster*, is warned to appear in this court within *30* days, and answer the complaint of plaintiff filed herein against him.

Given under my hand, this *13th* day of *April*, 1878. *T. C. Beard*, J. P."

An objection to this warning order that it was vague and uncertain, because it did not show before which justice the defendant was warned to appear, was not sustained. The court held that it was susceptible of but one interpretation, and it was clear that he was required to appear before the justice who made the warning order.

Form No. 16712.[1]

(Sand. & H. Dig. Ark. (1894), p. 1618, No. 7.)

Sebastian Circuit Court, *Fort Smith* District.

Richard Roe, plaintiff,
against
John Doe, defendant.
} Warning Order.

The defendant, *John Doe*, is warned to appear in this court within *thirty* days, and answer the complaint of the plaintiff, *Richard Roe*.

Calvin Clark, Clerk.

December 10, 1891.

Form No. 16713.[2]

In the *Superior* Court of the County of *Madera*, State of *California*.

John Doe, plaintiff,
against
Richard Roe, defendant.
} Order for Publication of Summons.

Upon reading and filing the affidavit of plaintiff, *John Doe*, and it appearing to me therefrom that defendant, *Richard Roe*, resides out of the state, and it also appearing from said affidavit that a cause of action exists in favor of the plaintiff and against the defendant, and that the defendant is a necessary and proper party to said action; and it further appearing that a summons has been duly issued herein, and that personal service of the same cannot be made upon the said defendant for the reason hereinbefore contained, and by the said affidavit made to appear; on motion of *Jeremiah Mason*, attorney for the plaintiff, it is ordered that the service of the summons in this action be made upon the defendant by publication thereof in the "*Madera Tribune*,"[3] a weekly newspaper published at *Madera*, in said county, hereby designated as a newspaper most likely to give notice to said defendant; that such publication be made at least *once* a week for *two* months.[4]

And it further appearing from said affidavit that the residence of said defendant is at *Northport*, in the state of *New York*, it is ordered and directed that a copy of the summons and complaint in this suit be forthwith deposited in the United States post-office at said *Madera*,

1. *Arkansas.* — Where it appears by the affidavit of the plaintiff, filed in the clerk's office at or after the commencement of the action, that the defendant is a nonresident of the state, the clerk shall make upon the complaint an order warning such defendant to appear in the action within thirty days from the time of making the order. Sand. & H. Dig. (1894), § 5679.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

2. *California.* — Code Civ. Proc. (1897), §§ 412, 413.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

3. **Designation of Newspaper.** — Order must direct publication to be made in a newspaper, to be designated, most likely to give notice to the person to be served. Cal. Code Civ. Proc. (1897), § 413.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

4. **Number of Publications.** — Publication shall be for such length of time as shall be deemed reasonable, at least once a week, but publication against a defendant residing out of the state or absent therefrom must not be less than three months. Cal. Code Civ. Proc. (1897), § 413.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

post paid, directed to said defendant at *Northport*, *New York*, said defendant's place of residence.[1]

Dated the *tenth* day of *June*, 1899.

John Marshall, Judge of the *Superior* Court.

Form No. 16714.[2]

(*Title as in Form No. 16686.*)

And now, to wit, this *twenty-first* day of *March*, A. D. 1900, the subpœna in this cause having been issued and delivered to the sheriff more than *thirty* days before the return thereof, and *Richard Roe*, the defendant, not being found and not having appeared, on motion of *Jeremiah Mason*, solicitor for the complainant, *John Doe*, and upon affidavit of such complainant that the said *Richard Roe* resides out of the state of *Delaware*, to wit, at *Trenton*, in the state of *New Jersey*, it is ordered by the chancellor that the said *Richard Roe* appear in this cause on or before the *third Monday* in *September next* (the first day of the term next ensuing) or that the bill be taken pro confesso as to him; and the register is directed to cause a copy of this order to be published within *thirty* days of this date in the "*Dover Telegram*," a newspaper published in *Dover*, in the county of *New Castle*, to be continued in said newspaper for *eight* weeks after the first publication thereof.

Form No. 16715.[3]

(Dist. of Col. Supreme Ct. Com. L. Rules, No. 17.)

In the *Supreme* Court of the *District of Columbia*.

John Doe, plaintiff,
v.
Richard Roe, defendant. } At *Law* (In *Equity*), No. *340*.

On motion of the plaintiff, by *Jeremiah Mason*, his attorney, it is, this *twentieth* day of *January*, 1899, ordered that the defendant cause his appearance to be entered herein on or before the *fortieth* day, exclusive of Sundays and legal holidays, occurring after the day of the first publication of this order; otherwise the cause will be proceeded with as in case of default. The object of this suit is (*Here state object briefly*).

By the Court,

John Marshall, Justice.

1. **Mailing Copy of Summons and Complaint.** — Where the residence of a non-resident or absent defendant is known, the court or judge must direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served at his place of residence. Cal. Code Civ. Proc. (1897), § 413.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

2. *Delaware.* — If, after subpœna, or other process, issued and delivered to the sheriff thirty days before the return thereof, any defendant named therein shall not appear according to the rule of the court, the court may, on affidavit that such defendant is out of the state, or cannot be found to be served with process, and that there is just ground to believe that he intentionally avoids such service, make an order for his appearance on a certain day, and publish such order in one or more newspapers, as the chancellor shall direct. Rev. Stat. (1893), p. 705, c. 95, § 5.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

3. *District of Columbia.* — Supreme Ct. Com. L. Rules, No. 17, provides that

Form No. 16716.[1]

In the *Circuit* Court, *Second* Judicial Circuit, *Leon* County, *Florida.*

John Doe
against
Richard Roe.
} In *Chancery.*

It appearing by affidavit appended to the bill filed in the above stated cause that *Richard Roe*, the defendant therein named, is a nonresident of the state of *Florida* and is a resident of the town of *Huntington*, in the county of *Suffolk* and state of *New York*, and is over the age of *twenty-one* years; it is therefore ordered that said nonresident defendant be and is hereby required to appear to the bill of complaint filed in said cause on or before *Monday*, the *eightenth* day of *May*, A. D. 19*00*; otherwise the allegations of said bill will be taken as confessed by said defendant.

It is further ordered that this order be published *once* a week,[2] for *four* consecutive weeks, in the "*Tallahassee News*,"[3] a weekly newspaper published in said county and state.

This *tenth* day of *April*, 19*00*.

Calvin Clark, Clerk *Circuit* Court.[4]

Form No. 16717.[5]

(Bullitt's Civ. Code Ky. (1895), p. 695.)

State of *Kentucky*,
Henry Circuit Court.

John Doe, plaintiff,
against
Richard Roe, defendant.
} Warning Order.

The defendant, *Richard Roe*, is hereby warned to defend the above style of action on the *first* day of the *next January* term of the court[6]

the form of order in case of service by publication shall be as set out above.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

1. *Florida.* — Rev. Stat. (1892), § 1413.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

2. Publication must be once a week for four consecutive weeks, if the defendant be stated to be a resident of the United States, and once each week for eight consecutive weeks if he be stated to be a nonresident of the United States or if his residence be stated to be unknown. Fla. Rev. Stat. (1892), § 1413.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

3. Newspaper must be designated in order. Fla. Rev. Stat. (1892), § 1413.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

4. Order must be made by clerk. Fla. Rev. Stat. (1892), § 1413.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

5. *Kentucky.* — Bullitt's Civ. Code (1895), §§ 57, 59.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

Order need not run in name of commonwealth, as it is in the nature of a rule and is not a process within the meaning of the code of practice or of that section of the constitution which provides that the style of all processes shall be "the Commonwealth of Kentucky." Northern Bank *v.* Hunt, 93 Ky. 67.

6. Order shall warn defendant to defend action on the first day of the next term

aforesaid; and *Jeremiah Mason*, a regular practicing attorney of said court,[1] is appointed attorney for him.

Witness, *Calvin Clark*, clerk of said court, this *twentieth* day of *September*, 1900.

Calvin Clark, Clerk.[2]

Form No. 16718.[3]

Commonwealth of *Massachusetts*.

Suffolk, ss.

At the *Police* Court of *Chelsea*, holden at said *Chelsea* within the County of *Suffolk*, for *civil* business, on the *seventh* day of *February*, A. D. 1900.

Harry W. Jeffers, plaintiff,
against
Margaret T. Lewis, defendant.

This is an action of contract to recover *thirty-three* dollars and *thirty-seven* cents, alleged to be due to the plaintiff from the defendant on the *fourth* day of *January*, A. D. 1900, as set forth in the plaintiff's writ of that date.

And it appearing to the court by the suggestion of the plaintiff, and on inspection of the officer's return on the plaintiff's writ, that the defendant is not an inhabitant of this commonwealth, nor is a resident therein at the time of the service of said writ, that she has no last and usual place of abode, tenant, agent or attorney in this commonwealth known to the plaintiff or to said officer, and that no personal service of said writ has been made upon the defendant;

It is ordered by the court, here, that the plaintiff give notice to the defendant of the pendency of this action, by publishing a true and attested copy of this order, *once* a week, for *three* successive weeks, in the "*Chelsea Gazette*," a newspaper published in said *Chelsea*, before the *third* day of *March*, 1900, at *nine* o'clock A. M., that she may appear

of the court which does not commence within sixty days after the making of the order. Bullitt's Civ. Code Ky. (1895), § 57; Payne *v.* Hardesty, (Ky. 1890) 14 S. W. Rep. 348; Brownfield *v.* Dyer, 7 Bush (Ky.) 505; Hogue *v.* Yeager, (Ky. 1900) 54 S. W. Rep. 961. And an order warning the defendant to appear and answer on the first day of the term of court which commences within sixty days from the date of the warning order is void. Payne *v.* Hardesty, (Ky. 1890) 14 S. W. Rep. 348; Brownfield *v.* Dyer, 7 Bush (Ky.) 505.

1. **A regular practicing attorney of the court shall be appointed** as attorney for the defendant by the clerk. Bullitt's Civ. Code Ky. (1895), § 59.

2. **Order shall be made by clerk.** Bullitt's Civ. Code Ky. (1895), § 57.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

Circuit Court in Continuous Session.— In Bullitt's Civ. Code Ky. (1895), p. 695, the following warning order from circuit court in continuous session is set out: "State of *Kentucky*,
Henry Circuit Court.

John Doe, plaintiff,
against
Richard Roe, defendant. } Warning Order.

The defendant, *Richard Roe*, is hereby warned to appear and defend the above styled action within *sixty* days after the date hereof, and *Jeremiah Mason*, a regular practici ng attorney of said court, is appointed as attorney for him.

Witness, *Calvin Clark*, clerk of said court, this *twentieth* day of *September*, 1900. *Calvin Clark*, Clerk."

3. *Massachusetts*. — If a defendant is absent from the commonwealth, or his place of residence is not known to the officer serving the writ, and no personal service is made on him, the court, upon

and show cause why judgment in the above entitled action should not be rendered against her, and that this action be continued to the said *third* day of *March*, 1900, or until notice shall be given to the defendant agreeably to this order.

John Marshall, Judge.

Form No. 16719.[1]

In Chancery of *New Jersey*.

Between *John Doe*, complainant, and *Richard Roe*, defendant. } On Bill, etc. Order of Publication.

The complainant having filed his bill in the above cause, and process of subpœna having been issued and returned according to law; and it being made to appear by affidavit that the defendant, *Richard Roe*, resides out of the state of *New Jersey*, and that process could not be served upon him;

It is, on this *tenth* day of *March*, one thousand eight hundred and ninety-*nine*, on motion of *Jeremiah Mason*, solicitor of the complainant, ordered that the said absent defendant do appear, plead, demur or answer to the complainant's bill[2] on or before the *tenth* day of *May next*, or that, in default thereof, such decree be made against him as the chancellor shall think equitable and just.

And it is further ordered that the notice of this order, prescribed by law and the rules of this court, shall, within *ten* days hereafter, be served personally on the said absent defendant by a delivery of a copy thereof to him or be published within the said *ten* days in the "*Trenton Times*," a newspaper printed at *Trenton* in this state, for *four* weeks successively,[3] at least *once* in each week, and in case of such publication that a copy thereof be also mailed, within the same time, to the said absent defendant, directed to his post-office address, if the same can be ascertained, in the manner prescribed by law and the rules of this court.

Dated this *tenth* day of *March*, 1899.

John Marshall, Chancellor.

suggestion thereof by the plaintiff, shall order the action to be continued from term to term until notice of the suit is given in such manner as the court may direct. Pub. Stat. (1882), c. 164, § 6.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

1. *New Jersey*. —Gen. Stat. (1895), p. 405, § 172.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

2. Order shall direct absent defendant to appear, plead, answer or demur to the complainant's bill at a certain day therein to be named, not less than one nor more than three months from the date of such order. N. J. Gen. Stat. (1895), p. 405, § 172.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

3. Copy of notice of order shall be mailed to the defendant, prepaid, directed to him at the post-office nearest to his residence, or post-office at which he usually receives letters, unless such residence or post-office be unknown and cannot be ascertained. N. J. Gen. Stat. (1895), p. 405, § 172.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

Form No. 16720.[1]

New Jersey Supreme Court.

Sarah A. Stillwell
against
Jesse A. Marshall et al., heirs at law of *John F. Marshall*, deceased.
} On Contract.

A summons having issued in the above entitled suit to the county of *Monmouth* in this state against *Jesse A. Marshall*, *Oscar Marshall*, *Madison Marshall* and *Deborah Ann Honeywell*, heirs at law of *John F. Marshall*, deceased, of land situated within this state, and all of said defendants residing out of this state, and not to be found within the same in order to be served with said writ, and the sheriff of the county of *Monmouth* in which the said land lies having so returned, and an affidavit having been made by *Joel P. Stillwell* to the satisfaction of the above entitled court out of which said summons issued, showing the residence, as nearly as may be, of such absent defendants to be as follows, viz, that they all reside in the city, county and state of *New York*:

It is, on this *twenty-fourth* day of *March*, A. D. 1899, ordered that the said absent defendants, *Jesse A. Marshall*, *Oscar Marshall*, *Madison Marshall* and *Deborah Ann Honeywell*, do appear to the said writ on or before the *thirty-first* day of *May next* and that a copy of this rule be served on the said absent defendants, *Jesse A. Marshall*, *Oscar Marshall*, *Madison Marshall* and *Deborah Ann Honeywell*, within *thirty* days from the date hereof, or published for *four* weeks successively, *once* at least in each week, the first publication to be made within *twenty* days from the time of making this rule, in "*The Monmouth Democrat*," a newspaper published in the county of *Monmouth*, the county where the said land lies.

On Motion of
Muirheid & McGee, Plaintiff's Attorneys.

Rule entered *March 24*, 1899.

Form No. 16721.[2]

On reading and filing the foregoing affidavit, and the facts therein stated appearing to the satisfaction of the court to be true;

1. *New Jersey.* — If a summons is issued, in any case, to the sheriff or coroner of any county where the defendant is a nonresident of this state, and the cause of action arose in this state and is one denominated local, and the sheriff or coroner shall return that the defendant cannot be found in his county, any justice of the supreme court may make an order, upon proper affidavit, that the defendant appear, at a certain day therein to be named, not less than one nor more than two months from the date of such order, of which order such notice as said justice shall by rule direct shall, within twenty days thereafter, be served personally on such defendant, by delivery of a copy thereof to him, either in or out of this state, or be published in a newspaper, to be designated by said justice, in the county where the cause of action arose, for at least four weeks successively, at least once in each week. Gen. Stat. (1895), p. 2599, § 376.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

2. *South Dakota.* — Dak. Comp. Laws (1888), §§ 4900 *et seq.*, 6056.

See also list of statutes cited *supra*,

It is ordered that service of the summons in this action be made upon the said defendant, requiring him to be and appear before the undersigned, one of the justices of the peace in and for said county, on the *tenth* day of *July*, 1899, at *ten* o'clock in the *fore*noon, at my office in the town of *Tyndall*, in said county, to answer to *John Doe*, the plaintiff, in a *civil* action, which summons shall state the time and place of filing the complaint herein, by publication of said summons in the "*Tyndall Gazette*," a *weekly* newspaper published in the county of *Bon Homme* and state of *South Dakota*, *once* in each week for *six* successive weeks.

And it is further ordered that a copy of the summons and complaint herein be forthwith deposited in the post-office at said *Tyndall*, postage prepaid, and directed to the defendant at *Huntington*, in the state of *New York*.

Dated at *Tyndall*, this *tenth* day of *May*, A. D. 1899.

Abraham Kent, Justice of the Peace.

Form No. 16722.[1]

The State of *Texas* to the Sheriff or any Constable of *Freestone* County, Greeting:[2]

You are hereby commanded[3] to summon *John Doe*, a nonresident of the state of *Texas*, by making publication of this citation *once* in each week for *four* successive weeks previous to the return day hereof,[4] in some newspaper published in your county, if there be a newspaper published therein, but if not, then in any newspaper published in the *thirteenth* judicial district; and if there be no newspaper published in said judicial district, then in a newspaper published in the nearest district to said *thirteenth* judicial district, to appear at the *next* regular term of the *District* Court of *Freestone* county, to be holden at the court-house thereof, in *Fairfield*, on the *first Monday* in *January*, A. D. 1899, the same being the *third* day of *January*, A. D. 1899, then and there to answer a petition filed in said court on the *seventh* day of *September*, A. D. 1899, in a suit numbered on the docket of said court No. *500*, wherein *Richard Roe* is plaintiff and said *John*

note 1, p. 2; and, generally, *supra*, note 5, p. 35.

1. *Texas.* — Rev. Stat. (1895), art. 1235.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

2. **Address.** — Citation shall be addressed to sheriff or any constable of the county in which the suit is pending. Tex. Rev. Stat. (1895), art. 1235.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35

3. **Command.** — Citation shall command officer to summon defendant by making publication of the citation in some newspaper published in his county, if there be any newspaper published therein, or if not, then in any newspaper published in the judicial district where the suit is pending; but if there be no newspaper published in such judicial district, then it shall be published in the nearest district to the district where the suit is pending. Tex. Rev. Stat. (1895), § 1235.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

4. **Time of Publication.** — Publication shall be once in each week for four consecutive weeks previous to the term day of the court. Tex. Rev. Stat. (1895), art. 1235.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

Doe is defendant, said petition alleging (*Here state briefly the cause of action.*)[1]

Herein fail not, but have before said court, at its aforesaid *next* regular term, this writ, with your return thereon, showing how you have executed the same.

Witness, *Calvin Clark*, clerk of the *District* Court of *Freestone* County.

Given under my hand and the seal of said court, at office in *Fairfield*, this the *twentieth* day of *September*, A. D. 1899.

(SEAL) *Calvin Clark*, Clerk,
District Court, *Freestone* County.[2]

Form No. 16723.[3]

In the clerk's office of the *Circuit* Court of the county of *Albemarle* on the *tenth* day of *January*, 1899.

John Doe, plaintiff,
against
Richard Roe, defendant.

The object of this suit is to (*Here state briefly object of suit*);[4] and an affidavit having been made and filed that the defendant is not resident of the state of *Virginia*, it is ordered that he do appear[5] here within *fifteen* days after due publication hereof, and do what may be necessary to protect his interest in this suit. And it is further ordered that a copy hereof be published *once* a week, for *four* successive weeks,[6] in the "*Charlottesville Progress*," and that a copy be posted at the front door of the court-house of this county on the *first* day of the *next* term of the *Circuit* Court. *Calvin Clark*, Clerk.

Form No. 16724.[7]

Circuit Court, *Milwaukee* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

1. **Brief statement of cause of action** shall be contained in the citation. Tex. Rev. Stat. (1895), art. 1235.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

2. **Citation shall be issued by clerk.** Tex. Rev. Stat. (1895), art. 1235.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

3. *Virginia.* — Code (1887), § 3231.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

Abbreviated style of suit shall be given in order. Va. Code (1887), § 3231.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

4. **Object of suit** shall be stated briefly in the order. Va. Code (1887), § 3231.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

5. **Appearance.** — Order shall require defendant against whom it is entered, or unknown parties, to appear within fifteen days after due publication thereof and do what is necessary to protect their interest. Va. Code (1887), § 3231.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

6. **Time of Publication.** — Publication shall be once a week for four successive weeks in such newspaper as the court may prescribe, or, if none be so prescribed, as the clerk may direct. Va. Code (1887), § 3231.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

7. *Wisconsin.* — Stat. (1898), § 2640.

On the pleadings and papers served and filed, and on the plaintiff's complaint herein, duly verified (of which a copy is hereunto annexed), and on the record in the above entitled action, and on the affidavit of *John Doe*, plaintiff, showing, and it appearing to my satisfaction, that the above entitled action has been commenced, and is now pending; that the plaintiff's complaint herein is duly verified, and has been filed with the clerk of the *Circuit* Court of *Milwaukee* county; that a cause of action exists in favor of the above named plaintiff and against the above named defendant,* the grounds of which are (*stating grounds of action*);† that said defendant is a nonresident of the state of *Wisconsin* (or *that said defendant's residence is unknown*), and that the plaintiff is unable, with due diligence, to make service of the summons in said action upon the said defendant; that the said defendant cannot be found within the state of *Wisconsin*, although diligent effort to find him and serve upon him said summons has been made; and that said defendant's post-office address is *Northport, New York*, and said defendant's residence is *Northport, New York* (or *that the plaintiff is unable to ascertain either the post-office address or the residence of said defendant, although the said plaintiff has made diligent effort to ascertain them*); that said defendant has property within the state of *Wisconsin*, to wit, (*describing it*) (or *that the cause of action set out in said plaintiff's complaint herein arose within the state of Wisconsin, and that the above entitled court has jurisdiction of the subject of the said action*); and on motion of *Jeremiah Mason*, attorney of said plaintiff:

It is hereby ordered that service of the summons in said action (hereunto annexed) upon the said defendant be made by publication of said summons in the "*Milwaukee News*,"[1] a newspaper published in the city of *Milwaukee*, county of *Milwaukee* and state of *Wisconsin*, which said newspaper is hereby designated as most likely to give notice to the said defendant, *once* a week for *six* weeks,[2] and that the *first* publication of said summons be made within *three* months from the date of this order; and that on or before the day of the *first* publication of said summons the said plaintiff shall deposit in the post-office of *Milwaukee*, county of *Milwaukee* and state of *Wisconsin*, a copy of said summons, together with a copy of the complaint in said action (or *together with a notice of the object of said action*), securely enclosed in an envelope, with the postage thereon duly prepaid, addressed to the defendant at *Northport* post-office, in the county of *Suffolk* and state of *New York*[3] (or *that the deposit of a copy of the*

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

1. Designation of Newspaper. — Order shall direct that service of the summons be made by its publication in a newspaper to be designated as most likely to give notice to the defendant to be served. Wis. Stat. (1898), § 2640.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

2. Length of Publication. — Order shall direct service by publication for such length of time as shall be deemed reasonable, not less than once a week for six weeks. Wis. Stat. (1898), § 2640.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

3. Mailing Copy of Summons. — Order shall direct that on or before the first day of publication plaintiff deposit in a specified post-office a copy of the sum-

summons in said action, together with a copy of the complaint in said action, or *together with a notice of the object of said action, in a specified post-office, securely enclosed in an envelope, with the postage duly prepaid, may be omitted, for the reason that the said plaintiff is unable, after due diligence, to ascertain either the post-office address or the residence of the said defendant, and after having made diligent effort to ascertain the same.*)

It is hereby further ordered that at the option of the said plaintiff a copy of said summons and a copy of said complaint (or *a notice of the object of said action*) be delivered to the said defendant personally,[1] without the state of *Wisconsin*, and that when said copy of the summons and said copy of the complaint (or *a notice of the object of said action*) have been so delivered to the said defendant, such delivery shall have the same effect as the completed publication of said summons and the mailing of said summons and complaint (or *a notice of the object of said action*), heretofore provided for, would have had.

Dated the *tenth* day of *June*, A. D. 1899.

John Marshall, *Circuit* Judge.

2. In Proceedings for Attachment.

Form No. 16725.[2]

In *Chancery* at *Jacksborough.* No. *200.*[3]

State of *Tennessee.*

Office of Clerk and Master, *Chancery* Court, *Jacksborough.*[4]

January 10, 1899.

John Doe, complainant,
against
Richard Roe, defendant.[5]

It appearing from affidavit filed in this cause that the defendant, *Richard Roe*, is a nonresident of the state of *Tennessee*; and it further

mons, together with a copy of the complaint, or with a notice of the object of the action, as the case may require, securely enclosed in an envelope, with postage duly paid, addressed to the defendant at his post-office, to be therein named, or a direction that such deposit may be omitted because the defendant's post-office address cannot be obtained. Wis. Stat. (1898), § 2640.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

1. Personal Service of Copy of Summons. — Order shall direct that, at the plaintiff's option, a copy of the summons and a copy of the complaint or of the notice of the object of the action may be delivered to the defendant personally without the state, which, when done, shall have the same effect as a completed publication and mailing. Wis. Stat. (1898), § 2640.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

2. *Tennessee.* — Code (1896), § 6164.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

3. Place where proceedings are held must be stated. Tenn. Code (1896), § 6167.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

4. Style of court in which proceedings are had must be stated. Tenn. Code (1896), § 6167.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

5. Names of parties must be stated. Tenn. Code (1896), § 6167.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

No brief or abstract of facts need be

appearing that an attachment has issued in this case and has been returned levied upon the following property, viz. (*Here describe property*);

It is therefore ordered that said defendant enter his appearance herein before or within the *first three* days of the *next* term of said court, to be held on the *first Monday* in *May next* (1899), and plead, answer or demur to complainant's bill, or the same will be taken for confessed as to him and set for hearing *ex parte*, and that a copy of this order be published for *four* consecutive weeks in the "*Jacksborough News*," a weekly newspaper published in *Jacksborough*.

Calvin Clark, Clerk and Master.

3. In Proceedings Against Corporation.

a. Domestic, Without Proper Officers.

Form No. 16726.[1]

(*Commencing as in Form No. 16724, and continuing down to* †) that said defendant is a private corporation, organized and existing under and by virtue of the laws of the state of *Wisconsin*; that the proper officers of said corporation, upon whom to make service of the summons in said action do not exist (or *cannot be founa*); that diligent effort and inquiry has been made to find the president, chief officer, vice-president, secretary, cashier, treasurer, director or managing agent, or other agent, officer or servant of such corporation, upon whom by law service of the summons in said action can be made, and to serve upon him the summons in said action; that no such officer, agent or servant exists (or *that no such officer, agent or servant can be found*); that said defendant's general office, when last in existence, and the place where its books were kept, was in the city of *Milwaukee*, county of *Milwaukee* and state of *Wisconsin*, but that said defendant has now no general office or place where its books are kept; that the said defendant's post-office address is *Milwaukee, Wisconsin* (or *that the said plaintiff is unable to ascertain the post-office address of said defendant, although the said plaintiff has made diligent effort to ascertain the same*); and on motion of *Jeremiah Mason*, attorney for said plaintiff,

It is hereby ordered (*concluding as in Form No. 16724*).

b. Foreign.

Form No. 16727.[2]

(*Commencing as in Form No. 16724, and continuing down to* †) that said defendant is a foreign corporation, organized and existing under and by virtue of the laws of the state of *New York*; that the place of business and home office of said defendant is in the town of *Hunting-*

stated unless directed by the court. Tenn. Code (1896), § 6167.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

1. *Wisconsin.* — Stat. (1898), § 2640.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

2. *Wisconsin.* — Stat. (1898), § 2640.

ton, county of *Suffolk* and state of *New York*; that *Richard White*, who resides at *Milwaukee*, *Wisconsin*, is the agent of said defendant; that the plaintiff is unable, with due diligence, to make service of the summons upon said defendant; that no officer or agent of said defendant, upon whom service of the summons in said action can by law be made, can, after due diligence, be found within the state of *Wisconsin*, although deponent has made diligent search and inquiry to find such an officer or agent of the defendant, upon whom to serve the summons in this action; that the said defendant's post-office address is *Huntington*, *New York*; that said defendant has property within the state of *Wisconsin*, to wit: (*describing it*) (or *that the cause of action set out in said plaintiff's complaint herein arose within the state of Wisconsin, and that the above entitled court has jurisdiction of the subject of the said action*); and on motion of *Jeremiah Mason*, attorney of said plaintiff,

It is hereby ordered (*concluding as in Form No. 16724*).

4. In Proceedings for Divorce.

Form No. 16728.[1]

Superior Court of *Fairfield* County — *September* Term, 1899.

Miner H. Knowlton against *Julia Knowlton.* } Complaint for *Divorce.*

Whereas, it has been shown to me that *Julia Knowlton*, the above named respondent, does not reside in this state, but is in parts unknown to the complainant, it is ordered that notice be given to the respondent of the pendency of this petition by publishing a true and attested copy of this order in the "*Stamford Advocate*," a newspaper published in *Stamford*, in said county, for *two* weeks successively before the term of court to which the same is made returnable, by some proper officer or indifferent person.

Dated *Danbury*, *September 20*, 1899.

Henry T. Blake,
Clerk of *Superior* Court for *Fairfield* County.

5. In Proceedings to Exclude Defendant from Any Lien on or Interest in Property.

Form No. 16729.[2]

(*Commencing as in Form No. 16724, and continuing down to* *) that the subject of said action is real (or *personal*) property in the state of

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

1. *Connecticut.* — Gen. Stat. (1888), § 2804.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

This is substantially the order of notice set out in Knowlton *v.* Knowlton, 155 Ill. 158, being one of the papers in an exemplified copy of the divorce proceedings in the Connecticut court, and used as evidence in said case.

2. *Wisconsin.* — Stat. (1898), § 2640.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

Wisconsin, to wit: (*describing it*); that said defendant has or claims a lien or interest, actual or contingent, on or in said property, as follows, to wit: (*stating nature of lien or interest*) (or *that the relief demanded by the plaintiff in said action consists wholly*, or *partially*, *in excluding said defendant from any lien or interest in said property*); that said plaintiff is unable, with due diligence, to make service of the summons in said action upon the said defendant; that the said defendant cannot be found within the state of *Wisconsin*, although diligent effort to find him and serve upon him the said summons has been made; that the said defendant's post-office address is *Northport*, *New York*, and said defendant's residence is *Northport*, *New York* (or *that the said plaintiff is unable to ascertain either the post-office address or the residence of said defendant, although the said plaintiff has made diligent effort to ascertain the same*); and on motion of *Jeremiah Mason*, attorney for said plaintiff,

It is hereby ordered (*concluding as in Form No. 16724*).

6. In Proceedings for Foreclosure of a Claim or Lien Upon Real Property.

Form No. 16730.[1]

(*Commencing as in Form No. 16724, and continuing down to* *), that said action is brought to foreclose (or *to redeem from* or *to satisfy*) a claim or lien upon certain real property situated in the county of *Milwaukee*, in the state of *Wisconsin*, of which the following is a description (*describing it*); that said claim or lien is of the following nature and description: (*stating nature of claim or lien*); that there is now due upon said claim or lien the sum of *one thousand* dollars and upward; that said plaintiff is unable, with due diligence, to make service of the summons in said action upon the said defendant, *Richard Roe*; that said defendant, *Richard Roe*, cannot be found within the state of *Wisconsin*, though diligent effort to find him and serve upon him the said summons has been made; that the post-office address of the said defendant, *Richard Roe*, is *Milwaukee*, *Wisconsin*, and that the residence of the said defendant, *Richard Roe* is *Milwaukee*, *Wisconsin* (or *that said plaintiff is unable to ascertain either the post-office address or the residence of the said defendant, Richard Roe, although the said plaintiff has made diligent effort to ascertain the same*); that the said defendant, *Richard Roe*, has or claims to have an interest in or lien upon the premises hereinbefore described, the nature and description of which interest or lien is as follows: (*stating nature of interest or lien*), which interest or lien is subsequent to the claim or lien of said plaintiff; that the relief demanded in this action consists partially in excluding and foreclosing the said defendant of and from all lien or interest in the said premises hereinbefore described; that the said defendant, *Richard Roe*, is a proper party to this action; and on motion of *Jeremiah Mason*, attorney for said plaintiff,

It is hereby ordered (*concluding as in Form No. 16724*).

1. *Wisconsin.* — Stat. (1898), § 2640. See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

7. In Proceedings for Foreclosure of Mortgage.

Form No. 16731.[1]

The Savings Bank of Walpole
vs.
Isaac Shapro, Anna Shapro.

State of *Vermont*, *Windham* county.

In *Chancery*, *September* term, A. D. 1*901*.

Whereas, *The Savings Bank of Walpole*, a corporation doing business at *Walpole*, in the county of *Windham* and state of *New Hampshire*, has filed in said court its petition of foreclosure against *Isaac Shapro* and *Anna Shapro*, his wife, returnable at the *November* term of said court, A. D. 1*901*, setting forth that said *Isaac Shapro* and *Anna Shapro*, then of *Westminster* in said county of *Windham*, on the *nineteenth* day of *September*, A. D. 1*892*, duly executed to said savings bank of *Walpole* a mortgage deed of certain land situate, lying and being in *Westminster* aforesaid, and described as follows, viz: Bounded easterly by the main highway leading from the east village of *Westminster* to *Putney* village; southerly, westerly and northerly by the old stage road that leads past and by the residence formerly occupied by *Henry A. Wells*, being all the premises lying between the said described roads and supposed to contain *six* acres more or less, and being the same premises conveyed to said *Isaac Shapro* by warranty deed from *Mary A. Wells* and *Henry A. Wells*, dated *April 11*, 1*892*, reference being had thereto: conditioned for the payment of the sum of *two hundred and fifty* dollars specified in a certain promissory note bearing date *April 1*, 1*892*, executed by the said *Isaac Shapro* and made payable to said savings bank of *Walpole*, or order on demand, with interest payable on the *first* day of *January* and *July* of each year, which note is now justly due and owing, not having been paid according to the effect of the same.

Wherefore the petitioner prays that the equity of redemption of the said *Isaac Shapro* and *Anna Shapro* in the premises may be foreclosed agreeably to the provisions of law, and that a short time be fixed by the court within which they may be permitted to redeem said premises.

And whereas, it appears that *Isaac Shapro* and *Anna Shapro* are now without the State of *Vermont*, to wit, in parts to the petitioner unknown.

It is ordered that said petitioner give notice of the pendency of said action by publishing the substance of the said petition as hereinbefore set forth, with this order, in the "*Bellows Falls Times*," a newspaper printed at *Bellows Falls*, in said county of *Windham*, *three* weeks successively, the last publication to be at least *twenty* days previous to the first day of said *September* term, A. D. 1*901*, of said court, and that said *Isaac Shapro* and *Anna Shapro* be required to appear in said court on the *first* day of said *September* term and make

1. *Vermont.* — Stat. (1894), §§ 921, 922.
See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.
This form is copied from the original papers in the case.

answer to said petition, otherwise the same will be taken as confessed, which said publication will be taken as sufficient notice to said *Isaac Shapro* and *Anna Shapro* to appear and make answer to said petition.

Given under my hand at *Brattleboro*, in said county of *Windham*, this *17th* day of *April*, A. D. 1901.

John H. Merrifield, Clerk.

Form No. 16732.[1]

(*Commencing as in Form No. 16724, and continuing down to* *) that the said action is brought to foreclose (or *to redeem from* or *to satisfy*) a mortgage on real property situate in *Milwaukee* county, in the state of *Wisconsin*, executed by the defendant, *Richard White*, and recorded in the office of the register of deeds of *Milwaukee* county, in volume *56* of mortgages, on page *600*; that there is now due upon said mortgage and the debts secured thereby the sum of *one thousand* dollars and upward; that said plaintiff is unable, with due diligence, to make service of the summons in said action upon the said defendant, *Richard Roe*, and that the said defendant, *Richard Roe*, cannot be found within the state of *Wisconsin*, although diligent effort to find him and serve upon him the said summons has been made; that the post-office address of the said defendant, *Richard Roe*, is *Milwaukee*, *Wisconsin*, and the residence of the said defendant, *Richard Roe*, is *Milwaukee*, *Wisconsin* (or *that the said plaintiff is unable to ascertain either the post-office address or the residence of said defendant, Richard Roe, although the said plaintiff has made diligent effort to ascertain them*); that the said defendant, *Richard Roe*, has or claims to have an interest in or lien by (*Here state nature of lien*) upon the premises described in said mortgage, which accrued subsequently to the mortgage of said plaintiff; and that the relief demanded in this action consists partially in excluding and foreclosing the said defendant, *Richard Roe*, of and from all lien or interest in said mortgaged premises, and that the said defendant, *Richard Roe*, is a proper party to this action; and on motion of *Jeremiah Mason*, attorney for said plaintiff,

It is ordered (*concluding as in Form No. 16724*).

III. NOTICE OR SUMMONS.[2]

1. *Wisconsin.* — Stat. (1898), § 2640.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 5, p. 35.

2. Requisites of Notice or Summons, Generally. — For the formal parts of a notice or summons in a particular jurisdiction see the title NOTICES, vol. 13, p. 212; SUMMONS.

Must Comply with Statute. — The notice must comply in all respects with the requirements of the statute. Hull *v.* Chicago, etc., R. Co., 21 Neb. 371; Odell *v.* Campbell, 9 Oregon 298.

Where the notice complies substantially with the statute, it will be sufficient, notwithstanding errors in recital, if such errors be not misleading. Clark *v.* Marfield, 77 Ill. 258; Rapp *v.* Kyle, 26 Kan. 89; Lane *v.* Innes, 43 Minn. 137; Loring *v.* Binney, 38 Hun (N. Y.) 152. The notice is sufficient where it states the filing of the petition and the substance and prayer thereof, and con-

1. In General.

forms in other respects to the statute. Board of Directors *v.* Tregea, 88 Cal. 334.

Description of Plaintiffs. — Where the plaintiffs were described as administrator and administratrix, without naming the person of whose estate they were administrator and administratrix, the notice was held sufficient. Pouns *v.* Gartman, 29 Miss. 133.

Names of parties to be served should be stated in the notice. Foley *v.* McDonald, 46 Miss. 238; Nashua Sav. Bank *v.* Lovejoy, 1 N. Dak. 211. And the names of the parties must be so stated as to be clearly identified. Thompson *v.* McCorkle, 136 Ind. 484; Clark *v.* Hillis, 134 Ind. 421; Schissel *v.* Dickson, 129 Ind. 139; Hubner *v.* Reickhoff, 103 Iowa 368; Newman *v.* Bowers, 72 Iowa 465; New Orleans *v.* De St. Romes, 28 La. Ann. 17; Colton *v.* Rupert, 60 Mich. 318; Magoffin *v.* Mandaville, 28 Miss. 354; Corrigan *v.* Schmidt, 126 Mo. 304; McRee *v.* Brown, 45 Tex. 503; Meyer *v.* Kuhn, 65 Fed. Rep. 705; Detroit *v.* Detroit City R. Co., 54 Fed. Rep. 1.

Where the notice is addressed "to the nonresident heirs," etc., without naming such as are known, it is not sufficient. Foley *v.* McDonald, 46 Miss. 238. But a slight variance in the spelling and pronunciation of the name of the defendant, if not misleading, will not render the notice void. Lane *v.* Innes, 43 Minn. 137.

Where the notice names the parties defendant with sufficient clearness to indicate their identity, it is sufficient, when questioned in a collateral proceeding. Cruzen *v.* Stephens, 123 Mo. 337. The publication need not necessarily state the names of any of the defendants, except those on whom service is desired by publication. Head *v.* Daniels, 38 Kan. 1. And where the publication contained the name of the defendant on whom service was sought to be made and that of one other defendant, but did not contain the name of the remaining defendants, it was held that there had been a substantial compliance with the statute. Brenen *v.* North, 7 N. Y. App. Div. 79.

In Baugher *v.* Woollen, 147 Ind. 308, it was held that in an action to foreclose a mortgage the plaintiff had the right to rely upon the record in the county recorder's office as to the name of the junior mortgagee. If the record showed no assignment of the junior mortgage and the junior mortgagee was a nonresident, a notice for publication in that name was sufficient, although the name of the payee of the note secured by the mortgage as set out in the record of the mortgage was not the same.

Partnership. — As a suit cannot be maintained against a partnership in its firm name in the absence of actual service, service by publication, directed to the partnership in its firm name, confers no jurisdiction over the members. Moses P. Johnson Machinery Co. *v.* Watson, 57 Mo. App. 629. But where notice is directed to the partners individually it is sufficient, though it misstate the firm name. Tabler *v.* Mitchell, 62 Miss. 437.

Intervenors. — Where, in a suit to foreclose a mechanics' lien, the property owners only are made defendants, and afterward other lien claimants by stipulation with plaintiff appear and file answers but do not serve any summons, the filing of such answers does not constitute an amendment of the complaint, and a published summons is sufficient, although it may not name the intervening lien claimants as parties. Goodale *v.* Coffee, 24 Oregon 346.

Time and place of filing complaint must be stated in the notice. Kendall *v.* Washburn, (Supreme Ct. Spec. T.) 14 How. Pr. (N. Y.) 380.

Date or term at which order was made must be stated in the notice. Miller *v.* Hall, 3 T. B. Mon. (Ky.) 242.

Facts sufficient to give defendant notice must be set out in the notice. Allen *v.* Gilliland, 6 Lea (Tenn.) 521.

Where the notice sets forth the pendency of the suit, the names of the parties thereto, the title of the court and the time and place of the return of the summons, and that a summons has been issued so returnable, it is sufficient. Hannas *v.* Hannas, 110 Ill. 53. Where the notice contains sufficient substance to inform the party on whom it may be served that there is an action instituted against him in court, the name of the plaintiff and the court, and the time when he is required to appear, it is sufficient. Jones *v.* Kohlar, 137 Ind. 528. An order of the clerk that the defendants be notified of the pendency of the suit, stating the title and court, the time of

the filing of the petition, the prayer, and on what founded, and the day on which the defendant is required to answer, and signed and sealed by the clerk, with the name of the plaintiff's attorney appended, is sufficient notice for publication of summons. McBride *v.* Hartwell, 2 Kan. 410.

Nature and object of suit must be stated in the notice. Bobb *v.* Woodward, 42 Mo. 482. The statute does not require a detailed and specific statement of the grounds of the plaintiff's action, but only that the notice should state the nature or controlling characteristic of the plaintiff's demand. Pipkin *v.* Kaufman, 62 Tex. 545. But where the notice advises the parties of the character of the action and of their interests which are sought to be affected, it is sufficient. Head *v.* Daniels, 38 Kan. 1; McCormick *v.* Paddock, 20 Neb. 486; Gary *v.* May, 16 Ohio 66.

Where the notice stated that the object of the suit was "to set aside" a deed conveying certain property, with no general statement of the ground on which the decree was prayed for, the notice was held insufficient. Bobb *v.* Woodward, 42 Mo. 482. Where suit is to set aside a deed as being in fraud of creditors, a notice giving a description of the land and stating that the object of the suit is to obtain a decree of title to the land is sufficient. Adams *v.* Cowles, 95 Mo. 501. Where the notice states that the action is founded on an account in the sum of one hundred and fifty dollars it is sufficient. Freeman *v.* Thompson, 53 Mo. 183. Where the proceeding is to foreclose a mortgage, a summons which specifies with particularity the note upon which the action is brought, and that the action is brought to foreclose a mortgage given to secure its payment, it is sufficient. DeCorvet *v.* Dolan, 7 Wash. 365. That the proceedings were "founded upon two promissory notes" is sufficient. Haywood *v.* Russell, 44 Mo. 252.

Time of Appearance. — Where the time for filing an answer is fixed by statute, the notice must require the defendant to answer at such time. McDermaid *v.* Russell, 41 Ill. 489; Calkins *v.* Miller, 55 Neb. 601; Scarborough *v.* Myrick, 47 Neb. 794; Wilkins *v.* Wilkins, 26 Neb. 235. Notice requiring defendant to appear at the next term is sufficient. Green *v.* Green, 7 Ind. 113. And a notice directing the defendant to appear on the first day of the next term is sufficient. Thomas *v.* Bailey, 7 Blackf. (Ind.) 149. The day upon which the term of court is commenced need not be stated. Green *v.* Green, 7 Ind. 113. And where the notice misstates the date of holding the term of court it will not render the notice void. Morgan *v.* Woods, 33 Ind. 23.

Place of Return. — In Michael *v.* Mace, 137 Ill. 485, it was held that where the publication contains substantial notice of the place of the return of the summons by giving the venue of the suit and stating that the bill is pending in the proper county, but fails to formally name the place of the return, it is not void, as the law fixes the place of holding the court and makes the summons returnable at that place.

That defendant is a "nonresident" should be stated in the notice. Moore *v.* Williams, 44 Miss. 61.

Place of residence, where defendant is a nonresident, should be stated in the notice. Moore *v.* Williams, 44 Miss. 61.

Without the State. — In McCully *v.* Heller, (Supreme Ct. Spec. T.) 66 How. Pr. (N. Y.) 468, it was held that the omission of the words "without the state" in the notice would not render the service void.

That summons is served by publication pursuant to an order of the judge must be stated. Loring *v.* Binney, 38 Hun (N. Y.) 152.

Copy of Summons. — Where the notice contains the substantial elements of the summons, though not a literal copy, it is sufficient. Van Wyck *v.* Hardy, 4 Abb. App. Dec. (N. Y.) 496; State *v.* Georgia Co., 109 N. Car. 310.

Grounds of Publication. — Where a statute providing for notice states the various grounds disjunctively, making each ground a distinct cause, it is only necessary that one of the grounds set out in the complaint should be stated in the notice. Redman *v.* Burgess, 20 Ind. App. 371.

In partition proceedings, where defendant is a nonresident, the premises should be described in the notice. Keil *v.* West, 21 Fla. 508.

Address of Attorney. — In Van Wyck *v.* Hardy, (Supreme Ct. Gen. T.) 11 Abb. Pr. (N. Y.) 473, it was held that where the summons was dated New York, and designated the place of the office of the attorney by street and number without adding the name of the city, it was sufficient.

Form No. 16733.[1]

(Precedent in Michael *v.* Mace, 137 Ill. 488.)[2]

Publication Notice.

State of *Illinois*, } ss. In the *Circuit* Court,
Vermillion County. } *October* Term, 1888.[3]

Precedents. — In State *v.* Georgia Co., 109 N. Car. 310, the notice, which was sufficient, was as follows:

"Notice.

Guilford County — *Superior* Court.

State of North Carolina and the Board of Commissioners of Guilford County v. *The Georgia Company.* } Service by Publication.

This is a civil action, brought in this court in behalf of the creditors of the defendant corporation to obtain the appointment of a receiver, and to follow and collect the assets of the defendant corporation for the payment of state and county taxes; and it appearing to my satisfaction that the defendant is a corporation duly organized under the laws of this state; that a summons has been duly issued against the defendant, and that no officer or agent thereof, upon whom the service of the same can be lawfully made, can, after due diligence, be found within the state, the defendant, the said *The Georgia Company*, is hereby notified to appear at the *next* term of this court to be held on the *3rst* day of *August*, 1891, and demur or answer to the complaint which will be filed in said cause within the *first three* days of said term, or judgment by default will be entered against it.

It is ordered that this notice be published *once* a week for *four* successive weeks in "*The Daily Record*," a newspaper published in the said county of *Guilford*.

This *3d* day of *August*, 1891.

Jno. J. Nelson, C. *S.* C."

In Gary *v.* May, 16 Ohio 66, is set out the following notice, which was held sufficient under the statute:

"*John W. Jones, Patrick Gary*" (and others, the defendants), "are hereby notified that on *April* 7, A. D. 1840, *John F. May*, of the commonwealth of *Virginia*, filed, in the court of common pleas of the county of *Delaware* and state of *Ohio*, a bill in chancery wherein they are defendants, the object and prayer of which bill is to enforce the sale of certain lands described in a deed dated *August* 7, 1820, made by *Thomas E. Gary* and wife to said *John W. Jones* and others, and duly recorded in said *Delaware* county, and, out of the proceeds of said sale, to refund to said *May*, certain moneys paid by said *May* in behalf of said *Gary*; and the said defendants are further notified that unless they appear and plead, answer or demur to said bill within *sixty* days after the next term of said court, the said complainant, at the term next after the expiration of said *sixty* days, will apply to said court to take the matters of said bill as confessed, and to decree thereon accordingly.

April 10.

P. B. Wilcox, Sol. for Comp'ts."

Other precedents are set out in Tibbs *v.* Allen, 27 Ill. 119; Pile *v.* McBratney, 15 Ill. 314.

1. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 22, par. 12.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2, p. 53.

2. An objection to the notice in this case because it failed to state the place of holding the court was not sustained, the court holding that notice of such place was substantially contained in the publication. "The notification was, that the court was the circuit court of Vermillion county, in the state of Illinois, and said court, in the absence of provision of law otherwise, was necessarily in the court-house of Vermillion county, at the county seat of Vermillion county." Words within [ ] have been supplied, in the form set out in the text, to make the notice more specific in this respect.

3. **Title of court** must be stated in the notice. Starr & C. Anno. Stat. Ill. (1896), c. 22, par. 12.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2, p. 53.

Catherine L. Michael, James K. Michael, John B. Michael, Martha A. Mace, Mary H. Smith, Jane Taylor, v. *Thomas F. Michael* and *Andrew Michael.*[1] } In *Chancery*, No. *4107.*

Affidavit of the nonresidence of *Thomas F. Michael* and *Andrew J. Michael*, the above defendants, having been filed in the clerk's office of the *circuit* court [in *Danville*, in] said county, notice is hereby given to the said nonresident defendants that the complainants filed their bill of complaint in said court, on the chancery side thereof, on the *16th* day of *August*, 1*888*, and that thereupon a summons issued out of said court wherein said suit is now pending,[2] returnable on the *first* day in the month of *October next*[3] [at the court-house in said *Danville*], as is by law required.

A. S. W. Hawes, Clerk.

Dated this *16th* day of *August*, 1*888*.

Form No. 16734.[4]

(Miss. Anno. Code (1892), § 3421.)

State of *Mississippi.*

To *John Doe* [the defendant]:

You are commanded to appear before the *chancery* court of the county of *Lee*, in said state, on the *third Monday* of *May*, A. D. 19*00*, to defend the suit, in said court, of *Richard Roe* [and others], wherein you are a defendant.

This *twentieth* day of *February*, A. D. 19*00*.

Calvin Clark, Clerk.

Form No. 16735.[5]

New York Supreme Court, County of *New York.*

Victoria A. Romaine, plaintiff, against *William J. Gilmartin, Louis A. Jaffer, Fanny Jaffer, his wife; Mamie E. Wagner, Bryan L. Kennelly, Philip Babinsky and Hyman Lewis*, defendants. } Amended and Supplemental Summons.

1. **Names of the parties** to the suit must be stated in the notice. Starr & C. Anno. Stat. Ill. (1896), c. 22, par. 12.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2, p. 53.

2. **Pendency of suit** must be stated in the notice. Starr & C. Anno. Stat. Ill. (1896), c. 22, par. 12.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2, p. 53.

3. **Time and place of return of summons** in the case must be stated in the notice. Starr & C. Anno. Stat. Ill. (1896), c. 22, par. 12.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2, p. 53.

4. *Mississippi.* — The clerk shall prepare and publish a summons to the defendant to appear and defend the suit on a rule day or on the first day of a term of the court sufficiently distant in time to admit of the due publication thereof. The summons shall be in the form set out in the text. Anno. Code (1892), § 3421.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2, p. 53.

5. *New York.* — Code Civ. Proc., §§ 440, 441.

See also list of statutes cited *supra*,

To the above-named defendants and each of them:

You are hereby summoned to answer the amended complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within *20* days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated *July 30*, 1901.

Redfield, Redfield & Lydon, Plaintiff's Attorneys.

Office and post-office address, *58 Pine* Street, *New York City.*

To the defendant *Fanny Jaffer*:

The foregoing summons is served upon you by publication, pursuant to an order of Hon. *P. Henry Dugro*, one of the Justices of the *Supreme* Court of the State of *New York*, dated the *26th* day of *August*, 1901, and filed with a copy of the amended complaint herein in the office of the Clerk of the County of *New York*, at the *County* Court House, in the Borough of *Manhattan*, City of *New York*, on the *29th* day of *August*, 1901, the original amended complaint herein having been filed in said County Clerk's office on the *31st* day of *July*, 1901.

Dated *N. Y., August 30th*, 1901.

Redfield, Redfield & Lydon, Attorneys for Plaintiff.

Office and post-office address, *58 Pine* Street, Borough of *Manhattan*, City of *New York.*

Form No. 16736.[1]

(Ballinger's Anno. Codes & Stat. Wash. (1897), § 4878.)

In the *Superior* Court of the state of *Washington* for the county of *Lewis.*

John Doe, plaintiff, vs. *Richard Roe*, defendant. } No. *500.*

The state of *Washington* to the said (*naming the defendant or defendants to be served by publication*):

You are hereby summoned to appear within *sixty* days after the date of the first publication of this summons,[2] to wit, within *sixty* days after the *tenth* day of *May*, 1900,[3] and defend the above entitled action in the above entitled court, and answer the complaint of the plaintiff, and serve a copy of your answer upon the undersigned attorneys for plaintiff, at his (or *their*) office below stated; and in

note 1, p. 2; and, generally, *supra*, note 2, p. 53.

This form of summons is copied from the original papers in the case.

1. *Washington.* — Ballinger's Anno. Codes & Stat. (1897), § 4878.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2, p. 53.

2. Appearance. — Summons shall require defendant or defendants, upon whom service by publication is desired, to appear and answer the complaint within sixty days from the date of the first publication of such summons. Ballinger's Anno. Codes & Stat. Wash. (1897), § 4878.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2, p. 53.

3. Date of first publication shall be stated in the summons. Ballinger's Anno. Codes & Stat. Wash. (1897), § 4878.

case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, which has been filed with the clerk of said court. (*Insert here a brief statement of the object of the action.*)[1]

Dated *May 10*, 1900.

Ellsworth & Mason, Plaintiff's Attorneys.[2]

P. O. address, *Chehalis*, County of *Lewis*, *Washington*.

2. In Proceedings for Attachment.[3]

See also list or statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2, p. 53.

1. Brief statement of object of action shall be set out in the summons. Ballinger's Anno. Codes & Stat. Wash. (1897), § 4878.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2 p. 53.

2. Subscribed by Plaintiff or Attorney. — Summons must be subscribed by the plaintiff or his attorney or attorneys. Ballinger's Anno. Codes & Stat. Wash. (1897), § 4878.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2, p. 53.

3. Requisites of Notice or Summons, Generally. — See *supra*, note 2, p. 53.

That property has been attached must be stated in the notice. Durossett *v.* Hale, 38 Mo. 346. But a notice that defendant's property is "about to be attached" is sufficient. Harris *v.* Grodner, 42 Mo. 159. And a notice to the defendant that an action has been commenced against him "by petition and attachment" is sufficient. Moore *v.* Stanley, 51 Mo 317.

In *Indiana*, however, it is unnecessary that the notice should show that the proceedings are by attachment. Dronillard *v.* Whistler, 29 Ind. 552; Redman *v.* Burgess, 20 Ind. App. 371.

Description of Property — *Generally.* — In some states, it is held that in proceedings by attachment the property attached must be described in the notice. Cackley *v.* Smith, 38 Kan. 450; Garrett *v.* Struble, 57 Kan. 508; Cohen *v.* Trowbridge, 6 Kan. 385. In other jurisdictions, however, it is held that no specific description of the property need be given. Warren *v.* Dick, 17 Neb. 241; Grebe *v.* Jones, 15 Neb. 312. And in *Ohio* it is held that no description of the property is required. Core *v.* Oil, etc., Co., 40 Ohio St. 636. In these jurisdictions, however, it is good practice to describe the property. Grebe *v.* Jones, 15 Neb. 312. And a description in general terms is sufficient. Grebe *v.* Jones, 15 Neb. 312.

Insufficient Description. — A notice of publication which described the land attached, and for the sale of which judgment was prayed, as "the northeast quarter of section *9*, town *5*, range *18*," was held defective in that it was not stated in what county the land lay, nor whether it was range 18 east or west of the sixth principal meridian, either of which would be in Kansas. Cohen *v.* Trowbridge, 6 Kan. 385.

Personal Property. — Where personal property is attached, no description is necessary. Beckwith *v.* Douglas, 25 Kan. 229; Race *v.* Malony, 21 Kan. 31. It is sufficient if the notice informs the defendant that a personal judgment for the amount claimed will be rendered against him, and that the property attached will be sold to satisfy such judgment. Race *v.* Malony, 21 Kan. 31.

That an order will be entered for the sale of the attached property should properly appear in the notice, but the omission of such a statement does not make it fatally defective. Rapp *v.* Kyle, 26 Kan. 89.

Precedent. — In Warren *v.* Dick, 17 Neb. 241, the following form of notice, which was held sufficient, is set out:

"In the *Cass* county district court of the *second* judicial district of *Nebraska*.

John Black, plaintiff,
vs.
James H. Dick and *Margaret A. Dick*, defendants.

To the defendants, *James H. Dick* and *Margaret A. Dick*, above named, non-resident defendants:

You and each of you will take notice that *John Black* of the county of *Cass*, and state of *Nebraska*, did, on the *3d* day of *August*, 1877, file his petition in the *Cass* county district court, within and for the county of *Cass*, in said state of *Nebraska*, against the said *James H.*

Form No. 16737.[1]

(Precedent in Long *v.* Fife, 45 Kan. 272.)[2]

[State of *Kansas*, County of *Wyandotte.* } In the *District* Court of the said county.
J. O. Fife, plaintiff, against *M. A. Hays*, defendant.][3]

M. A. Hays, defendant above named, will take notice that she has been sued in the *district* court of *Wyandotte* county, *Kansas*, by *J. O. Fife*, plaintiff above named, for the sum of $*100*, and interest thereon at the rate of 7 per cent. per annum from *April 1*, 1*885*, and that defendant must answer plaintiff's petition on or before the *25th* day of *October*, 1*886*, or said petition will be taken as true, and judgment rendered in favor of plaintiff against defendant for said sum and costs, and that lot *42*, in block *49*, and lot *6*, in block *79*, all in *Wyandotte*, now part of *Kansas City*, *Wyandotte* county, *Kansas*, the property of defendant, and heretofore by the sheriff of *Wyandotte* county attached, will be sold, and the proceeds thereof applied toward the payment of said judgment and costs.

J. O. Fife, Plaintiff.
By *Jas. F. Getty*, Att'y for Plaintiff.

3. In Proceedings for Divorce.[4]

Form No. 16738.[5]

(Precedent in Shedenhelm *v.* Shedenhelm, 21 Neb. 389.)[6]

In the *District* Court of *Saline* County, *Nebraska*.
Nettie B. Shedenhelm vs. *James W. Shedenhelm.* } Petition for Divorce and Alimony.

To *James W. Shedenhelm*: You will take notice that I have this day caused a petition to be filed in the above court[7] against you, praying

Dick and *Margaret A. Dick*, defendants, setting forth that the said *James H. Dick* did, on the *13th* day of *Nov.*, 1876, give to the said *John Black* his, the said *James H. Dick's* promissory note for the sum of *forty* dollars, with interest at *12* per cent. per annum, interest payable semi-annually, which time has long since passed, and yet he has not paid said sum, nor any part thereof, but the same remains due and wholly unpaid, and in order to collect the same said *John Black* has commenced a suit in attachment.

You are hereby notified to appear and answer said petition *September 17th*, 1877, according to law and the rules of said court, or judgment will be entered against you by default, and your property sold to satisfy the same."

See also Form No. 2862 for another form of notice.

1. *Kansas.* — Gen. Stat. (1897), c. 95, § 74.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 3, p. 59.

2. No objection was made to the form of this notice.

3. The matter enclosed by [ ] will not be found in the reported case.

4. **Ground upon which divorce is sought** should be set out in the notice. Shedenhelm *v.* Shedenhelm, 21 Neb. 387.

5. *Nebraska.* — Comp. Stat. (1899), § 5671.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2, p. 53.

6. No objection was made to the form of the notice in this case.

7. **Court wherein petition was filed** must be mentioned in the notice. Neb. Comp. Stat. (1899), § 5671.

a divorce from you, with reasonable alimony, on the ground that you have cruelly neglected and refused to furnish me with reasonable support, you being of sufficient ability so to do.[1]

That unless you answer said petition on or before *Monday, October 18th* (*eighteenth*), 1886,[2] you will be in default, and said petition will be taken as confessed, and judgment entered accordingly.

Crete, *September 6th*, 1886.

Nettie B. Shedenhm.

Abbott & Abbott, Att'ys for Plaintiff.

4. In Proceedings for Foreclosure of Mortgage.[3]

Form No. 16739.[4]

In the *District* Court within and for the County of *Wyandotte*, in the State of *Kansas*.

John Doe, plaintiff,
against
Richard Roe, defendant.

Richard Roe,[5] defendant above named, will take notice that the said *John Doe*, plaintiff, did, on the *tenth* day of *June*, 1899, file his petition in said *District* Court,[6] within and for the county of *Wyandotte*, in the state of *Kansas*, against the said defendant, and

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2, p. 53.

1. **Summary statement of the object and prayer of petition** must be contained in the notice. Neb. Comp. Stat. (1899), § 5671.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2, p. 53.

2. **Time of Appearance.** — Notice must notify person or persons to be served when they are required to answer. Neb. Comp. Stat. (1899), § 5671.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2, p. 53.

3. **Precedents.** — In Winemiller *v.* Laughlin, 51 Ohio St. 421, the following form of notice is set out:

"*Henry L. Custer, J. M. Custer* and *Mary B. Laughlin*, whose place of residence are to the undersigned unknown, will take notice that *Clara A. Hoover*, on the *20th* day of *May*, A. D. 1886, filed her petition in the court *of common pleas* of the county of *Paulding* and the state of *Ohio*, alleging, among other things, that *J. W. Vogelsong* executed and delivered to her his certain promissory note calling for $1,000.00, and to secure the payment thereof he had executed and delivered to *Clara A. Hoover* a mortgage upon certain real estate therein described, and that said claim is unpaid, and praying for a judgment and foreclosure of said mortgage, and alleging that the aforesaid *Henry L. Custer, J. M. Custer* and *Mary B. Laughlin* claim a lien upon the premises in said mortgage described.

Said cause will be for hearing on the *3d* of *January*, A. D. 1887, and unless the above named, and each of them, come into court and set forth their said respective claims they will be barred therefrom."

The sufficiency of the above notice was not considered by the court.

See also Form No. 13978 for another form of notice.

4. *Kansas.* — Gen. Stat. (1897), c. 95, § 74.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2, p. 53.

5. **Name of party** shall be stated in the notice. Kan. Gen. Stat. (1897), c. 95, § 74.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2, p. 53.

6. **Court in which petition is filed** shall be stated in the notice. Kan. Gen. Stat. (1897), c. 95, § 74.

that the said defendant must answer said petition, filed as aforesaid, on or before the *third Monday* of *September*, 1899,[1] or said petition will be taken as true and a judgment rendered in said action against said defendant for the sum of *six hundred* dollars, with interest thereon at the rate of *six* per cent. per annum from the *tenth* day of *May*, 1897; and for the further sum of *one hundred* dollars for exchange and for costs of suit; and a further judgment against said defendant for the foreclosure of a certain mortgage upon the following described real estate, to wit: (*Here describe real estate*), lying and situated in the county of *Wyandotte*, in the state of *Kansas*, and adjudging that the said plaintiff has the first lien on said premises, to the amount for which judgment will be taken as aforesaid, and ordering said premises to be sold without appraisement, and the proceeds applied to the payment of the amount due plaintiff and costs of suit, and forever barring and foreclosing said defendant of and from all right, title, estate, interest, property and equity of redemption in or to said premises, or any part thereof.

Jeremiah Mason, Attorney for Plaintiff.

Attest: *Calvin Clark*, Clerk.

IV. PROOF OF PUBLICATION.

1. Affidavit.

a. Of Mailing.[2]

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2, p. 53.

1. **Time of Appearance.** — Notice must notify defendant that he has been sued and must answer the petition filed by the plaintiff on or before a time to be stated (which shall not be less than forty-one days from the date of the first publication), or the petition will be taken as true and judgment, the nature of which shall be stated, will be rendered accordingly. Kan. Gen. Stat. (1897), c. 95, § 74.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2, p. 53.

2. **Affidavit of Mailing.**—In some jurisdictions, proof of mailing must be made by affidavit. Cullum *v.* Branch Bank, 23 Ala. 797; Hahn *v.* Kelly, 34 Cal. 391; Seaver *v.* Fitzgerald, 23 Cal. 85; Roberts *v.* Roberts, 3 Colo. App. 6; Strode *v.* Strode, (Idaho, 1898) 52 Pac. Rep. 161; Haase *v.* Corbin, 2 Mont. 409; Scorpion Silver Min. Co. *v.* Marsano, 10 Nev. 370.

Requisites of Affidavit, Generally.— For the formal parts of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

Every requirement of statute must be complied with. Strode *v.* Strode, (Idaho, 1898) 51 Pac. Rep. 161.

For statutory requisites as to mailing notices see list of statutes cited *supra*, note 1, p. 2.

Time of mailing must be shown by the affidavit. Briggs *v.* Finn, 10 Iowa 590.

Usual Residence of Defendant. — Affidavit must show that the post-office to which notice was mailed was the usual residence of the defendant. Pinkney *v.* Pinkney, 4 Greene (Iowa) 321; Foley *v.* Connelly, 9 Iowa 240. And it is not sufficient to show that the notice was sent to a particular post-office. Foley *v.* Connelly, 9 Iowa 240.

In Foley *v.* Connelly, 9 Iowa 240, an affidavit of publication to the effect that a sealed envelope, containing true copies of the petition and notice, was deposited in the post-office at Dubuque, directed to James Connelly, Sacramento City, California, was held insufficient. The court said: "The affidavit should have stated that copies of the petition and notice were directed to [defendant] 'at his usual place of residence.' It is not sufficient to prove that they were sent to a particular post-office without

Form No. 16740.[1]

(*Commencing as in Form No. 814*) that on the *fifteenth* day of *June*, 1898, he deposited in the post-office of the city of *San Francisco* a copy of the summons issued in the above action, and a copy of the complaint filed therein, addressed to the defendant, *Benjamin F. Coons*, at *St. Louis*, *Missouri*, his place of residence, the postage thereof being prepaid.

(*Signature and jurat as in Form No. 814.*)

Form No. 16741.[2]

(*Title of court and cause as in Form No. 16719.*)

New Jersey, ss.

Jeremiah Mason, being duly sworn, on his oath deposes and says that he is the solicitor for the above named complainant, and that he has in good faith made diligent and careful inquiry for the residence and post-office address of *Richard Roe*, the defendant above named; that deponent is credibly informed and verily believes that the aforesaid *Richard Roe* resides in the city of *Boston*, in the commonwealth of *Massachusetts*; that his post-office address is No. *10 State* street, *Boston*, *Massachusetts*; that on the *tenth* day of *June*, 1900, deponent deposited in the post-office at the city of *Trenton*, in the state of *New Jersey*, a letter, with the postage prepaid, and

showing that this post-office was at such place of residence of [defendant]."

That notice was mailed in sufficient time before appearance term must be shown by the affidavit. Pinkney *v.* Pinkney, 4 Greene (Iowa) 324.

That letter was deposited by a white male citizen, or that affiant is such citizen, need not be stated. It is sufficient if the deposit and the affidavit were made by a human being. Sharp *v.* Daugney, 33 Cal. 505.

That post-office was a United States post-office need not be stated. Sharp *v.* Daugney, 33 Cal. 505.

Office of Deposit. — An affidavit as to mailing of summons and complaint, which showed that affiant deposited a copy thereof, "duly directed to *James Stuart* and *Ann Stuart*, his wife, at *Belleville*, *N. J.*, and paid full postage thereon, there being a regular mail communication between the city of *New York* and *Belleville*, *N. J.*," is sufficient. The use of the terms "full postage" and "regular mail," together with the designation of the places between which communication by mail was designed to be made, can leave no reasonable doubt that the deposit was made in the post-office at New York city. Steinle *v.* Bell, (C. Pl. Spec. T.) 12 Abb. Pr. N. S. (N. Y.) 171.

That there was communication by mail between the place of deposit and the place to which the notice was addressed need not be stated. Sharp *v.* Daugney, 33 Cal. 505.

Precedent.—In Trimble *v.* Longworth, 13 Ohio St. 431, is set out the following affidavit of mailing:

"State of *Ohio*, *Hamilton* County, ss.

Adam N. Riddle, being duly sworn, deposeth and saith that the "*Cincinnati Gazette*," the same paper in which the above notice was inserted, was by said deponent transmitted by mail to *Nathaniel P. Hill*, and others, defendants in said case, to *Montgomery*, *Orange* county, *New York*, on the *11th July*, A. D. 1835; further, deponent saith not.

A. N. Riddle.

Sworn to and subscribed before me this *7th* day of *October*, 1835.

John Burgoyne, A. J."

This affidavit was held "clearly insufficient as to all of [defendants] except Nathaniel P. Hill."

1. *California.* — Code Civ. Proc. (1897), § 415.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2, p. 62.

2. *New Jersey.* — Gen. Stat. (1895), p. 405, § 172.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 2, p. 62.

directed to the said *Richard Roe* at No. *10 State* street, *Boston, Massachusetts*, containing a copy of the notice annexed to this affidavit.

(*Signature and jurat as in Form No. 16697.*)

(*Attach copy of notice.*)

b. Of Publication in Newspaper.[1]

1. Necessity for Affidavit. — Proof of publication must be made by affidavit. Tunno *v.* Robert, 16 Fla. 738.

Requisites of Affidavit, Generally. — For the formal parts of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

All recitals required by law must be contained in the affidavit. Lawrence *v.* State, 30 Ark. 719.

By Whom Made — *Generally.* — In some jurisdictions, the affidavit may be made by anyone having personal knowledge of the fact of the publication. Farrell *v.* Leighton, 49 Iowa 174; Johnson *v.* Colby, 52 Neb. 327; Taylor *v.* Coots, 32 Neb. 30; Wescott *v.* Archer, 12 Neb. 345; Miller *v.* Lefever, 10 Neb. 77.

Printer, Foreman or Clerk. — Affidavit must be made by the printer, his foreman or principal clerk. Hahn *v.* Kelly, 34 Cal. 391; Steinbach *v.* Leese, 27 Cal. 295; Seaver *v.* Fitzgerald, 23 Cal. 85; Gray *v.* Palmer, 9 Cal. 616; Kay *v.* Watson, 17 Ohio 27; Schlee *v.* Darrow, 65 Mich. 362; Ullman *v.* Lion, 8 Minn. 381; Odell *v.* Campbell, 9 Oregon 298; Hill *v.* Hoover, 5 Wis 354; Pennoyer *v.* Neff, 95 U. S. 714.

Publisher or proprietor may make affidavit. Woodward *v.* Brown, 119 Cal. 283; People *v.* Thomas, 101 Cal. 571; Quivey *v.* Porter, 37 Cal. 458; Sharp *v.* Daugney, 33 Cal. 505; Menard *v.* Crowe, 20 Minn. 448; Bunce *v.* Reed, 16 Barb. (N. Y.) 347; Palmer *v.* McCormick, 28 Fed. Rep. 541. The word "proprietor" being synonymous in the sense of the statute with "printer." Woodward *v.* Brown, 119 Cal. 283; Quivey *v.* Porter, 37 Cal. 458; Palmer *v.* McCormick, 28 Fed. Rep. 541.

Editor. — Where the affidavit is made by the editor instead of the printer or publisher, as required by the statute, it is not sufficient. Saffold *v.* Saffold, 14 Ark. 408; Sprague *v.* Sprague, 7 J. J. Marsh. (Ky.) 331; Butler *v.* Cooper, 6 J. J. Marsh. (Ky.) 29. But in Pennoyer *v.* Neff, 95 U. S. 714, which was a case arising in Oregon, it was held, overruling the decision of the lower court (see 3 Sawy. (U. S.) 274), that the provision of the statute requiring proof to be made by the "affidavit of the printer, or his foreman, or principal clerk," was satisfied by an affidavit made by the editor of the paper, the term "printer" not being used to indicate the person who sets up the type, but rather as synonymous with "publisher."

"*Manager.*" — Where the affidavit is made by the "manager" of a newspaper, it is sufficient. Waters *v.* Waters, (Buffalo Super. Ct. Spec. T.) 7 Misc. (N. Y.) 519.

Corporation. — Where the publisher is a corporation, the proof may be made by an agent. Pentzel *v.* Squire, 161 Ill. 346; Maass *v.* Hess, 140 Ill. 576.

Character of Affiant — *Generally.* — It must be shown by the oath of the affiant that he holds a position entitling him to make the affidavit. Baker *v.* York, 65 Ark. 142; Cross *v.* Wilson, 52 Ark. 312; Gibney *v.* Crawford, 51 Ark. 34; Pillow *v.* Sentelle, 39 Ark. 61; Lawrence *v.* State, 30 Ark. 719; Brodie *v.* Skelton, 11 Ark. 120; People *v.* Thomas, 101 Cal. 571; Steinbach *v.* Leese, 27 Cal. 295; Freeman *v.* Brown, 7 T. B. Mon. (Ky.) 263; Wilkinson *v.* Perrin, 7 T. B. Mon. (Ky.) 214; Evans *v.* Benton, 3 T. B. Mon. (Ky.) 389; Nicholas *v.* Gratz, 2 J. J. Marsh. (Ky.) 486; Odell *v.* Campbell, 9 Oregon 298; Hill *v.* Hoover, 5 Wis. 354; Cissell *v.* Pulaski County, 3 McCrary (U. S.) 446.

The mere recital of his position or connection with the paper is not sufficient. Baker *v.* York, 65 Ark. 142; Hill *v.* Hoover, 5 Wis. 354.

Where the affidavit commences "*H. F. W. Hoffman*, principal clerk in the office," etc., it is insufficient. The affiant simply names himself as principal clerk, but does not swear to his position. Steinbach *v.* Leese, 27 Cal. 295. Where affiant describes himself as "bookkeeper of the *Lansing State Republican*," it does not comply with the statute. Schlee *v.* Darrow, 65 Mich. 362. Where the affidavit states that it was made by "*H. Egabroad*, a printer in the office of the ——, a paper," etc., it is not sufficient. Gillett *v.* Needham, 37 Mich. 143. An affidavit

commencing "*C. B. Crandall*, editor of the *Oregon Statesman*," is insufficient, as affiant does not swear to the position he occupies. Odell *v.* Campbell, 9 Oregon 298. An affidavit stating that A. B., foreman, etc., being duly sworn, deposes and says, is insufficient, as affiant does not swear that he is foreman. Hill *v.* Hoover, 5 Wis. 354.

Where affiant says that he is employed in the office of the newspaper, and knows well the facts stated in the affidavit, it is sufficient. It is not required that he describe himself as clerk, where it appears that he is intrusted with the duty of making affidavits of publication. Pettiford *v* Zoellner, 45 Mich. 358. Where the affiant describes himself as foreman of the paper, it complies sufficiently with the requirement of the statute that the affidavit must be made by the foreman of the printer of the newspaper. Dexter *v.* Cranston, 41 Mich. 448.

Principal Clerk. — Where the affidavit is shown to be made by a clerk in the office of the paper, it is sufficient. Affiant need not describe himself as principal clerk. Gray *v.* Palmer, 9 Cal. 616.

Facts showing publication must be stated. Hahn *v.* Kelly, 34 Cal. 391; Lewis *v.* Hancock, Sneed (Ky.) 151. And an affidavit that "legal publication" has been made is a mere conclusion and not sufficient. Lewis *v.* Hancock, Sneed (Ky.) 151.

Paper in which publication was made must be stated. Hahn *v.* Kelly, 34 Cal. 391; Gillett *v.* Needham, 37 Mich. 143.

That newspaper was one authorized by statute to publish legal notices must be stated. Cross *v.* Wilson, 52 Ark. 312; Cissell *v.* Pulaski County, 3 McCrary (U. S.) 446.

That paper was a newspaper printed in the county, having a bona fide circulation therein, must be stated. Gallagher *v.* Johnson, 65 Ark. 90. But where affidavit shows that the paper was published and circulated in the county, it need not show that it was actually printed there. Dexter *v.* Cranston, 41 Mich. 448; Nebraska Land, etc., Co. *v.* McKinley-Lanning L. & T. Co., 52 Neb. 410. The word "printed" being used in the statute in the sense of "published." Nebraska Land, etc., Co. *v.* McKinley-Lanning L. & T. Co., 52 Neb. 410. That affidavit was published in a paper "published and circulated in the county" complies sufficiently with the requirement of the statute that the notice must be published in a newspaper printed in the county, where the order for publication named the paper and described it as printed in the county. Dexter *v.* Cranston, 41 Mich. 448.

Time of publication must be stated. Pillow *v.* Sentelle, 39 Ark. 61; Lawrence *v.* State, 30 Ark. 719; Hahn *v.* Kelly, 34 Cal. 391; Godfrey *v.* Valentine, 39 Minn. 336; Golcher *v.* Brisbin, 20 Minn. 453; Ullman *v.* Lion, 8 Minn. 381. And the length of time of publication must be stated. Gallagher *v.* Johnson, 65 Ark. 90; Brodie *v.* Skelton, 11 Ark. 120. But the day of publication in each week need not be specified. Wilkinson *v.* Conaty, 65 Mich. 614. And it is unnecessary to show publication on the same day in the week. Publication is sufficient if made on any day in each week during which it is required. Bachelor *v.* Bachelor, 1 Mass. 256; Raunn *v.* Leach, 53 Minn. 84; Wood *v.* Knapp, 100 N. Y. 109; Steinle *v.* Bell, (C. Pl. Spec. T.) 12 Abb. Pr. N. S. (N. Y.) 171; Ronkendorff *v.* Taylor, 4 Pet. (U. S.) 349. But see *contra* Matter of King, 5 Ben. (U. S.) 453.

Where the affidavit states that the notice was published "*fourteen* consecutive times, to wit, from the *18th* day of *October*, 1889, to and until the *2nd* day of *November*, 1889, both days inclusive, and on the *18*, *19*, *21*, *22*, *23*, *24*, *25*, *26*, *28*, *29*, *30*, *31st October* and *1st* and *2nd* day of *November*, 1889, every day said newspaper was published during said time, Sundays and holidays excepted," it is sufficient. Matter of Hamilton, 120 Cal. 421.

Where the affidavit states that the "Madera Tribune" is a daily and weekly newspaper, "and that the summons, of which the annexed is a true and correct printed copy, has been published weekly in the said newspaper, commencing on the *seventeenth* day of *May*, A. D. 1894, and ending on the *twenty-sixth* day of *July*, A. D. 1894, inclusive, in each and every one of the consecutive weekly issues of said newspaper issued during said period of time, being the regular weekly issues thereof," it is sufficient. Woodward *v.* Brown, 119 Cal. 283.

"*Once* a week for *three* weeks, namely, from *April 26* to *May 30*, 1861," is sufficient, showing a publication for

three successive weeks. Abrahams *v.* Howard, 23 Cal. 388. That "the notice was duly published in said paper for *three* weeks consecutively, the first of which was on the *11th September*, 1890, and the last on the *25th* day of *September*, 1890," is sufficient, the construction being that the first and third publications were on the first and last days mentioned, and the second on an intervening day. Curry *v.* State, 131 Ind. 439. An affidavit showing that the notice has been published "*once* in each week for *six* successive weeks, commencing *August 31* and ending *October 5*," shows sufficient publication. Horton *v.* Monroe, 98 Mich. 195. That notice has been published "*once* in each week for *four* successive weeks," giving the date of publication, is sufficient. It is not necessary to state the day of publication in each week. Wilkinson *v.* Conaty, 65 Mich. 614. That paper was printed and published weekly and every week, and that publication was for thirteen successive weeks from a given date, is sufficient to show a publication once in each week. Snyder *v.* Hemmingway, 47 Mich. 549. "*Once* in each week for *seven* successive times" is not sufficient, where the statute requires publication once in each week for six successive weeks. Perrien *v.* Fetters, 35 Mich. 233.

Where the affidavit stated that the summons had been published "*seven* weeks *once* a week," and gave the date of the first and last publications, from which it appeared that six weeks was intended, it was nevertheless sufficient. Lane *v.* Innes, 43 Minn. 137.

Where the affidavit stated that "the order of publication has been published in the county for *four* weeks successively, *once* every week, commencing on the *fourth* day of *April last*, and ending on the *fifth* day of *May*, in the '*Woodville Republican*,'" it was held that the affidavit was sufficient, that the statement that the publication had been made for *four* weeks successively was a compliance with the statute, and that the subsequent part of the affidavit giving the dates was mere surplusage and did not vitiate the affidavit. Swayze *v.* Doe, 13 Smed. & M. (Miss.) 317.

Where a copy of the advertisement accompanied by the affidavit of the publisher that the notice "was published on the *13th* of *November*, 1830, and continued in each publication of said paper from that time to the *19th* of *March*," it was held to be sufficient. Key *v.* Watson, 17 Ohio 27.

Where the statute provides for publication for four successive weeks, it is not satisfied by proof of publication for four weeks. Pond *v.* Treathart, 43 Kan. 41.

An affidavit that notice "was published in the said paper for *three* consecutive weeks, the first publication being made on the *thirteenth* day of *April*, 1877, and the last publication being made on the *twentieth* day of *April*, 1877," is defective, because it shows that the notice was not published for the period of three weeks. Pierce *v.* Butters, 21 Kan. 124.

An affidavit that publication has been made for '*six* successive weeks" does not show the publication to haye been made once in each week for that period as required by the statute. Godfrey *v.* Valentine, 39 Minn. 336. That publication was for "*six* weeks successively, commencing," etc., does not sufficiently comply with the requirements of the statute that publication be made "not less than *once* a week for *six* weeks." Frisk *v.* Reigelman, 75 Wis. 499. That publication was made for a period of seven successive weeks is not sufficient, where the statute requires that notice be published once in each week for six consecutive weeks. Bigelow *v.* Chatterton, 51 Fed. Rep. 614.

Time of first publication should be stated in the affidavit. Gray *v.* Worst, 129 Mo. 122.

Date of paper in which notice was published must be stated. Brodie *v.* Skelton, 11 Ark. 120.

Annexation to Copy of Notice. — An affidavit which stated that "the annexed notice has been duly published in said paper at least *once* in each week for *four* successive weeks, and that the first publication thereof was on the *tenth* day of *January*, A. D. 1879," was held a sufficient compliance with a statute providing for the annexation of the affidavit to a printed copy of the notice "taken from the paper in which it was published." "The statute does not require that the notice shall be cut from the paper. What it does require is identity of the notice annexed with that published." Wilkinson *v.* Conaty, 65 Mich. 614. But see Ullman *v.* Lion, 8 Minn. 381, holding that an affidavit which failed to state that the notice annexed to it was taken from the paper in which it was published was insufficient.

Form No. 16742.[1]

The State of *Alabama*, *Jefferson* County. } In *Chancery* at *Birmingham*, *Alabama*, *Fifth* District, *Northwestern* Chancery Division, *May* Term, 1899.

Personally appeared before me, *Calvin Clark*, register in chancery for the *fifth* district of the *northwestern* chancery division of said state, *John White*, who, being first duly sworn, states that the annexed publication has been regularly made *once* a week, for *four* consecutive weeks, in the "*Birmingham News*," a newspaper published in said county of *Jefferson*. *John White.*

Sworn to and subscribed before me this *tenth* day of *June*, 1899.
Calvin Clark, Register.

(*Attach copy of notice.*)

Form No. 16743.[2]

State of *Arkansas*, County of *Pulaski*. } ss. No. *200*.

I, *Richard Grant*, do solemnly swear that I am proprietor[3] of the "*Little Rock Blade*," a weekly newspaper printed in said county, and that I was such proprietor at the dates of publication hereinafter stated, and that said newspaper had a bona fide circulation in such county at said dates, and had been regularly published in said county for

Affidavit must be made before clerk of court and not before a deputy. Murdock *v.* Hillyer, 45 Mo. App. 287.

Precedents. — In Brown *v.* Phillips, 40 Mich. 264, this affidavit was held sufficient: (*Title and venue.*) "*Lee Gray Hull*, a printer in the office of the "*Constantine Weekly Mercury*," a public newspaper printed, published and circulated in the county of *St. Joseph* and State of *Michigan*, being duly sworn, says that the annexed notice, chancery order, has been published in said newspaper at least *once* in each week for *six* successive weeks; that the first publication of such notice in said newspaper was on the *12th* day of *December*, A. D. 1872, and the last publication of the same was on the *30th* day of *January*, A. D. 1873." (*Signature and jurat.*)

In Nebraska Land, etc., Co. *v.* McKinley-Lanning L. & T. Co., 52 Neb. 410, the following affidavit was held sufficient: "I, *S. S. Smith*, being duly sworn, on oath say that I am one of the publishers of the '*Nebraska Standard*,' a weekly newspaper of general circulation, published in *Kearney*, *Buffalo* county, *Nebraska*, and that the notice, a true copy of which is hereto annexed, was published *five* consecutive weeks in the regular and entire issue of every number of said newspaper for the time stated, the first publication being on the *19th* day of *January*, A. D. 1894."

In Waggoner *v.* Dubois, 19 Ohio 67, is set out the following affidavit of publication:

"State of *Ohio*, *Huron* county, ss.

On the *8th* day of *May*, A. D. 1832, personally came *Samuel Preston*, one of the editors of the '*Huron Reflector*,' a paper published in said county, who being duly sworn, deposeth and saith, that a notice, of which the annexed is a copy, was published in the '*Huron Reflector*' for *five* successive weeks, commencing on the *twenty-seventh* day of *March*, A. D. 1832. *Samuel Preston.*

Sworn to and subscribed in open court. *D. Gibbs*, Clerk.

Deponent's fees, 25 cents."

1. *Alabama.* — Ch. Ct. Rules, § 22.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

2. *Arkansas.* — Sand. & H. Dig. (1894), § 4685.

See also list of statutes cited *supra*, note 1, p. 2: and, generally, *supra*, note 1, p. 64.

3. **By Whom Made.** — Affidavit may be made by the editor, proprietor, manager or chief accountant. Sand. & H. Dig. Ark. (1894), § 4685.

See also list of statutes cited *supra*,

the period of *one* month next before the date of the first publication of the advertisement hereto annexed, and that the said advertisement was published in said newspaper *four* times, for *four* weeks consecutively,[1] the first insertion having been made on the *tenth* day of *May*, 1899,[2] and the last on the *thirty-first* day of *May*, 1899.

Richard Grant.

Sworn to and subscribed before me this *fourth* day of *June*, 1899.

(SEAL) *Calvin Clark*, Notary Pu.

(*Attach copy of notice.*)[3]

Form No. 16744.[4]

In the *Superior* Court of the County of *Madera*, State of *California*.

John Doe, plaintiff, against *Richard Roe*, defendant. } Affidavit of Publication of *Summons*.

State of *California*, } ss.
County of *Madera*. }

Richard White, of said county, being duly sworn, says that he is a citizen of the United States, over *twenty-one* years of age, and is not a party to this action; that he is the printer[5] of the "*Madera Tribune*,"[6] a newspaper printed and published *weekly* in the said county; that the summons, of which the annexed is a printed copy, was published in said newspaper on (*Here state dates when published*).[7]

Richard White.

Subscribed and sworn to before me this *tenth* day of *June*, 1899.

(SEAL) *Calvin Clark*, Notary Public.

(*Attach copy of notice.*)[8]

note 1, p. 2; and, generally, *supra*, note 1, p. 64.

1. Number of times notice was published must be stated. Sand. & H. Dig. Ark. (1894), § 4685.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

2. Date of papers in which notice was published must be stated. Sand. & H. Dig. Ark. (1894), § 4685.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

3. Copy of notice or advertisement shall be annexed to the affidavit. Sand. & H. Dig. Ark. (1894), § 4685.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

4. *California.* — Code Civ. Proc. (1897), §§ 415, 2010.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

5. By Whom Made. — Affidavit may be made by the printer of the newspaper, his foreman or principal clerk. Cal. Code Civ. Proc. (1897), §§ 416, 2010.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

6. Paper in which publication was made should be stated. Cal. Code Civ. Proc. (1897), §§ 416, 2010.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

7. Times when publication was made should be stated. Cal. Code Civ. Proc. (1897), §§ 416, 2010.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

8. Copy of summons should be annexed. Cal. Code Civ. Proc. (1897), §§ 416, 2010.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

Form No. 16745.[1]

State of *Kansas*, } ss.
Rawlins County. }

John Doe, being first duly sworn, says he is foreman[2] of "*The Times*," which is a weekly newspaper, printed and of general circulation in said county of *Rawlins*; that the annexed notice was published in said paper for *three* consecutive weeks, the first publication being on *Monday*, the *tenth* day of *May*, 1899, and the last publication on *Monday*, the *twenty-fourth* day of *May*, 1899; and that said newspaper has been continuously and uninterruptedly published in said county during the period of *fifty-two* consecutive weeks prior to the first publication of said notice.

John Doe.

Subscribed and sworn to before me this *second* day of *June*, 1899.

Calvin Clark, Clerk.

Form No. 16746.[3]

(Precedent in Feustmann *v.* Gott, 65 Mich. 596, note.)[4]

State of *Michigan*, } ss.
County of *Washtenaw*. }

H. E. H. Bower, one of the publishers[5] of the "*Ann Arbor Democrat*,"[6] a newspaper printed and circulating in the county of *Washtenaw*, being duly sworn, deposes and says that the annexed notice,[7] taken from papers in which it was printed and published, has been duly published in said paper at least *once* in each week for *three* successive weeks,[8] and that the first publication thereof was on the *twentieth* day of *March*, A. D. 1885, and the last publication thereof was on the ——— day of ———, A. D. 188–.

H. E. H. Bower.

Sworn to and subscribed before me this *tenth* day of *April*, A. D. 1885.

M. Seeley, Notary Public for said County.

1. *Kansas.* — Gen. Stat. (1897), c. 95, §§ 74, 75.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

2. **By Whom Made.** — Affidavit may be made by printer, his foreman or principal clerk, or other person knowing the facts. Kan. Gen. Stat. (1897), c. 95, § 75.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

3. *Michigan.* — Comp. Laws (1897), § 10162.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

4. The affidavit in this case was held sufficient.

5. **By Whom Made.** — Affidavit should be made by the printer or his foreman or principal clerk. Mich. Comp. Laws (1897), § 10162.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

6. **Paper in which notice was published** should be specified in the affidavit. Mich. Comp. Laws (1897), § 10162.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

7. **Copy of the notice,** taken from the paper in which it was published, should be annexed Mich. Comp. Laws (1897), § 10162.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

8. **Times when notice was published** should be specified in affidavit. Mich. Comp. Laws (1897), § 10162.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

Form No. 16747.[1]

State of *Minnesota*, } ss.
County of *Ramsey*. }

Came personally before me *Richard White*, and, being duly sworn, deposes and says that he now is, and during all the time hereinafter mentioned has been, the manager and printer[2] of the "*St. Paul Pioneer*," a weekly newspaper printed and published in *St. Paul*, in said county, on *Thursday* of each week. That he knows of his own knowledge that the printed notice of summons hereto attached, cut from the columns of such newspaper, was inserted, printed and published in said newspaper *once* in each week for *six* successive weeks, and that all of said publications were made in the English language. That said notice was first inserted, printed and published in said newspaper on *Thursday*, the *first* day of *June*, 1899, and was printed and published therein on each and every *Thursday* thereafter until and including *Thursday*, the *sixth* day of *July*, 1899; that during all the time aforesaid said newspaper was a collection of general and local news, comments and miscellaneous literary items, and regularly issued and published on *Thursday* of each week from a known office of publication, said office being equipped with the necessary materials and skilled workmen for producing the same, and has consisted of not less than *four* pages, of *five* columns or more to each page, each column not less than *seventeen and three-fourths* inches in length, and never made up wholly of patents, plates and advertisements, or either or any of them, and has not been substantially a duplicate of any other newspaper, and has been regularly delivered each week to more than *two hundred and forty* paid subscribers, and that said newspaper, composed and consisting as above set forth, was printed and published in the English language weekly, and generally circulated in *Ramsey* county for more than *one* year next preceding the date of the first publication of said notice; that the publisher of said newspaper, on the *twentieth* day of *January*, 1896, filed with the county auditor of said *Ramsey* county an affidavit setting forth the facts required by section 2 of chapter 33 of the laws of the state of Minnesota for the year 1893, and amendments thereto.

Richard White.

Subscribed and sworn to before me this *tenth* day of *July*, 1899.
(SEAL) *Calvin Clark*, Notary Public,
Ramsey County, *Minn.*

Form No. 16748.[3]

(Precedent in Iowa State Sav. Bank *v.* Jacobson, 8 S. Dak. 299.)[4]

1. *Minnesota.* — Stat. (1894), §§ 5205, 5208; Laws (1895), c. 121.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

2. **By Whom Made.** — Affidavit shall be made by printer or his foreman. Minn. Stat. (1894), § 5205.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

3. *South Dakota.* — Dak. Comp. Laws (1887), § 4903, provides that proof of the service of the summons in case of publication shall be by the affidavit of the printer or his foreman or principal clerk, showing the same.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

4. Objection was made to this affidavit because it did not show that the

[(*Venue and title of court and cause and venue as in Form No. 868.*)][1]
A. E. Dean, of said county and state, being first duly sworn, on his oath says that the "*Capital*" is a weekly newspaper of general circulation, printed and published in *Mitchell*, in said county and state, by the *Mitchell Printing Co.*, and has been such newspaper during the time hereinbefore mentioned; and that I, *A. E. Dean*, the undersigned, am business manager of said newspaper, in charge of the advertising department thereof, and have personal knowledge of all the facts stated in this affidavit, and that the advertisement headed "Summons," a printed copy of which is hereunto attached, was printed and published in the said newspaper for *seven* successive issues, to wit: the first publication being made on *December 25*, 1891, and the last publication on *February 5*, 1892.
[(*Signature and jurat as in Form No. 868.*)][1]

2. Certificate.

a. By Clerk.

(1) In General.

Form No. 16749.[2]

The State of *Alabama*, *Jefferson* County. } In *Chancery* at *Birmingham*, *Alabama*, *Fifteenth* District, *Northwestern* Chancery Division.

I, *Charles A. Senn*, register in chancery for the *fifteenth* district, *Northwestern* chancery division of said state, do hereby certify that the publication annexed to the affidavit of *John White* was duly made; that a copy of the same was posted up at the court-house door of *Jefferson* county, and that a copy thereof was sent by mail to the defendant, properly directed and mailed to him at the place of his residence, as shown by affidavit in the cause; and that said copies were posted up and sent by mail to him, as aforesaid, within *twenty* days from the making of said order.
Witness my hand this *tenth* day of *May*, 1899.
Charles A. Senn, Register.

Form No. 16750.[3]

State of *Florida*, *Leon* County. }
I, *Calvin Clark*, clerk of the *Circuit* Court in and for said county and state, certify that the foregoing order has been published *once* a week, for *four* consecutive weeks, in the "*Tallahassee News*," a weekly newspaper published in *Leon* county, *Florida*, and a copy thereof was

summons was published "*once* in each week for *six* successive weeks," as required by the statute and directed by the court. This objection was not sustained.

1. The matter to be supplied within [] will not be found in the reported case.

2. *Alabama*. — Ch. Ct. Rules, § 22. See also list of statutes cited *supra*, note 1, p. 2.

3. *Florida*. — Rev. Stat. (1892), § 1413. See also list of statutes cited *supra*, note 1, p. 2.

posted at the court-house in *Tallahassee*, it being the place where the court is held in said county, and a copy thereof mailed to *Richard Roe*, *Huntington*, *New York*, within *twenty* days after the making of said order.

In testimony whereof, I have hereunto set my hand, and seal of said court, this *twentieth* day of *May*, 1900.

(SEAL) *Calvin Clark*, Clerk *Circuit* Court.

(2) Of Mailing.[1]

Form No. 16751.[2]

State of *Illinois*, } ss.
Cook County. }

I, *Calvin Clark*, clerk of the *Superior* Court of *Cook* county, state of *Illinois*, do hereby certify that on the *twenty-fifth* day of *August*, A. D. 1899, I sent by mail the notice, a copy of which is hereto attached, marked "Exhibit *A*," to *Richard Roe*, the defendant in said notice named, by depositing the same in a sealed envelope, postage prepaid, in the post-office at *Chicago* in the state of *Illinois*, addressed as follows: "*Richard Roe*, *Detroit*, *Wayne* county, *Michigan*."

Calvin Clark, Clerk *Superior* Court.

b. By Sheriff.

(1) Of Mailing.

1. Certificate of Mailing. — In *Illinois*, proof of mailing is made by certificate of the clerk. Bickerdike *v.* Allen, 157 Ill. 95; Star Brewery *v.* Otto, 63 Ill. App. 40; Dennison *v.* Taylor, 142 Ill. 45.

Requisites of Certificate, Generally. — No special form of certificate is required. Smith *v.* Clinton Bridge Co., 13 Ill. App. 572.

Must be Signed by Clerk.—Star Brewery *v.* Otto, 63 Ill. App. 40.

Mistake as to Date. — Where a certificate of the publication of a notice stated that the first publication was on August 18th, 1888, and the certificate of the clerk stated that he mailed copies thereof on August 17th, 1888, and "within *ten* days after the first publication of the notice," it was held that the presumption was that the clerk performed his duty; that the statement that he mailed the notices prior to the time when they were printed should be rejected and the latter part of his statement would govern. The certificate was held sufficient. Michael *v.* Mace, 137 Ill. 485. And where the certificate of the clerk stated that he mailed a copy of the notice on July 19, 1884, and also that "within *ten* days of the first publication of the notice" he mailed the copy. The printer's certificate showed that the first publication was made on July 25, 1884. It was held that there was an evident mistake in writing July 19 instead of July 29 and that the service was good. Schaefer *v.* Kienzel, 123 Ill. 430.

Insufficient Certificate. — Where the certificate of the clerk stated, "I * * * do hereby certify that on the *21st* day of *August*, A. D. 188–, I sent by mail a notice, a copy of which is hereto attached, marked Exhibit *A*, to the following defendants, and addressed as follows: *one* copy to *A. T.* and *F. W. Dennison*, *Detroit*, *Wayne* county, *Michigan*," it was held to be fatally defective, in that it failed to show that notice had been sent to each of the defendants. Dennison *v.* Taylor, 142 Ill. 45.

2. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 22, par. 12, provides that a copy of the notice shall be sent by mail, addressed to defendant, where his place of residence is stated in the affidavit. The certificate of the clerk that he has sent such notice shall be evidence.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, this page.

Form No. 16752.[1]

(Precedent in Clemson Agricultural College *v.* Pickens, 42 S. Car. 515.)[2]

Clemson Agricultural College of South Carolina, plaintiff,
v.
Samuel M. Pickens, defendant.

State of *South Carolina*,
County of *Anderson*.

I hereby certify that on the *20th* day of *April*, A. D. *1893*, at *Anderson C. H., S. C.*, I deposited in the post-office, directed to *Samuel M. Pickens*, defendant above named, at *Elberton, Ga.*, a copy of the summons and complaint in this action, and prepaid the postage thereon in full.

M. B. Gaines, Sheriff of *Anderson* County.

Sworn to before me this *20th* day of *April*, *1893*.

Jno. C. Watkins, *C. C. P.* and *G. S.*

(2) Of Publication in Newspaper.

Form No. 16753.[3]

Sheriff's Return.

Came to hand on the *tenth* day of *May*, A. D. *1899*, at *ten* o'clock *A.* M., and I executed the within citation by publishing the same in the "*Fairfield Times*," a newspaper published in the county of *Freestone*, in the state of *Texas*, *once* in each week for *four* successive weeks previous to the return day hereof. Said publication was made respectively on the *ninth*, *sixteenth*, *twenty-third* and *thirtieth* days of *April*, A. D. *1899*,[4] and a printed copy thereof is returned herewith.[5]

Jason Dunslow, Constable,
Precinct No. *2*, *Freestone* County, *Texas*.[6]

c. By Publisher of Newspaper.[7]

1. *South Carolina.* — Code Civ. Proc. (1893), § 159.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 72.

2. No objection was made to the form of certificate in this case.

3. *Texas.* — Rev. Stat. (1895), art. 1238.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

Return shall be indorsed or attached to citation. Tex. Rev. Stat. (1895), art. 1238.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

Time and manner of execution of citation shall be shown in the return. Tex. Rev. Stat. (1895), art. 1238.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

4. **Dates of publication** shall be specified in the return. Tex. Rev. Stat. (1895), art. 1238.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

5. **Copy of publication shall accompany** return. Tex. Rev. Stat. (1895), art. 1238.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 1, p. 64.

6. **Return shall be signed** by officer officially. Tex. Rev. Stat. (1895), art. 1238.

7. **That certificate was made by publisher** or printer who conducts the paper must be shown. Haywood *v.* Collins, 60

Form No. 16754.[1]

I, *John Doe*, do hereby certify that I am president[2] of the *Law Journal Print*, a corporation existing under the laws of the state of *Illinois*, and authorized agent for said corporation for the purpose of

Ill. 328; Haywood *v.* McCrory, 33 Ill. 459; Riely *v.* Barton, 32 Ill. App. 524; Freeman *v.* Brown, 7 T. B. Mon. (Ky.) 263; Evans *v.* Benton, 3 T. B. Mon. (Ky.) 389; Sprague *v.* Sprague, 7 J. J. Marsh. (Ky.) 331; Jeffreys *v.* Callis, 4 Dana (Ky.) 466.

Authority of person making certificate must be shown. Brown *v.* Mahan, 4 J. J. Marsh. (Ky.) 59. And the simple signature "*J. J. Polk*" is not sufficient. Brown *v.* Mahan, 4 J. J. Marsh. (Ky.) 59.

That notice was published must be shown by the certificate. Hopkins *v.* Claybrook, 5 J. J. Marsh. (Ky.) 234.

Paper in which notice was published must be stated. Hopkins *v.* Claybrook, 5 J. J. Marsh. (Ky.) 234.

Time when notice was printed must be stated. Tevis *v.* Richardson, 7 T. B. Mon. (Ky.) 654; Miller *v.* Hall, 3 T. B. Mon. (Ky.) 242. And that order was inserted during time required by statute must be shown. Passmore *v.* Moore, 1 J. J. Marsh. (Ky.) 591.

Number of days notice was published should be stated in the certificate. Beygeh *v.* Chicago, 65 Ill. 189; Haywood *v.* McCrory, 33 Ill. 459. That notice has been published five times is not a sufficient compliance with the statute that the notice be published on five successive days. Toberg *v.* Chicago, 164 Ill. 572; Casey *v.* People, 165 Ill. 49.

Where a statute provides that "publication shall be continued *six* weeks," a certificate that notice was published "for *six* successive weeks, to wit, *six* times, in the '*Chicago Daily Law Bulletin*,' a public daily newspaper, * * * and that the date of the first paper containing the same was the *twenty-fourth* day of *April*, A. D. 1895, and that the date of the last paper containing same was the *twenty-ninth* day of *May*, A. D. 1895," etc., is sufficient, although notice so published ceased at the end of five weeks and one day. Illinois Watch Co. *v.* National Mfg., etc., Co., 63 Ill. App. 480.

Order of publication must be identified in the certificate of the printer. Young *v.* Pate, 3 Dana (Ky.) 306.

Date of last paper containing notice should be stated. Haywood *v.* McCrory, 33 Ill. 459.

Certificate must be signed by publisher or his agent. Kearney *v.* Chicago, 163 Ill. 293.

Precedents. — In Clark *v.* Chamberlin, 70 Ill. App. 262, this certificate was held sufficient: "*Review Printing and Publishing Company*, publishers of the '*Chicago Daily Law Bulletin*,' do hereby certify that a notice, of which the annexed printed slip is a true copy, was published for *three* successive weeks, to wit, *three* times, in the '*Chicago Daily Law Bulletin*,' a public daily newspaper published in the city of *Chicago*, county of *Cook* and state of *Illinois*, and of general circulation throughout said county and state, and that the date of the first paper containing the same was on the *6th* day of *February*, A. D. 1895, and that the date of the last paper containing same was the *20th* day of *February*, 1895, and that we have received $*11* for publishing the same.

Dated at *Chicago*, this *21st* day of *February*, 1895.

Review Printing and Publishing Company, Publishers.

(SEAL) By *G. D. Newell*, Secretary."

Where the certificate states "that a notice, of which the annexed notice is a true copy, has been published *five* successive days in the '*Chicago Mail*,' a daily newspaper published in the city of *Chicago*, in said county, and that the date of the first paper containing the said published notice was the *fifth* day of *February*, A. D. 1892, and that the date of the last paper containing the same was the *tenth* day of *February*, 1892," it is in compliance with the statute. McChesney *v.* People, 145 Ill. 614.

For other precedents see Bass *v.* People, 159 Ill. 207; McChesney *v.* People, 145 Ill. 614; Finlay *v.* Dickerson, 29 Ill. 9; Tibbs *v.* Allen, 27 Ill. 119; Pile *v.* McBratney, 15 Ill. 314.

1. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 100, par. 1.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 7, p. 73.

2. By Whom Made. — Certificate may be made by the publisher or by his

making this certificate; that the notice, a true copy of which is hereto annexed, was published in the "*Chicago Law Journal Weekly*," a secular newspaper of general circulation, published weekly in the city of *Chicago*, *Cook* county, and state of *Illinois*, by the *Law Journal Print* aforesaid, *three* times for *three* weeks successively;[1] that the date of the first publication was the *thirty-first* day of *January*, A. D. 18*96*, and of the last publication was the *fourteenth* day of *February*, A. D. 18*96*.[2]

In witness whereof, I have hereunto set my hand and affixed the seal of said corporation, this *fifteenth* day of *February*, A. D. 18*96*.

(SEAL) *John Doe.*

(*Attach copy of notice.*)[3]

authorized agent. Starr & C. Anno. Stat. Ill. (1896), c. 109, par. 1.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 7, p. 73.

1. Number of times notice was published should be stated in the certificate. Starr & C. Anno. Stat. Ill. (1896), c. 100, par. 1.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 7, p. 73.

2. Dates of first and last papers containing notice should be stated. Starr & C. Anno. Stat. Ill. (1896), c. 100, par. 1.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 7, p. 73.

3. Written or printed copy of notice should be annexed to the affidavit. Starr & C. Anno. Stat. Ill. (1896) c. 100, par. 1.

See also list of statutes cited *supra*, note 1, p. 2; and, generally, *supra*, note 7, p. 73.

PUBLIC LANDS.

By Harold N. Eldridge.

CROSS-REFERENCES.

For Forms relating to Recovery of Possession of Lands in General, see the title EJECTMENT, vol. 7, p. 279.

For Forms relating to Mining Lands, see the title MINES AND MINING, vol. 12, p. 319.

For Forms relating to Quieting Title to Lands in General, see the title QUIETING TITLE AND REMOVING CLOUD, post, p. 154.

See also the GENERAL INDEX to this work.

I. Civil Proceeding.

1. Notice that Application will be Made to Purchase Lands.[1]

Form No. 16755.[2]

(Precedent in Beedy *v.* State, 4 Kan. App. 577.)[3]

[(*Commencement as in Form No. 12529.*)][4]

The undersigned hereby gives notice that he will, on the *2d* day of *April*, 1894,[5] make an application to the *probate* court of *Rawlins* county, *Kansas*, to purchase[6] the following-described school-land[7]

1. **For the formal parts** of a notice in a particular jurisdiction see the title Notices, vol. 13, p. 212.

2. *Kansas.* — Gen. Stat. (1897), c. 65, § 4.

3. An objection to the notice in this case on the ground that the description of the land was defective, indefinite and uncertain, and capable of several meanings, was not sustained.

4. The matter to be supplied within [ ] will not be found in the reported case.

5. **Time when petition will be heard** by the probate court shall be set forth in the notice. Kan. Gen. Stat. (1897), c. 65, § 4.

6. **That petitioner will ask to be allowed to purchase land** must be stated in the notice. Kan. Gen. Stat. (1897), c. 65, § 4.

7. **Description of the land** shall be set

situated in the organized county of *Rawlins*, *Kansas*, viz., the S. E. quarter, S. W. quarter, N. W. quarter, N. E. quarter of the S. E. quarter of section *16*, township *5*, range *36*. He names the following persons to prove his settlement, continuous residence and improvements,[1] viz., *C. M. Hunter*, residence *Pentheka*, *Joe Conner*, residence *Pentheka*, *Kan.* Done at *Atwood*, county of *Rawlins*, *Kansas*, this *16th* day of *March*, 1894.

Daniel Beedy, Petitioner.

2. Complaint or Petition.[2]

a. For Permission to Purchase Lands.

Form No. 16756.[3]

(Precedent in Beedy *v.* State, 4 Kan. App. 576.)[4]

[(*Venue and title of court and cause, and address as in Form No. 9920.*) *Daniel Beedy*, the undersigned petitioner,][5] would respectfully represent to this honorable court that he is over the age of *21* years, the head of a family, and that he did on the *20th* of *August*, 1893, make actual settlement[6] upon and has improved the southeast quarter of section *16*, township *5*, south, range *36*, in the organized county of *Rawlins*, *Kansas*, and that he has resided thereon continuously and made it his only home since the *20th* day of *August*, 1893, being a period of *six* months immediately prior to the appraisement of said land; that said land was appraised on the *16th* day of *March*, 1894, at the sum of $*480*,[7] and that the improvements[8] on said land made by your petitioner consists of a permanent dwelling-house, and the following other improvements: *One* horse and cow stable, hen-house, hog-pen, feed-yards, well, pump and piping with barrels set in the ground, *1* grain granary connected to the house, *16*x*24*, and were appraised at the sum of $*242*;[9] that he has given *10* days' notice[10] through a news-

forth in the notice. Kan. Gen. Stat. (1897), c. 65, § 4.

1. Names and residences of two witnesses, by whom petitioner expects to prove settlement and improvements, must be set forth in the notice. Kan. Gen. Stat. (1897), c. 65, § 4.

2. For the formal parts of a complaint or petition in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; PETITIONS, vol. 13, p. 887.

3. *Kansas.* — Gen. Stat. (1897), c. 65, § 4.

4. The petition in this case was held by the court of appeals to be sufficient to constitute a cause of action.

5. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

6. Settlement on Land. — Petition must state that petitioner has settled upon land in question and resided thereon continuously for a period of not less than six months immediately prior to the appraisement. Kan. Gen. Stat. (1897), c. 65, § 4.

7. Appraisal of Land. — That land in question has been appraised, and the amount thereof, must be stated in the petition. Kan. Gen. Stat. (1897), c. 65, § 4.

8. Improvements. — Petitioner must show that he has permanently improved the land in question to the amount of one hundred dollars; that said improvements consist of a permanent dwelling and such other improvements as show an intention to make a permanent home thereon. Kan. Gen. Stat. (1897), c. 65, § 4.

9. Appraisal of Improvements. — That improvements have been appraised, and the amount thereof, must be stated in the petition. Kan. Gen. Stat. (1897), c. 65, § 4

10. Public Notice. — That ten days'

paper of general circulation of the hearing of this petition; that the names and residence of the witnesses by whom he expects to prove said settlement and improvement are as follows, viz.: *C. M. Hunter*, residence, *Pentheka*, *Kan.*; *J. Conner*, *Pentheka*, *Kan.*; that a copy of said notice is hereto appended; that he has not heretofore purchased school land[1] under the provisions of the act providing for the purchase of school-land, approved February 18, 1896, or under the provisions of the act of which said act is amendatory. Now, therefore, your petitioner would respectfully ask that he be permitted to purchase said land at the appraised value thereof, as provided by law. And your petitioner will ever pray.

Daniel Beedy.

State of *Kansas*, } ss.
County of *Rawlins*. }

I, *Daniel Beedy*, being duly sworn, depose and say,[2] that I have read the foregoing petition and know the contents thereof, and that each and all of the statements contained therein are correct and true. So help me God.

Daniel Beedy.

Subscribed and sworn to in my presence and before me, this *16th* day of *March*, 1894.

(SEAL) *G. Leeper*, *Probate* Judge.

b. To Confirm Title to Lands Granted.[3]

public notice has been given through a newspaper of general circulation in the county wherein the land is situated must be stated in the petition. Kan. Gen. Stat. (1897), c. 65, § 4.

1. No School Land Heretofore Taken. — That petitioner has not heretofore taken school land to the amount of one quarter-section under the provisions of the different Kansas acts relating to school lands must be stated in the petition. Kan. Gen. Stat. (1897), c. 65, § 4.

2. Verification. — Petition should be verified. Kan. Gen. Stat. (1897), c. 65, § 4.

For a form of verification in a particular jurisdiction see the title VERIFICATIONS.

3. Precedents. — In Chouteau *v.* U. S., 9 Pet. (U. S.) 137, the following petition is set out:

"To the honorable the *District* Court of the United States for the district of *Missouri*:

The petition of *Auguste A. Chouteau*, *Gabriel Cerè Chouteau*, *Henry Chouteau*, *Edward Chouteau*, *Eulalie Paul* and *René Paul*, husband of said *Eulalie*, *Louise Paul* and *Gabriel Paul*, husband of said *Louise*, *Emilie Smith* and *Thomas F. Smith*, husband of said *Emilie*, respectfully showeth, that in the year *1799*, *Auguste A. Chouteau*, deceased, late of *St. Louis*, the father of your petitioners, applied to and obtained permission from the government then existing in *Upper Louisiana*, to establish a distillery in or near the town of *St. Louis*, as will more fully appear by the petition and order thereon, dated the *5th* of *November*, *1799*, and *3d* of *January*, 1800, which are herewith shown to the court and prayed to be taken as part of this petition, marked No. *1*; that on the *5th* day of *January*, 1800, said *Auguste Chouteau* presented his petition of that date to the lieutenant-governor of the province of *Upper Louisiana*, praying that a tract of land containing *twelve hundred and eighty-one* arpents, superficial measure of *Paris*, situated near the town of *St. Louis*, bounded on the north by a tract granted to Doctor *John Watkins*, on the south and on the west by the lands of the third line of concessions, should be granted to the said *Auguste Chouteau* and his heirs, for the purpose of enabling the said *Auguste Chouteau* to obtain a sufficient supply of fire-wood for the distillery aforesaid; that on the same day, to wit, the *5th* of *January*, 1800, the said lieutenant-governor made his decree conformably to the prayer of

said petition, whereby said lieutenant-governor directed and ordered that the surveyor of the said province, *Don Antonio Soulard*, should put the said *Auguste Chouteau* in possession of the said tract of *twelve hundred and eighty-one* arpents, in the place indicated and demanded, to the end that said *Auguste Chouteau* might afterwards obtain the complete title thereto from the governor-general, all which will appear by said petition and decree, now here produced, marked No. *2*, and which petition and decree is prayed to be taken as part of this petition; that afterwards, in obedience to said decree, to wit, on the *5th* day of *March*, 1801, the said surveyor, *Don Antonio Soulard*, delivered the possession of said tract to said *Auguste*, and executed a survey and plat of survey thereof, as will more fully appear by the said plat and certificate of survey, bearing date the *10th* of *April*, 1801, now here produced, marked No. *3*, and which said plat and certificate were recorded in book *A*, p. *43*, No. *82*, in the office of said surveyor, as by reference to the said certificate and to said record in the office of the surveyor of this district will appear; that said decrees so made by said lieutenant-governor, were made in pursuance of the special instruction given by the governor-general of *Louisiana*, *Don Manuel Gayoso De Lemos*, to said lieutenant-governor, to favor and forward the aforesaid undertakings of said *Auguste Chouteau*, as will appear by the letter of said governor-general, addressed to said *Auguste Chouteau*, under date the *20th* of *May*, *1799*, in answer to an application made by said *Auguste Chouteau* to said governor-general, as will appear by reference to said original letter herewith exhibited, marked No. *4*, and prayed to be taken as part of this petition; that, by virtue of said decrees, survey, and delivery of possession, said *Auguste* occupied and enjoyed said tract, so granted, as the lawful proprietor thereof, from the date of said delivery of possession until the decease of said *Auguste Chouteau*; that said *Auguste*, during his life, did, in conformity to the acts of Congress in that case made and provided, submit his claim to said tract, derived as aforesaid, to the board of commissioners heretofore created for the settlement and adjudication of *French* and *Spanish* land claims in *Upper Louisiana*; that said board rejected said claim on the sole ground that a tract of a league square having been already confirmed to said *Auguste Chouteau*, the board had not power under the law, as it then stood, to confirm to said *Chouteau* any greater quantity; and your petitioners show that said board, for the purpose, as it is supposed, of testifying their sense of the merits of said claim, did cause to be endorsed on the back of a document therein exhibited to them, the words 'bona fide,' as will appear, reference being had to said document No. *2*, herein before mentioned; your petitioners further show, that said *Auguste Chouteau* has departed this life, and that previous to his death, he made his last will and testament, in due form of law, whereby he devised to your petitioners the said tract of *twelve hundred and eighty-one* arpents, besides other property, to your petitioners and their heirs, as tenants in common. Wherefore your petitioners pray that said title may be inquired into, and that the same be confirmed, as the same would have been confirmed had not the sovereignty of said province been transferred to the United States."

There was a decree declaring the claim of petitioners to the tract of land in question to be valid and confirming their title to the same.

In U. S. *v.* Clarke, 8 Pet. (U. S.) 436, the following petition is set out:

"To the honorable the judge of the *superior* court for the district and territory aforesaid, in chancery sitting:

The petition of *George J. F. Clarke*, a native and inhabitant of the aforesaid territory, respectfully showeth—

That, upon the *6th* day of *April*, in the year of our Lord 1816, *Don Jose Coppinger*, then acting governor of the province of *East Florida* (by virtue of authority derived from the *Spanish* government), actually made to your petitioner, an absolute title in fee, of *five* miles square of land, which your petitioner avers, amounts to the number of *sixteen thousand* acres, on the west side of *St. John's* river, near and at *Black creek*, and at a place called *White Spring*, for and in consideration of your petitioner having actually (being the day of the date of said grant) constructed a saw mill, to be impelled by animal power, which sufficiently appeared by proof to the said governor, as is fully evidenced by the tenor of the grant aforesaid, and as a reward for the in-

dustry and ingenuity of your petitioner in the constructing of the aforesaid saw mill, and for other causes and considerations in said grant set forth, all of which will more fully appear by reference to said grant, a certified translation whereof will in due time be filed herewith, and exhibited to this honorable court, and prayed to be made a part hereof.

Your petitioner further showeth, that, finding there was not vacant land at the place aforesaid suiting his wishes, sufficient to make the amount or number of acres aforesaid granted to him, he did, on the *25th* day of *January*, 18*19*, file a memorial before the aforesaid governor *Coppinger*, praying to be allowed to survey eight thousand acres of said grant on other vacant lands; and that, by a decree or grant of the aforesaid governor *Don Jose Coppinger*, bearing date on the *25th* day of *January*, 18*19*, the prayer of your petitioner was accorded to him, as will fully and at large appear, by reference to a translation of a document herewith filed.

Your petitioner further states that, in pursuance of, and in accordance with the grant first before referred to, and the subsequent grant amendatory thereto, the said lands were surveyed to him in *three* surveys. *One* of *eight thousand* acres, at a place in the original grant named, on the west shore of *St. John's* river, beginning at a stake at *Picolata* ferry landing, and running south *eighty-two* degrees west *one hundred and ten* chains, to a pine; *second* line, north *fifteen* degrees west *one hundred and twenty-three* chains, to a pine; *third* line, north *five* degrees east *one hundred and twenty-three* chains, to a pine; *fourth* line, north *thirty-five* degrees west *one hundred and seventy-five* chains, to a pine; *fifth* line, north *eighty-two* degrees west *one hundred and fifty-four* chains, to a pine; *sixth* line, north *sixty* degrees west *one hundred and seventy-four* chains, to a pine; *seventh* line, north *twenty-five* degrees east *one hundred and twelve* chains, to a stake on the south side of *Buckley* creek at the mouth, and thence with the meanders of *St. John's* river to the beginning. One other survey of *three thousand* acres, situated in and about *Cone's hammock*, to the south of *Mizzell's* or *Orange* lake, beginning at a stake, and running thence, south *seventy* degrees east *one hundred and sixty-three* chains *ninety-two* links, to a pine; *second* line, south *twenty* degrees west *one hundred and twenty-two* chains *fifty* links, to a hickory; *third* line, north *seventy* degrees west *one hundred and twenty-two* chains *fifty* links, to a red bay; *fourth* line, north *fifty-eight* degrees west *one hundred and forty-four* chains, to a pine; *fifth* line, north *twenty* degrees, east *ninety* chains *seventy-one* links, to the beginning. And one other survey of *five thousand* acres, situated in *Lang's hammock*, on the south side of *Mizzell's* or *Orange* lake. Plats and certificates of all which surveys will in due time be filed and exhibited herein: the lands herein designated, all being and lying within the jurisdiction of this court.

Your petitioner further states, that his aforesaid claim was filed before the board of commissioners appointed to ascertain claims and titles to lands in *East Florida*, who, as he is informed and believes, have refused to recommend the same to the favorable notice of the *United States* government; and have rejected the same, but have not reported it forged or antedated. But your petitioner is advised and believes, and alleges and avers, that, by and under the usages, customs, laws and ordinances of the king of *Spain*, he is entitled to, and invested with a complete and full title in fee simple, to the lands so as aforesaid granted to him; and that, by the treaty between *Spain* and the *United States*, of the *22d February*, 18*19*, the *United States* are bound to recognize and confirm to him his aforesaid title, in as full and ample a manner as he had or held the same under the *Spanish* government. Without this, as far as your petitioner is advised, the *United States* are the rightful claimants to said lands.

And your petitioner prays, in consideration of the premises, this honorable court will take jurisdiction of this his petition, and that a copy hereof, and a citation to show cause, etc., may be served on *Thomas Douglas*, Esquire, *United States* district attorney for this district, pursuant to the provisions of the statute in such cases made and provided; and, finally, that your honor will decree to your petitioner a confirmation of his title to the lands in this his petition claimed, and all such further and other relief as in equity he is entitled to; and your petitioner, as in duty," etc.

Form No. 16757.

(Precedent in Chouteau *v.* U. S., 9 Pet. (U. S.) 148.)[1]

To the honorable judge of the *District* Court of the United States for the state of *Missouri*:

Respectfully showeth your petitioners, *Auguste A.*, *Gabriel Ceré*, *Henry* and *Edward Chouteau*, *René Paul* and *Eulalie* his wife, *Gabriel Paul* and *Louise* his wife, *Thomas F. Smith* and *Emilie* his wife, that *Auguste Chouteau*, late of the city and county of *St. Louis*, state of *Missouri*, deceased, on the *5th* day of *January*, in the year *1798*, being then a resident of the province of *Upper Louisiana*, presented his petition to *Don Zenon Trudeau*, lieutenant-governor of said province, and of the western part of the *Illinois* district, whereby he prayed that a tract of land consisting of *seven thousand and fifty-six* arpents, or a square league, situated on the *Mississippi* river, about *fifty* miles, more or less, distant from the town of *St. Louis*, should be granted to your petitioner for the purpose of enabling him to establish a grazing and agricultural farm thereon, when his means should permit him so to do. That on the *8th* day of *January*, in the year last aforesaid, the said lieutenant-governor did, in compliance with the prayer of said petitioner, decree and direct that the surveyor of said province, *Don Antonio Soulard*, should put your petitioner in possession of the land so prayed for, and should survey the same, and make a plat certificate thereof, in order that the petitioner might make use of the same to solicit a complete title thereon from the Governor-General of the province of *Louisiana*, who by said decree was informed that the said petitioner's circumstances were such as to entitle him to that favor. That, in pursuance of said decree or order of possession and survey, the deputy-surveyor, *Don Santiago Rankin*, duly thereto authorized by the principal surveyor, the said *Antoine Soulard*, did, on the *20th* day of *December*, in the year 1*803*, locate and survey said tract of a league square on a part of the royal domain, about *fifty-seven* miles north of *St. Louis* aforesaid, and about *three* miles south of the *Mississippi* boundary; the said *seven thousand and fifty-six* arpents on the north-west quarter north, by the lands of *Don Joseph Brazeau*, on the south-east quarter south, north-east quarter east, and south-west quarter west, by the royal domain lands, and said *Don Santiago Rankin* did, then and there, by virtue of the decree and authority aforesaid, deliver possession of said tract of a square league, so bounded and located, to said *Auguste Chouteau*; all which will more fully appear by the following documents here brought into court and ready to be produced, to wit: said original petition and decree, and by the certificate of survey, dated the *9th* of *December*, 1*803*, and duly signed and sealed by the said surveyor

There was a decree in the superior court confirming petitioner's title to the lands in question, which plea was affirmed by the supreme court except as to the lands contained in the surveys of five thousand acres, on the tenth day of March, 1899, and three thousand acres on the twelfth day of the same month.

1. The claim of the petitioners to the tract of land in the petition in this case was confirmed by the supreme court.

of the province of *Upper Louisiana*, *Don Antoine Soulard*, and which said survey is duly recorded in book *B*, folio *27*, No. *26*, now in the office of the surveyor-general of this district. And your petitioners aver that said *Auguste Chouteau*, at the date of his said petition and of said order or decree of said lieutenant-governor, and at date of said survey, was possessor of at least *one hundred* head of tame cattle, from *two* to *three hundred* hogs, from *thirty* to *forty* horses, about *forty* sheep, and from *fifty* to *sixty* slaves. The said original concession and survey have been submitted to the board of commissioners heretofore established for the adjudication of unconfirmed land claims, and by it refused to be confirmed. Your petitioners further show, that at the date of said decree of concession and survey, and ever since, until his death, the said *Auguste Chouteau* has been a resident of the province of *Upper Louisiana*, or state of *Missouri*. That said *Auguste Chouteau*, by virtue of the act of Congress in that case made and provided, procured the said tract and survey to be laid down on the general plat in the office of the register of the land office of this district, and the same has been and is reserved from public sale until a decision shall be had by the proper authority thereon. That the sectional boundary lines on the general plat are as follows: commencing at the north-west corner of *Joseph Brazeau's* confirmed claim of *seven thousand and fifty-six* arpents, in the south-east quarter of section number *thirty-five*, in township number *fifty-two*, north, of range number *one*, east: running thence, north *thirty*, east *two hundred and forty-five* chains, to a point near the line, between sections number *fifteen* and *twenty-two*, in township number *fifty-two*, north, of range number *one*, east; thence north *sixty*, east *two hundred and forty-five* chains, to a point in section number *twelve*, in township number *fifty-two*, north, of range number *one*, east; thence south *thirty*, east *two hundred and forty-five* chains, to the north-east corner of the survey of *Brazeau*, before mentioned, in the north-west quarter of section number *twenty-nine*, in township number *fifty-two*, north, of range number *two*, east; thence with *Brazeau's* line, south *sixty*, west *two hundred and forty-five* chains, to the beginning. Your petitioners further show, that no part of said tract, so laid down and surveyed, is occupied or claimed by any person or persons adverse to the title of your petitioners. Your petitioners further show that said *Auguste Chouteau* has departed this life, and that previous to his decease, he devised to your petitioners the said tract of *seven thousand and fifty-six* arpents, by his will, duly executed, and now ready to be produced. Wherefore your petitioners pray, that the validity of the claim and title to said square league, as herein before set forth, may be inquired into and decided upon by this honorable Court; and that, inasmuch as the same might have been perfected into a complete title, under and in conformity to the laws, usages and customs of the government under which the same originated, had not the sovereignty of the country been transferred to the *United States*, your petitioners pray that the said title and claim be confirmed to said tract of land so surveyed, bounded and located, as aforesaid; and your petitioners pray that a citation be directed to the district attorney of the *United States*, requiring him, on a day certain, to

appear and show cause, if any he can, against the decree prayed for by your petitioners.

[(*Signatures of petitioners.*)][1]

c. To Set Aside Land Grant and Quiet Title in Plaintiff.[2]

Form No. 16758.[3]

In the *District* Court of *Lincoln* County, Territory of *Oklahoma. November*, 1893, Term.

Abraham Parker, plaintiff, against *James Brown*, defendant. } Complaint.

Comes now the plaintiff and for causes of action against the defend ant herein says:

1. That he, on or before the *22d* day of *September*, 1891, was a naturalized citizen of the United States, over the age of *twenty-one* years, the head of a family.

2. That prior to *12* o'clock *noon* (Central Standard Time) of *September 22d*, 1891, the Honorable Secretary of the Interior selected and set apart the East half of Section *Nine* (*9*) in Township *fourteen* (*14*) North of Range *Four* (*4*) East, as and for the County Seat of County "*A*," (now *Lincoln*), in said Territory, to be entered for the purpose of trade and business for the use and benefit of the occupants thereof under section 2387 and 2388 of the Revised Statutes of the United States.

3. That on the *28th* day of *September* 1891 at *12* o'clock *noon* (Central Standard Time) said tract of land was duly declared open to settlement under and by virtue of the provisions of said act.

4. Plaintiff further says that in a very short time after *12* o'clock *noon* of said *28th* day of *September* 1891, he entered, settled upon and

1. The matter to be supplied within [] will not be found in the reported case.

2. **Requisites of Complaint or Petition, Generally.** — For the formal parts of a complaint or petition in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; PETITIONS, vol. 13, p. 887

Mistake or fraud in the issue of the patent which affected the department in its determination must be alleged. Lee *v.* Johnson, 116 U. S. 48. And the facts constituting the fraud and misrepresentations must be stated with fullness and particularity sufficient to show that they must necessarily have affected the action of the officers of the department. Peabody *v.* Prince, 78 Cal. 511; Rogers *v.* Vass, 6 Iowa 405; State *v.* Pitzer, 39 Kan. 656; State *v.* Carlander, 39 Kan. 655; State *v.* Dennis, 39 Kan. 509; Cummings. *v.* McDermid, 4 Okla. 272; State *v.* Opperman 74 Tex. 136; Quinby *v.* Conlan, 104 U. S. 420. And mere general allegations of fraud and misrepresentations are not sufficient. Peabody *v.* Prince, 78 Cal. 511; Rogers *v.* Vass, 6 Iowa 405; State *v.* Pitzer, 39 Kan. 656; State *v.* Carlander, 39 Kan. 655; State *v.* Dennis, 39 Kan. 509; Cummings *v.* McDermid, 4 Okla. 272; State *v.* Opperman, 74 Tex. 136; Quinby *v.* Conlan, 104 U. S. 420.

Evidence upon which commissioners acted should be set out. Myers *v.* Berry, 3 Okla. 612.

Findings of fact upon which commissioners made their rulings should be stated. Myers *v.* Berry, 3 Okla. 612.

3. This form is copied from the original papers in Brown *v.* Parker, 2 Okla. 258. In the trial court, a demurrer to the petition was overruled, and upon appeal this ruling was affirmed, the supreme court holding that the complaint alleged all facts necessary to entitle the plaintiff to the relief prayed for.

occupied as a claimant and for the purpose of business and trade, Lot No. *12* in Block No. *43* in said tract as the same appears on the recorded plat of said county seat.

5. Plaintiff further says that he was the first settler upon, and occupant of said lot, for the purpose of business and trade, and has at all times since his said settlement and occupancy of said lot, maintained open, notorious, continuous and exclusive possession of said lot, and has improved the same; that immediately after settling upon said lot, he erected a tent thereon, *10x12* feet, which he used as a temporary dwelling and place of business, that he soon after inclosed said lot with a substantial post fence; that said tent is now and has been at all times since first put upon said lot, within said enclosure as evidence of plaintiff's continual claim and possession of said lot.

6. Plaintiff further says that he is the only party who has ever had possession of said lot, by virtue of settlement and occupancy or otherwise, that the defendant never settled upon and occupied said lot, for purposes of business and trade or otherwise since said *22d* day of *September* 1891, nor on that day. That said defendant was not an occupant of said townsite at the time said tract was entered by the *Probate* Judge of County "*A*" (now *Lincoln*) for the use and benefit of the occupants thereof, that said defendant was on the *28th* day of *September* 1891, has at all times since been, and now is a non-resident of County "*A*" (now *Lincoln*).

7. Plaintiff further says that he did not enter upon or occupy any lands opened to settlement in *Oklahoma* Territory on the *22d* day of *September* 1891 at *12* o'clock *noon* (Central Standard Time) prior to that time, nor did he enter upon and occupy any of the lots, blocks or squares included in the Townsite of *Chandler* prior to *12* o'clock *noon*, *September 28th* 1891, and that all acts done and claims made by plaintiff as to said Lot *12*, Block *43* in said townsite were done and made by him as a townsite-settler under the provisions of said act.

8. Plaintiff says that on said *28th* day of *September* 1891 *William M. Allison* was the duly appointed, commissioned and acting *Probate* Judge of said County "*A*" (now *Lincoln*) that as such Judge, on the *9th* day of *November* 1891, he entered said tract of land at the *Guthrie* land office, for the use and benefit of the occupants thereof, that at the time of said entry, said tract of land was occupied by several hundred people, (including this plaintiff,) for the business and trade, that pursuant to the provisions of said act of Congress, said Judge appointed *Thomas L. Braidwood*, *R. R. Carlin* and *A. M. Fowler* Commissioners to perform the duties prescribed by the said act; that said Commissioners surveyed and platted, or caused to be surveyed and platted, said tract or townsite into lots, blocks, squares, streets, alleys, etc., and notified plaintiff by notice in writing, (a copy of which is hereto attached and made a part of this complaint, marked Ex. "*A*,") that *three* persons, (including defendant,) laid claims to said Lot *12*" in Block *43* in Townsite of *Chandler*; that said Board had fixed the *10th* day of *Feb.* 1892 at the office of said Board, as the time and place of hearing proofs of respective claims of parties interested, and further requiring a deposit of $*25.00* from plaintiff to defray the expenses of said Board for *one* day's trial; that if said

deposit was not made by plaintiff on or before the above named date, a default would be entered against all parties failing to make said deposit; that plaintiff refused to make said deposit of $*25.00* with said Board for the reason that they possessed no legal right to exact it from plaintiff as a precedent condition to hearing plaintiff's proofs, touching his claims to said lot and for the further reason that plaintiff was under no legal obligation to make said deposit as precedent to his rights to offer proof of such claim; that plaintiff was ready on said *10th* day of *February* 1892, to submit this proof to said Board of his right and claim to said lot. But said Board wrongfully refused to hear the same unless plaintiff should pay said Board said sum of $*25.00*; that said Board at the time and place aforesaid defaulted said plaintiff and wrongfully and corruptly awarded said lot to defendant, and made return to said *Probate* Judge that said defendant was entitled to a deed therefor.

9. Plaintiff further says that after the award so made by said Commissioners to defendant and after making said return to said *Probate* Judge, plaintiff, before said *Probate* Judge had made and executed and delivered a deed for said lot to said defendant, tendered to said Judge all sums of money required by him, and by law to be paid and demanded of said *Probate* Judge that he make, execute and deliver to plaintiff a deed for said lot, all of which said Judge wrongfully refused to accept and do, but on the contrary did on the *10th* day of *March* 1892 make, execute and deliver to defendant a deed to said lot, thereby conveying the legal title to said lot to said defendant who is now holding the same without any right as against plaintiff.

10. Plaintiff further says that prior to the commencement of this action he used all due diligence to find the defendant for the purpose of making a tender to defendant of all sums of money paid by defendant to said Judge, as was required by law to obtain said deed and title, and to demand of said defendant a deed for said lot, but has been unable to find defendant, that he is now, and at all times heretofore has been ready, able and willing to pay the same to defendant when the legal title to said lot shall be transferred to plaintiff, either by the defendant in person or by the decree of the Court.

Wherefore, plaintiff prays that he be declared the owner of said lot, that defendant holds the legal title in trust for plaintiff, that defendant by decree of Court be required to convey said legal title to plaintiff, and in default of defendant to convey, that a commissioner be appointed by the Court to execute such conveyance, and for all other and further relief touching the premises, to which he may be entitled and for costs of this action. *Abraham Parker.*

Territory of *Oklahoma*, }
County of *Lincoln*, ss. }

Being duly sworn on oath says that he is plaintiff in the above cause, that he has heard read the foregoing complaint and knows the contents thereof and that the facts and allegations therein contained are true as he verily believes. *Abraham Parker.*

Subscribed and sworn to before me this *18th* day of *May* A. D. 1893.

T. C. Risley, Clerk,
by *G. A. Sears*, Deputy.

II. CRIMINAL PROSECUTION.

1. For Cutting Timber on Land.[1]

Form No. 16759.[2]

(Precedent in Leatherbury *v.* U. S., 32 Fed. Rep. 780.)[3]

[(*Commencement as in Form No. 10729*)][4] that heretofore, to-wit, during the years 1883, 1884, 1885, and 1886, in said district, and within the jurisdiction of this court, *Geo. S. Leatherbury* did unlawfully cut, and cause to be cut, a quantity of timber, to-wit, *31,784* pine trees of the value each of *fifteen* cents, then and there standing and growing upon certain lands of the United States, theretofore acquired, to-wit, (*description of lands*), with intent to dispose of the said timber, in a manner other than for the use of the navy

1. **Requisites of Indictment or Information, Generally.** — For the formal parts of an indictment or information in a particular jurisdiction see the titles INDICTMENTS, vol. 9, p. 615; INFORMATIONS IN CRIMINAL CASES, vol. 9, p. 768.

Description of Lands — *Generally.* — The lands from which the timber was removed must be specifically described. U. S. *v.* Schuler, 6 McLean (U. S.) 28. And where the indictment charged that defendant was employed in "removing from lands of the United States, at the mouth of the river *Muskegon*, in the county of *Ottawa*, and district of *Michigan*, a large amount of timber," the description was held to be insufficient. U. S. *v.* Schuler, 6 McLean (U. S.) 28.

"*Lands of the United States*" is not sufficient. In order to charge the particular offense, a particular description as to place is necessary. U. S. *v.* Schuler, 6 McLean (U. S.) 28.

Class of lands from which trees were cut need not be stated. U. S. *v.* Thompson, 6 McLean (U. S) 56.

Description of Timber. — Class of timber cut need not be described in the indictment. U. S. *v.* Redy, 5 McLean (U. S.) 358.

Intent with which timber was cut must be stated in the indictment. U. S. *v.* Hacker, 73 Fed. Rep. 292; U. S. *v.* Garretson, 42 Fed. Rep. 22.

That timber was taken from lands reserved for naval purposes, or that the timber was cut on lands not so reserved, and was liveoak or red cedar, must be stated. U. S. *v.* The Schooner Helena, 5 McLean (U. S.) 273.

That timber was removed from land on which it was grown or from which it was cut need not be alleged, but that it was removed from lands of the United States, specially describing them according to the public survey, is a necessary allegation. U. S. *v.* Schuler, 6 McLean (U. S.) 28.

That defendant knowingly commited the act need not be alleged. U. S. *v.* Schuler, 6 McLean (U. S.) 28.

"Cut and Removed." — Under a statute providing punishment for any person who shall "remove" timber, an indictment which charges that defendant did wilfully, feloniously and unlawfully cut and remove certain timber is sufficient and does not charge two offenses, the word "cut" being mere surplusage. State *v.* Dorman, 9 S. Dak. 528; U. S. *v.* Stone, 49 Fed. 848.

"Unlawfully." — Where the offense is created by statute, and the indictment charges the offense in the precise words of the statute, it is unnecessary to prefix to the charging part the word "unlawfully" or any other word showing a wrongful intention. U. S. *v.* Thompson, 6 McLean (U. S.) 56.

Negativing Exceptions. — An indictment which charges that the cutting and removing of the timber was for use other than for the navy of the United States is sufficient. It is not necessary to allege that the defendant did not appropriate the timber by any of the several laws of the United States granting him such right. U. S. *v.* Stone, 49 Fed. Rep. 848.

2. *United States.* — Rev. Stat. (1878), § 2461.

3. No objection was made to the form of the indictment in this case.

4. The matter to be supplied within [ ] will not be found in the reported case.

of the United States, to-wit, for his own use and benefit, against the peace and dignity of the United States, [and contrary to the form of the statute in such case made and provided.

(*Signature and indorsements as in Form No. 10729.*)][1]

2. For Erecting Inclosure on Lands.

Form No. 16760.[2]

(*Commencing as in Form No. 10729, and continuing down to* *) did wrongfully and unlawfully erect and construct an inclosure on certain public lands of the United States, to wit, (*describing them*), by which he, the said *John Doe*, did inclose *six hundred and forty* acres of said public lands, and that he, the said *John Doe*, at the time he made said inclosure, did not have any claim or color of title to said land made or acquired in good faith, or an asserted right thereto, by or under claim made in good faith and with a view to entry thereof at the proper land office under the general laws of the United States, contrary to (*concluding as in Form No. 10729*).

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

2. *United States.* — 23 Stat. at L. (1885), p. 321, c. 149.

This form is based upon the facts in the case of U. S. *v.* Felderward, 36 Fed. Rep. 490.

Negativing Exceptions. — An indictment under the above statute is not sufficient which alleges merely that the inclosure was made "without any lawful claim or color of title acquired in good faith." The indictment must go further and allege that the inclosure of the land was not made under "a right thereto, by or under claim made in good faith with a view to entry thereof at the proper land office under the general laws of the United States." U. S. *v.* Felderward, 36 Fed. Rep. 490.

PUBLIC OFFICERS.

By Harold N. Eldridge.

CROSS-REFERENCES.

For Forms in Actions on Bonds of Public Officers, see the title BONDS AND UNDERTAKINGS (ACTIONS ON), vol. 3, p. 528.
For Forms relating to Bribery, see the title BRIBERY, vol. 4, p. 1.
For Forms relating to Proceedings By and Against Bridge Authorities, see the title BRIDGES, vol. 4, p. 42.
For Forms relating to Certiorari to Board of Public Officers, see the title CERTIORARI, vol. 4, p. 427.
For Forms in Contempt Proceedings Against Public Officers, see the title CONTEMPT, vol. 5, p. 226.
For Forms in Proceedings Against Board of Dental Examiners or Commissioners, see the title DENTISTS, vol. 6, p. 472.
For Form of Petition to Compel Registration by State Board of Pharmacy, see the title DRUGGISTS, vol. 7, *Form No. 8035.*
For Form of Indictment Against Public Officer for Being Intoxicated, see the title DRUNKENNESS, vol. 7, *Form No. 8053.*
For Forms relating to Election Officers, see the title ELECTIONS, vol. 7, p. 382.
For Forms in Criminal Proceedings Against Public Officers for Embezzlement, see the title EMBEZZLEMENT, vol. 7, *Forms Nos. 8307 et seq.*
For Form of Complaint Against Juror to Recover Penalty for Accepting Bribe, see the title EMBRACERY, vol. 7, *Form No. 8329.*
For Forms in Proceedings Against Officers for Suffering Escape of Prisoners, see the title ESCAPE AND RESCUE, vol. 7, p. 781.
For Forms of Indictment Against Public Officers for Extortion, see the title EXTORTION, vol. 8, p. 470.
For Forms in Proceedings Against Public Officers for False Imprisonment, see the title FALSE IMPRISONMENT, vol. 8, p. 494.
For Forms in Proceedings to Enjoin Public Officers from Doing an Illegal Act, see the title INJUNCTIONS, vol 9, p. 822.
For Form of Indictment Against Selectmen for Neglecting to Appoint Agent for Purchase of Intoxicating Liquors, see the title INTOXICATING LIQUORS, vol. 10, *Form No. 11620.*
For Form of Indictment Against Clerk of Court for Larceny of Public Record, see the title LARCENY, vol. 11, *Form No. 12871.*
For Forms in Proceedings concerning Libel of Public Officers, see the title LIBEL, vol. 11, p. 342.
For Form of Indictment Against Commissioner of Labor for Removing and Destroying Public Documents, see the title MALICIOUS MISCHIEF AND WILFUL TRESPASS, vol. 11, *Form No. 13349.*
For Forms in Proceedings by Mandamus Against Public Officers, see the title MANDAMUS, vol. 11, p. 767.
For Forms in Proceedings Against Public Officers for Illegal Solemnization of Marriage, see the title MARRIAGE, vol. 11, p. 988.
For Forms in Proceedings Against Municipalities, see the title MUNICIPAL CORPORATIONS, vol. 12, p. 952.

For Forms relating to the Obstruction of Justice by Resisting or Obstructing Officer, see the title OBSTRUCTING JUSTICE, vol. 13, p. 317.

For Forms in Proceedings relating to Poor Persons, see the title POOR PERSONS, vol. 14, p. 24.

For Forms in Proceedings Against Employees of the Postal Service, see the title POSTAL CRIMES, vol. 14, p. 97.

For Forms in Proceedings for Writ of Prohibition Against Public Officers, see the title PROHIBITION, WRIT OF, vol. 14, p. 987.

For Forms in Quo Warranto Proceedings, see the title QUO WARRANTO.

For Forms relating to Receivers, see the title RECEIVERS.

For Forms relating to Sheriffs and Constables, see the title SHERIFFS AND CONSTABLES.

For other Forms in Proceedings Against Public Officers Concerned in the Management of Streets and Highways, see the title STREETS AND HIGHWAYS.

See also the titles SCHOOLS; TAXATION; TRESPASS; and the GENERAL INDEX to this work.

I. PROCEEDINGS BY PUBLIC OFFICERS.

1. In General.[1]

1. Requisites of Complaint, Declaration or Petition, Generally. — For the formal parts of a complaint, declaration or petition in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, vol. 6, p. 244; PETITIONS, vol. 13, p. 887.

Description of Plaintiff — *Generally.* — If suit is brought by a public officer, the individual name of the officer must be given, with the addition of his name of office. County Treasurer *v.* Bunbury, 45 Mich. 79; Galway *v.* Stimson, 4 Hill (N. Y.) 136; Highway Com'rs *v.* Peck, 5 Hill (N. Y.) 215; Paige *v.* Fazackerly, 36 Barb. (N. Y.) 392; People *v.* Highway Com'rs, 27 Barb. (N. Y.) 94; Brooklyn Fire Department *v.* Acker, (Supreme Ct. Gen. T.) 26 How. Pr. (N. Y.) 263; Horton *v.* Parsons, 37 Hun (N. Y.) 42; Hebron *v.* Ely, Hill & D. Supp. (N. Y.) 379; Mount Pleasant State Prison *v.* Rikeman, 1 Den. (N. Y.) 279. And to designate the plaintiff by his official title is not sufficient. County Treasurer *v.* Bunbury, 45 Mich. 79; Brooklyn Fire Department *v.* Acker, (Supreme Ct. Gen. T.) 26 How. Pr. (N. Y.) 263; Horton *v.* Parsons, 37 Hun (N. Y.) 42; Hebron *v.* Ely, Hill & D. Supp. (N. Y.) 379.

In *Ohio*, it has been held that under a law to compel the payment of a tax into the county treasury, it is not necessary that the individual name of the treasurer should appear or be inserted as plaintiff. Covington, etc., Bridge Co. *v.* Mayer, 31 Ohio St. 317.

Where right to bring an action is in individuals who fill certain offices, and not in the individuals by name, the plaintiffs must aver themselves to be the incumbents of the offices, in order to entitle them to the action. Sinking Fund Com'rs *v.* Walker, 6 How. (Miss.) 143; Albro *v.* Rood, 24 Hun (N. Y.) 72.

Manner and circumstances of election or appointment of officer, or the detail or regularity of the proceedings by which he was inducted into office, need not be set forth. Kelly *v.* Breusing, 33 Barb. (N. Y.) 123.

That claim is made by the officer and not by the individual must be shown by proper averment. Gould *v.* Glass, 19 Barb. (N. Y.) 179. Merely adding to the name of the plaintiff, in the title of the cause, the name of the office which he holds will not render the action an action in favor of the plaintiff in his official character,

Form No. 16761.[1]

Supreme Court, *Suffolk* County.

John Doe and *John Den*, as overseers of the poor of the town of *Huntington*, in the county of *Suffolk* and state of *New York*, plaintiffs,
against
Richard Roe, defendant.

The complaint of the above named plaintiffs respectfully shows to this court:

1. That the above named plaintiffs are the duly elected, qualified and acting overseers of the poor of the town of *Huntington*, in the county of *Suffolk* and state of *New York*;

2. (*Here set out the cause of action.*)

Wherefore plaintiffs, as such overseers (*concluding with prayer for relief, the signature and post-office address of attorney, and verification*).

2. On Relation of Private Person Having an Interest in Subject-matter.

Form No. 16762.[1]

Supreme Court, *Suffolk* County.

The People of the State of *New York*, on the relation of *John Doe*, plaintiffs,
against
Richard Roe, defendant.

The People of the State of *New York*, by *Andrew Jackson*, their attorney-general, complaining of the above named defendant, allege:

unless the necessary averments are inserted in the complaint. Gould *v.* Glass, 19 Barb. (N. Y.) 179. Thus, where the complaint in the title of the cause described the plaintiffs as "*Calvin H. Gould*, *John Sheldon* and *John McBride*, commissioners of highways of the town of *Lisbon*, against *John Glass*," but did not in any other part contain an averment that the suit was brought by the plaintiffs in their official character, or that the plaintiffs were commissioners of highways, or that they complained as such, or demanded judgment as such, it was held that the action must be deemed as brought in favor of the plaintiffs in their individual character. Gould *v.* Glass, 19 Barb. (N. Y.) 179. Where the complaint alleged in the first count that the plaintiff was supervisor, etc., and in the second count that he, as supervisor as aforesaid, charged, etc., and demanded that the money should be paid to the benefit of the town, the complaint was held sufficient and not open to the objection that it was in behalf of the plaintiff as an individual. Griggs *v.* Griggs, 66 Barb. (N. Y.) 287. Where the complaint commenced, "the plaintiffs, commissioners of highways, complain," it was held that a cause of action in the plaintiffs as commissioners might be shown. Fowler *v.* Westervelt, (Supreme Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 59.

In an action by a supervisor, it is sufficient for the plaintiff to describe himself by his official designation in the title and to aver that he complains as supervisor as aforesaid. Smith *v.* Levinus, 8 N. Y. 472. The addition of the words "the commissioners of the board of excise of —— county" to the names of the plaintiffs in the title of the cause, without anything else, is a mere description of the persons, and the action will be held to have been brought by plaintiffs in their individual character. Bonesteel *v.* Garlinghouse, 60 Barb. (N. Y.) 338.

1. See, generally, *supra*, note 1, p. 91.

1. That this action is brought upon the relation of *John Doe*, above named;

2. (*Here set out cause of action.*)

Wherefore (*concluding with prayer for relief, the signature and post-office address of attorney, and verification*).

II. PROCEEDINGS AGAINST PUBLIC OFFICERS.

1. Civil.[1]

a. For Damages.

(1) AGAINST MAGISTRATE.

(a) For Levying on Wife's Property Under Warrant Against Husband.

1. Requisites of Complaint, Declaration or Petition, Generally. — For the formal parts of a complaint, declaration or petition in a particular jurisdiction see the titles COMPLAINTS, vol, 4, p. 1019; DECLARATIONS, vol. 6, p. 244; PETITIONS, vol. 13, p. 887.

Description of Defendant — *Generally.* — When action is brought against a public officer, he must be sued in his official capacity. Bennett *v.* Whitney, 94 N. Y. 302; Shuler *v.* Meyers, 5 Lans. (N. Y.) 170. And where the action is against the defendants in their individual names, with the addition of their names of office, it is insufficient. Bennett *v.* Whitney, 94 N. Y. 302. The addition of their names of office being *descriptio personæ* only. Bennett *v.* Whitney, 94 N. Y. 302. It has been held, however, that it is not necessary to add in the title the official designation to the individual name, when it sufficiently appears in the body of the complaint that the officers are sought to be charged in their representative capacity. Sullivan *v.* Husson, (Supreme Ct. Spec. T.) 50 How. Pr. (N. Y.) 475.

In *Michigan*, it is held that an omission to sue an officer by his official title is not a substantial objection. where liability is shown. Hart *v.* Port Huron Tp., 46 Mich. 428.

Omission of Word "As." — Where the action is brought against the defendants in their individual names, with the titles of their respective offices added, the complaint is insufficient, where the word "as" does not precede the official designation. Bennett *v.* Whitney, 94 N. Y. 302. Where the action was against George Myers and others, trustees of school district No. 4, it was held that there could be no recovery, as there was no averment that the defendants were trustees or that plaintiff claimed to recover against them as such. Shuler *v.* Meyers, 5 Lans. (N. Y.) 170.

Commission of officer need not be set out, where it is averred that the officer was lawfully appointed and the duties of his office are specified. People *v.* Pace, 57 Ill. App. 674

Facts showing particular negligence or misfeasance must be stated. Abrams *v.* Johnson, 65 Ala. 465; State *v.* Kirby, 6 Ark. 453; School Dist. No. 2 *v.* Tebbetts, 67 Me. 239; Bailey *v.* Butterfield, 14 Me. 112; Bennet *v.* Bozorth, 3 N. J. L. 132; Leaming *v.* Denny, 3 N. J. L. 196; Parker *v.* Parker, 3 N. J. L. 433; Merrit *v.* Downs, 3 N. J. L. 484; Smith *v.* Wright, 27 Barb. (N. Y.) 621.

That defendant owed a duty to the plaintiff must be shown. Strong *v.* Campbell, 11 Barb. (N. Y.) 135; Martin *v.* Brooklyn, 1 Hill (N. Y.) 545; Rome Bank *v.* Mott, 17 Wend. (N. Y.) 554; South *v.* Maryland, 18 How. (U. S.) 396.

In *Indiana*, it has been held that where the trustee of a school township made and filed in the auditor's office of the county his annual tax levy for school purposes, and the auditor refused to make the assessment, in a mandamus proceeding to compel him to do so the petition need not specifically aver that the relator had a special interest in the performance of the duty which he asked the court to coerce the auditor to perform, where the facts showed a special interest. Cole *v.* State, 131 Ind. 591.

Form No. 16763.

(Precedent in Holtzclaw *v.* Gassaway, 52 S. Car. 552.)[1]

[(*Commencement as in Form No. 5932.*)][2]

The plaintiff, *Amelia A. Holtzclaw*, complaining of the defendant, alleges:

I. That the defendant resides in State and county aforesaid.

II. That at the times hereinafter mentioned, the plaintiff, *Robt. F. G. Holtzclaw*, was, and is now, her husband, and is, therefore, joined with her as one of the plaintiffs in this action.

III. That on or about *January 25*, 1897, the defendant issued or executed under his hand and seal, a paper styled a "distress warrant, for rent," against her husband, a copy of which is hereto attached and made a part of this complaint.

IV. That under and by virtue of said distress warrant, *W. D. Whitmire* and the defendant came to plaintiff's residence in *Greenville* city, in State and county aforesaid, for the purpose of distraining on the goods and chattels of her husband, for rent claimed to be due the defendant, as agent of *Peter Nelson.*

V. That some of the furniture in said residence belonged to her at the time; and the defendant, knowing or presuming such to be the case, and in order to have distress made of all her said furniture as well as her husband's, and to put her in so much fear as to deter and prevent her from even claiming said furniture, did wilfully, maliciously, and fraudulently, by hints, insinuations, and inuendoes, tell her and make her believe that, if she claimed her said furniture, and thereby prevented said distress, her husband would be arrested and imprisoned as a criminal, and she and her children would then be forever disgraced, and a levy was then made on her said furniture, under such distress warrant.

VI. That in consequence of said wilful, malicious, and fraudulent conduct on the part of the defendant, she was prostrated, threatened with miscarriage or abortion, and confined to her bed until the *19th* day of *March*, 1897, when she gave birth prematurely to a child, who immediately died; and she has not yet, and fears she never will, recover from the effects, to her damage $*5,000.*

Wherefore, the plaintiff, *Amelia A. Holtzclaw*, demands judgment against the defendant for the sum of $*5,000* and the costs of this action.

[(*Signature and verification as in Form No. 5932.*)][2]

(*b*) *For Neglecting to Write Out Appeal Bond, Whereby Security was Lost.*

1. Upon appeal from an order sustaining a demurrer to this complaint, on the ground that it did not state facts sufficient to constitute a cause of action, the judgment of the trial court was reversed. The court said: "The alleged invasion of her [wife's] rights by the defendant in levying upon her property to satisfy a debt of her husband, by which she was damaged, alone constituted a good cause of action."

See also, generally, *supra*, note 1, p. 93.

2. The matter to be supplied within [ ] will not be found in the reported case.

Form No. 16764.

(Precedent in Lathrop *v.* Snellbaker, 6 Ohio St. 276.)[1]

[(*Commencement as in Form No. 5929*)][2] that on the *10th* day of *January*, A. D. 18*50*, the said defendant was an acting justice of the peace in and for the township of *Cincinnati*, county of *Hamilton*, and State of *Ohio*, duly commissioned and sworn; that on said day the plaintiffs recovered a judgment before said defendant, as such justice of the peace, against *Joseph Dupler*, for the sum of $*81.12* damages, and $*9.25* costs; that from said judgment said *Dupler* attempted to take an appeal to the court *of common pleas* of said county, and offered as security for that purpose one *David Ichler*, who signed his name on the docket of said justice; that said justice made a transcript of his proceedings and judgment in said cause, including what purports to be a copy of the bond of said *Ichler* taken by said justice. That the transcript aforesaid was filed by said *Dupler* in the court *of common pleas* on the *4th* day of *February*, 18*50*; that at the *November* term, 18*50*, of said court, the plaintiffs recovered a judgment on said transcript against said *Dupler* for the sum of *ninety* dollars damages, together with costs. On which said judgment an execution was issued to the sheriff of said county, and returned, "no goods or chattels, lands or tenements," etc. That afterward, on the *9th* day of *November*, 18*54*, the plaintiffs commenced an action before *William Chidsey*, a justice of the peace in and for said township and county, against the said *David Ichler*, as security, as aforesaid; and on the trial of the said last-mentioned case, it was proven in evidence that, although said *Ichler* had signed his name on the docket of said Justice *Snellbaker*, the latter had failed to write out the bond, which in his aforesaid transcript he purports to have copied; so that, in fact, no bond was taken by said *Snellbaker* in the case wherein these plaintiffs sued *Joseph Dupler*, as aforesaid. And for the last-mentioned cause, said Justice *Chidsey* rendered a judgment for said *Ichler* against these plaintiffs for costs, amounting to $*1.50*. That the neglect or omission of duty by said *Snellbaker*, as aforesaid, was not discovered by or known to the plaintiffs until the said trial before Justice *Chidsey*. And the plaintiffs represent that the said *Ichler* is solvent, and responsible for the amount for which he intended to become security, as aforesaid; and that by reason of the neglect and omission of said *Snellbaker* to draw up a bond, as by law he was required to do in such case, these plaintiffs are prevented from recovering their claim against said *Dupler* and *Ichler*.

Whereupon they ask judgment against the defendant for the amount of the judgment in the common pleas, and costs before said Justice *Chidsey*, with interest [(*concluding as in Form No. 5929*).][2]

(2) Against Selectmen of Town, for Maliciously Appointing an Overseer to Manage Plaintiff's Estate.

1. The court found for the defendant in this case, on the ground that the action was barred by the statute of limitations. No objection was made to the form of the petition.

See also, generally, *supra*, note 1, p. 93.

2. The matter to be supplied within [ ] will not be found in the reported case.

Form No. 16765.[1]

(Conn. Prac. Act, p. 136, No. 236.)

(*Commencement as in Form No. 5912.*)

1. At the time of the grievance herein complained of, the defendants were and ever since have been selectmen of the town of *Enfield*, and the defendant was an inhabitant of said town.

2. On *February 18th*, 1879, the defendants, as such selectmen, did, in compliance with the forms of law, appoint *John Stiles* of *Enfield* an overseer over the plaintiff for *three* years from the date of his appointment, to advise and order him in the management of his business.

3. Before, and at the time of said appointment, the plaintiff was prudent and discreet in the management of his affairs, and in no respect likely to become chargeable to said town, and the defendants, with full knowledge thereof, made said appointment without probable cause.

4. The defendants made said appointment with a malicious intent thereby to injure, wrong, and oppress the plaintiff.

5. By reason of said appointment, the plaintiff was for the space of *six* months deprived of the privilege of managing his own affairs, and was obliged to expend a large sum, to wit, $*75*, in obtaining the removal of said overseer.

The plaintiff claims $*500* damages.

(*Concluding as in Form No. 5912.*)

b. For Penalty.

(1) Against Clerk of Court, for Failure to Transmit Transcript to Another Court.

Form No. 16766.[2]

(Precedent in Randol *v.* Garoutte, 78 Mo. App. 612.)[3]

[(*Title of court and cause as in Form No. 5921.*)][4]

Now comes plaintiff above named and for her cause of action alleges: That she was plaintiff in an action against *G. A. Rhode*,

1. *Connecticut.* — Gen. Stat. (1888), § 3265.

See also, generally, *supra*, note 1, p. 93.

2. *Missouri.* — Where there is an order for a change of venue, the clerk shall immediately make out a full transcript of the record and proceedings in the cause, and transmit the same, duly certified, together with all the original papers filed in the cause and not forming a part of the record, to the clerk of the court to which the removal is ordered, and on failure to do so shall forfeit one hundred dollars to the party aggrieved, to be recovered by a civil action. Rev. Stat. (1899), § 825.

3. Judgment was rendered for the plaintiff in this case.

That plaintiff has suffered pecuniary loss or damage by the delay occasioned by the negligence of the clerk need not be alleged. The party aggrieved is entitled to recover the penalty whenever it is made to appear that he has been harassed or oppressed or his right to a speedy trial has been denied by reason of the negligence of the clerk to make out immediately his full transcript of the record and transmit the same to the clerk of the court to which the change of venue was awarded. Randol *v.* Garoutte, 78 Mo. App. 609.

4. The matter to be supplied within

David Godsey, *W. C. Rogers*, *A. A. Baldwin* and others, which said action was pending in the *October* term of the *Howell* county *circuit* court, 1897, and was triable at such term of court, and was instituted by her for the purpose of recovering about $*1,400* damages from said defendants for the wrongful conversion by them of personal property belonging to this plaintiff; that on the *fourth* day of the *October* term of said court, it being on the *14th* day of *October*, 1897, defendants made application for a change of venue of such action, filing their affidavit therefor, and that thereupon Hon. *W. N. Evans*, presiding judge of such court, granted a change of venue of such action, defendants having paid into court the $*10* required by law, and such change was by the request of this plaintiff made to the *circuit* court of *Texas* county, *Missouri*, which court convened at *Houston*, in said *Texas* county, on the *8th* day of *November*, 1897. Plaintiff states that the above named defendant, *George L. Garoutte*, was at the time the change of venue was taken in such action and is now the *circuit* clerk of *Howell* county, *Missouri*, and that he failed and neglected to make out a full transcript of the record and proceedings in said cause of action, and transmit them to the clerk of the *circuit* court of *Texas* county, *Missouri*, as required by such order of removal and by section 2265, R. S. 1889.

Wherefore this plaintiff feeling aggrieved by the failure and neglect of the defendant to transmit such transcript and proceedings in the cause to perfect such change of venue, so that said action would have been for trial in the *November* term of said *Texas* county *circuit* court (1897), respectfully asks judgment against the defendant for the statutory penalty of *one hundred* dollars, with costs of this action.

[*Jeremiah Mason*, Attorney for Plaintiff.][1]

(2) Against Magistrate, for Charging Excessive Fee for Recording Mortgage.

Form No. 16767.[2]

(Precedent in Lee *v.* Lide, 111 Ala. 128.)[3]

[(*Venue and title of court and cause as in Form No. 5907.*)][4]

The plaintiff claims of the defendant *R. A. Lee*, as *probate* judge of said county, the sum of $*50*, as a forfeiture for knowingly charging and receiving the sum of $*3* as a fee for recording a certain mortgage executed by plaintiff to the *British and American Mortgage Company* (*Limited*) and delivered by plaintiff to the defendant as *probate* judge, to be recorded by him on the public records of said county, and which was recorded on the *26th* day of *November*, 1894,

[ ] will not be found in the reported case.

1. The matter enclosed by [ ] will not be found in the reported case.

2. *Alabama.* — Any judge of probate, who knowingly receives any other or higher fees than are allowed by law, forfeits fifty dollars, to be recovered in the name of the person aggrieved. Civ. Code (1896), § 1368.

3. This complaint was held sufficient.

4. The matter to be supplied within [ ] will not be found in the reported case.

in Book of Mortgages "*24*," and on page *36* of said book, said fee so charged being a higher or greater fee than is allowed by law in such cases, to the damage of the plaintiff in the sum aforesaid.

[*Jeremiah Mason*, Attorney for Plaintiff.][1]

c. To Compel Police Commissioners to Certify Record Relating to Attempted Removal of Petitioner from Office of Police Officer.[2]

Form No. 16768.

(Precedent in Andrews *v.* Police Board, 94 Me. 69.)[3]

State of *Maine*.

York, ss.

To the Honorable Justice of the *Supreme Judicial* Court:

Respectfully represents *Leonard Andrews* of *Biddeford*, in the county of *York* and state of *Maine*, that on the *third* day of *July*, A. D. 1893, he was duly appointed Police Officer of the city of *Biddeford*, and was duly qualified as such officer, by the Board of Police, duly constituted and acting, under and by virtue of chapter 625 of the laws of the state of Maine, for the year A. D. 1893.

That at a meeting of said Board of Police, held on the *fourteenth* day of *November*, A. D. 1898, said Board of Police undertook to remove your petitioner from the office of Police of the city of *Biddeford*, and served notice on your petitioner that he was so removed.

That said appointment and qualification of your petitioner and said attempt to remove him fully appears upon the records to be produced and exhibited herein.

And your petitioner represents and shows that said Police Board have no jurisdiction in the matter of said removal, and that their acts in making said removal were erroneous and unlawful, and the records thereof are erroneous and illegal, in the several causes which your petitioner relies on for his support.

Wherefore, your petitioner prays that this court will issue a writ of certiorari ordering the said Board of Police to certify their records relating to said attempted removal of your petitioner that they may be presented in court to the end that the same or so much thereof as may be illegal may be quashed, for the several causes which are recited and annexed to this petition and made a part thereof, upon which your petitioner relies for its support.

1st. Because it does not appear, nor is it true in fact, that any charges or complaints were ever filed with said Board of Police against your petitioner.

2nd. Because it also does not appear, nor is it true in fact, that any notice was ever given to your petitioner that said Board of Police was to act upon the question of the removal of your petitioner.

3rd. Because it does not appear, nor is it true in fact, that said attempted removal was for cause and with notice to your petitioner.

1. The matter enclosed by [ ] will not be found in the reported case.

2. For other forms in certiorari proceedings against public officers see the title CERTIORARI, vol. 4, Form No. 5354 *et seq.*

3. The writ was issued in this case.

4th. Because attempted removal was made without cause and without notice to your petitioner of any cause, and without any opportunity to your petitioner to be heard upon the question of his removal.

All in violation of chapter 625 of the private and special laws of the state of Maine of 1893.

Leonard Andrews.

State of *Maine.*

York, ss. *April 21*, A. D. 1899.

Personally appeared *Leonard Andrews*, and subscribed and made oath to the above.

Before me,

(SEAL). *Charles S. Hamilton*, Justice of the Peace.

d. To Reverse Decision of Auditor of Public Accounts Disallowing Claim.

Form No. 16769.[1]

(Precedent in Cornell *v.* Irvine, 56 Neb. 658.)[2]

[(*Title of court and cause as in Form No. 5923.*)][3]

The said *Frank Irvine*, appellant, for cause of action states:

1. That the said *John F. Cornell* is, and for more than a year past has been, the auditor of public accounts of the state of *Nebraska*, and as such auditor is charged with the duty, among other things, of examining certificates drawn by the regents of the *University of Nebraska*, and drawing warrants thereon upon the state treasurer for the payment of claims against said university.

2. That a contract exists, and for many years past has existed, between the said appellant and the said regents whereby the said appellant is engaged to deliver each year, so long as said parties see fit to continue said contract, lectures before the senior class of the College of Law of said university at the agreed compensation of $*20* per lecture.

3. That in pursuance of said contract, and at times fixed by the authorities of said university, the said *Frank Irvine* did, during the months of *February* and *March*, 1898, to-wit, on *three* successive *Wednesdays* at *2* o'clock *P.* M., and on *three* successive *Thursdays* at *10:45* o'clock *A.* M., deliver *six* lectures before said class, and thereby was entitled to receive from the funds of said university devoted to said college of law the sum of $*120*.

4 That there was at all times mentioned, and is now, a specific appropriation by the legislature available and sufficient for the maintenance of said college of law and for payment of said claims of appellant.

5. That, as more fully appears from the transcript filed herein, the

1. *Nebraska.* — Comp. Stat. (1899), § 4999.

2. A general demurrer to the petition in this case was overruled, and the auditor electing to stand upon the demurrer, there was a judgment as prayed for in the petition.

See, generally, *supra*, note 1, p. 93.

3. The matter to be supplied within [ ] will not be found in the reported case.

said board of regents caused to be issued and signed by its secretary and president a certificate that said services had been performed, and that said *Frank Irvine* was entitled to said sum and directing appellee to draw his warrant upon the state treasurer therefor. Said certificate was duly presented to said appellee, and all things requisite and necessary to require the drawing of said warrant were by appellant and said board of regents done and performed, and it thereby became the duty of said appellee to draw his warrant as aforesaid, directing said treasurer to pay to appellant the sum aforesaid.

6. That said appellant is, and for *five* years last past has been, one of the commissioners of the *supreme* court, and as such commissioner has drawn from the treasury his salary as provided by law, and about the *1st* day of *April*, 1898, drew his salary as such commissioner for the quarter ending the *31st* day of *March*, 1898.

7. The said appellee examined and rejected said claim and certificate and disallowed the same and refused to draw his warrant therefor, giving as his sole and only reason for such action, in the official notice thereof served on the appellant, that, from certain opinions rendered by the attorney general, he was led to believe that said appellant was not entitled to receive compensation for the services so by him rendered to said university, because he filled such position as commissioner and received salary as such.

Wherefore appellant prays that the decision of said auditor be reversed, and that this court, by its order and mandate, require the appellee to issue his warrant for the sum of $*120* as required by law. Appellant also prays judgment for costs, and such other relief as may be just and lawful.

[(*Signature and verification as in Form No. 5923.*)][1]

2. Criminal.[2]

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **Requisites of Indictment or Information, Generally.** — For the formal parts of an indictment or information in a particular jurisdiction see the titles INDICTMENTS, vol. 9, p. 615; INFORMATIONS IN CRIMINAL CASES, vol. 9, p. 768.

Official character of defendant must be stated in the indictment. State *v.* Noland, 111 Mo. 473.

That defendant was the lawful incumbent of the office must be stated. Shanks *v.* State, 51 Miss. 464.

Election or appointment to office must be shown, and where the indictment fails to state when and how defendant was appointed, and the authority for the appointment, it is not sufficient. State *v.* Flint, 62 Mo. 393. That defendant "then and there being an officer duly elected by the laws of the state, to wit, a constable," specifying city and district in which he was elected, is sufficient. State *v.* Manley, 107 Mo. 364.

That defendant qualified by taking the oath of office must be shown. Wood *v.* State, 47 Ark. 488.

Description of Office. — In some cases, failure to particularly describe the office will not render the indictment defective, where enough is set out to enable the court to take judicial notice that the office is one created by statute, and the duties imposed thereby. People *v.* Doss, 39 Cal. 428; People *v.* Potter, 35 Cal. 110; Spalding *v.* People, 172 Ill. 40; U. S. *v.* Bornemann, 36 Fed. Rep. 257.

Facts showing duty imposed upon officer must be stated. Butler *v.* State, 17 Ind. 450; People *v.* Wattles, 13 Mich. 446; State *v.* Fitts, 44 N. H. 621; State *v.* Hall, 97 N. Car. 474; State *v.* Hall, 5 S. Car. 120.

a. Against Clerk of County, for Failing to Pay Over Public Moneys to Successor.

Form No. 16770.[1]

(Precedent in People *v.* Hamilton, (Cal. 1893) 32 Pac. Rep. 526.)[2]

[(*Title of court and cause as in Form No. 10816.*)][3]

M. D. Hamilton is accused by the district attorney of the said county, by this information, of the crime of omitting and refusing to pay over money received by him under duty imposed by law to pay over the same. Committed as follows: The said *M. D. Hamilton*, on the *5th* day of *January*, A. D. 18*91*, at the said county of *San Diego*, and before the finding of this information, having theretofore, for the *two* years immediately preceding, been an officer of said county, to wit, the clerk of the county of *San Diego*, and an officer charged with the receipt, safe-keeping, transfer, and disbursement of public moneys in his official capacity as such clerk and officer, and his official term as such clerk and officer having expired by limitation of law, and there then and there remaining in his hands certain pub-

Violation or neglect of official duty must be charged in the indictment. Com. *v.* Kinnaird, (Ky. 1896) 37 S. W. Rep. 840; State *v.* Hall, 97 N. Car. 474; State *v.* Hall, 5 S. Car. 120. And irregular or improper conduct on the part of the officer must be directly alleged and must not be left to inference. State *v.* Darling, 89 Me. 400.

Facts constituting the offense must be set out, where the statute creating the offense does not specifically define it. State *v.* Ragsdale, 59 Mo. App. 590.

Facts showing conduct to be a criminal offense must be stated. State *v.* Coon, 14 Minn. 456.

Knowingly, Wilfully and Corruptly. — Where the act or omission to act is not in itself illegal, but knowledge, malice, wilfulness or corruption are necessary ingredients of the offense, the indictment must allege that the defendant acted or omitted to act wilfully, knowingly and corruptly. Casey *v.* State, 53 Ark. 334; People *v.* Ward, 85 Cal. 585; Smith *v* Ling, 68 Cal. 324; Jones *v.* People, 3 Ill. 477; State *v.* Ross, 4 Ind. 541; State *v.* Kite, 81 Mo. 97; State *v.* Pinger, 57 Mo. 243; State *v.* Hein, 50 Mo. 362; State *v.* Gardner, 2 Mo. 23; State *v.* Grassle, 74 Mo. App. 313; State *v.* Latshaw, 63 Mo. App. 620; State *v.* Hoit, 23 N. H. 355; State *v.* Buxton, 2 Swan (Tenn.) 57; Jacobs *v.* Com., 2 Leigh (Va.) 709. And the indictment should allege the act to be wilful, not that the defendant wilfully did an illegal act, as the latter allegation is bad on demurrer. State *v.* Gardner, 2 Mo. 23. Where the indictment was against a county court justice for an abuse of public trust in voting for a certain appropriation and charged that "well knowing the appropriation and payment were illegal," etc., "he knowingly and feloniously did vote the said illegal appropriation," it was held insufficient. That he was actuated by some dishonest or corrupt motive should have been stated. State *v.* Pinger, 57 Mo. 243.

1. *California.* — Any county officer charged with the receipt, safe keeping, transfer or disbursement of public moneys, who wilfully omits or refuses to pay over to any officer or person authorized by law to receive the same any money received by him under any duty imposed by law so to pay over the same, is punishable. Pen. Code (1897), § 424

2. Under this information the defendant was found guilty, but judgment was arrested in the superior court on the ground that the facts that the defendant was an officer and had received and had in his hands the moneys mentioned were not positively alleged, but were merely recitals, and that the statement that the moneys so in his hands were "public moneys" was a conclusion of law. On appeal to the supreme court, however, it was held that the superior court erred in arresting the judgment, as the information was sufficient.

3. The matter to be supplied within [ ] will not be found in the reported case.

lic moneys theretofore received by him in his official capacity, as such clerk, during the said official term as aforesaid, the sum of *four thousand four hundred and twenty-two and thirty-six one-hundredths* dollars, money of the United States of America, and it being his duty imposed by law to transfer and pay over to his successor in office in the office of county clerk of said county, one *W. M. Gassaway*, he, the said *M. D. Hamilton*, did willfully, unlawfully, fraudulently, and feloniously, omit and refuse, neglect, and fail to pay over the said sum of money to the said *W. M. Gassaway*, he, the said *Gassaway*, being then and there the clerk of said county as aforesaid, and being the officer and person authorized by law to demand and receive the same as the successor in the office of said county clerk, to said *M. D. Hamilton*; the demand for the transfer and payment of the said sum of money having then and there been made of the said *M. D. Hamilton* by the said *W. M. Gassaway*, clerk of said county and successor in the said office as aforesaid; the said omitting and refusing, neglecting, and failing to transfer and pay over the said money and moneys being contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of *California*.

[(*Signature of attorney and indorsements as in Form No. 10816.*)][1]

b. Against Clerk of Court.

(1) For Failing to Publish Financial Report of Condition of Affairs of County.

Form No. 16771.[2]

(*Venue and title of cause as in Form No. 10682.*)

The grand jury of *Carroll* county, in the name and by the authority of the state of *Arkansas*, accuse *John Doe* of the crime of malfeasance in office, committed as follows, viz:

The said *John Doe*, on the *thirtieth* day of *June*, one thousand eight hundred and *ninety-nine*, then and there being the duly elected, qualified and acting clerk of the *County* Court of said *Carroll* county, did, as such clerk, make an annual settlement with *Richard Roe*, the collector of said *Carroll* county, and he, the said *John Doe*, did fail and neglect for *thirty* days after the making of said settlement to publish in some newspaper published in said *Carroll* county, there being a newspaper then published in said county, a full and complete financial report of the condition of affairs of said county, giving its indebtedness, its source of revenue, the amount expended for all purposes during the fiscal year ending the *thirtieth* day of *June*, one thousand eight hundred and *ninety-nine*, the amount from all sources for all purposes collected, and the financial condition of each school district in said county, against the peace (*concluding as in Form No. 10682*).

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *Arkansas.*—Sand. & H. Dig. (1894), §§ 6668, 6715.

In Words of Statute.—It is sufficient to charge the offense in the substantial words of the statute without further explanation. Moose *v.* State, 49 Ark. 499.

(2) For Failing to Turn Over to Successor Money Received by Him as Such Officer.

Form No. 16772.[1]

(Precedent in State *v.* Assmann, 46 S. Car. 558.)[2]

The State of *South Carolina*,
County of *Lexington*.

At a Court *of General Sessions*, begun and holden in and for the county of *Lexington*, in the state of *South Carolina*, at *Lexington* Court House, in the county and state aforesaid, on the *third Monday* of *September*, in the year of our Lord one thousand eight hundred and *ninety-five*, the jurors of and for the county aforesaid, in the state aforesaid, upon their oath present: That *William J. Assmann*, late of the county and state aforesaid, on the *first* day of *April*, in the year of our Lord one thousand eight hundred and *ninety*, and on divers other days since said day, and up to the *eighth* day of *December*, in the year of our Lord one thousand eight hundred and *ninety-one*, with force and arms unlawfully did commit official misconduct, in this, that he, the said *William J. Assmann*, was duly elected clerk of the court *of common pleas and general sessions* of *Lexington* county, at the regular general election in the year *1888*, and duly qualified as such within the time required by law, and entered upon and continued to discharge the duties of said office up to and until the *eighth* day of *December*, in the year of our Lord one thousand eight hundred and *ninety-one*, at which time one *Isaiah Haltiwanger* succeeded him, the said *William J. Assmann*, as clerk of the court *of common pleas and general sessions* of the county of *Lexington* aforesaid, and entered upon the discharge of the duties of said office. And at that time aforesaid, to wit: on the *eighth* day of *December*, in the year of our Lord one thousand eight hundred and *ninety-one*, the said *William J. Assmann* then and there had and held in his hands a certain sum of money, to

1. *South Carolina.* — It shall be the duty of the clerk of the court of common pleas intrusted with funds by virtue of his office upon retiring from office to turn over to his successor all moneys received by him as such officer, and remaining in his hands as such officer, within thirty days from the time when his successor shall have entered upon the duties of his office, and any public officer neglecting or refusing obedience to the requisition herein contained shall be guilty of a misdemeanor. Crim. Stat. (1893), § 304.

2. The defendant moved to quash the indictment in this case on the following grounds:

(1) Because it does not state that the offense charged was committed in Lexington county.

(2) Because it does not allege that the money charged not to have been turned over was ever received by the defendant.

(3) Because it does not charge that defendant neglected or refused to turn over moneys in his hands to his successor in office.

(4) Because it charges defendant with not turning over to his successor moneys remaining in his hands of one certain estate named, whereas indictment lies only for not turning over all the moneys remaining in his hands as clerk.

The motion was refused, and on appeal such ruling was sustained. The defendant was convicted.

That defendant failed to turn over money to his successor is a sufficient allegation. It is equivalent to an allegation in the words of the statute that defendant "neglected or refused" so to do. State *v.* Assmann, 46 S. Car. 554.

wit: the sum of $1,926.45, which had been received [by][1] him, the said *William J. Assmann*, as clerk as aforesaid, in proceedings had in a case entitled *Ex parte E. E. Fort*, as administratrix of the estate of *Hugh L. Boyd*, deceased, *in re E. E. Boyd*, as administratrix, as aforesaid, plaintiff, v. *Mary L. Lee*, as executrix, and others, defendants, which said sum of money the said *William J. Assmann*, upon the succession of him, the said *Isaiah Haltiwanger*, to the office aforesaid, at the time aforesaid, and within *thirty* days thereafter, he, the said *William J. Assmann*, [then and there][2] failed to pay over to his successor in office as clerk of the court *of common pleas and general sessions* of *Lexington* county, to wit: to the said *Isaiah Haltiwanger*, the aforesaid sum of $1,926.45, paid him as clerk aforesaid, under the proceedings aforesaid. Against the form of the statute in such case made and provided, and against the peace and dignity of the state.

P. H. Nelson, Solicitor.

c. Against County Commissioners, for Failing to Act with Building Committee in Erection of Court-house.

Form No. 16773.[3]

(Precedent in Knight *v.* State, 54 Ohio St. 366.)[4]

The State of *Ohio*, *Wood* County. } ss. In the Court *of Common Pleas*, *Wood* County, *Ohio*, of the Term of *February*, in the Year of our Lord eighteen hundred and *ninety-five*.

The jurors of the grand jury of the state of *Ohio*, within and for the body of the county of *Wood*, impaneled, sworn, and charged to inquire of crimes and offenses committed within the said county of *Wood*, in the name and by the authority of the state of *Ohio*, on their oaths do find and present that *Jacob Stahl*, *Samuel Knight* and *James Gibson*, late of said county, on the *3d* day of *May*, in the year of our Lord eighteen hundred and *ninety-three*, in said county of *Wood* and state of *Ohio*, were then and there the county commissioners in and for said county, having been duly and legally elected and duly qualified to perform the duties of said office of county commissioner during the term of office to which they had been severally elected as aforesaid; that said *Jacob Stahl*, *Samuel Knight*, and *James Gibson* had for a long time before said *3d* day of *May*, A. D. 1893, been, and for a long time thereafter continued to be, the county commissioners in and for said county, duly elected and qualified as aforesaid, and the said *Samuel Knight* and *James Gibson* still continue to be, and now are, county commissioners in and for said county, and are acting in that official capacity; that said *Jacob Stahl*, *Samuel Knight*,

1. The word "by" was accidentally omitted in the indictment set out in the report.

2. The words within [ ], although held by the court unnecessary, have been added to make the venue more certain with reference to the turning over of the money to the succeeding clerk.

3. *Ohio.* — Bates' Anno. Stat. (1897), § 6915.

4. The indictment in this case was held bad on demurrer, because the place where the offense was committed was not alleged. This defect has been cured in the form set out in the text.

and *James Gibson*, as such county commissioners of said *Wood* county, *Ohio*, acting in their said official capacity, did on said *3d* day of *May*, 1893, resolve upon and declare their intention to erect a new courthouse in and for said county of *Wood* and state of *Ohio*, under and by virtue of the provisions of an act of the general assembly of the state of Ohio entitled "An act to authorize the commissioners of Wood county, Ohio, to build a courthouse," which said act was passed and took effect on the 2d day of February, A. D. 1893. That thereupon on said *3d* day of *May*, 1893, said *Jacob Stahl*, *Samuel Knight*, and *James Gibson*, as such county commissioners of said county, as aforesaid, [at said county, as aforesaid,] did unlawfully, willfully, knowingly, and corruptly make and enter into a certain contract with a partnership then and there doing business under the firm name and style of *Yost & Packard*, whereby they employed the said *Yost & Packard* to make the plans and specifications for, and supervise the erection of said new courthouse; that prior to said last named date, to wit: on the *28th* day of *February*, A. D. 1893, the judges of the *circuit* court in and for said county of *Wood*, and state of *Ohio*, had duly and legally appointed *Earl W. Merry*, *Frank A. Baldwin*, *Edward B. Beverstock*, and *John Ault* as the building committee, under and in accordance with the provisions of the aforesaid act of the general assembly of the state of *Ohio*, to act and vote with the aforesaid county commissioners in procuring, making and approving plans, estimates and specifications for said courthouse, and in determining all questions in connection with the erection of said courthouse, all of which the said *Jacob Stahl*, *Samuel Knight*, and *James Gibson*, as such county commissioners of said county, as aforesaid [at said county aforesaid], unlawfully, knowingly, willfully and corruptly failed, neglected, omitted and refused to act with the aforesaid building committee in the procuring of said plans and specifications for said courthouse, and unlawfully, knowingly, willfully, and corruptly refused to permit the aforesaid building committee to act with or to vote with them, the said *Jacob Stahl*, *Samuel Knight*, and *James Gibson*, as such county commissioners of said county as aforesaid, in procuring the said plans and specifications for said courthouse, and in making the aforesaid contract therefor, and unlawfully, knowingly, willfully, and corruptly prevented the aforesaid building committee from in any manner acting or voting or participating in the procuring of said plans and specifications for said courthouse, and in providing for the supervision of the erection thereof, and they, the said *Jacob Stahl*, *Samuel Knight*, and *James Gibson*, as such county commissioners as aforesaid, in the manner and by the means hereinbefore stated, and without the co-operation therein by the aforesaid building committee, did unlawfully, knowingly, willfully and corruptly make and enter into the aforesaid contract with said firm of *Yost & Packard*, and caused the aforesaid plans and specifications for said courthouse to be made by the said firm of *Yost & Packard*, and did commence and proceed with the erection of said courthouse, and did cause the work of the erection and construction of said courthouse to be done under the supervision of said firm of *Yost & Packard*. And so the jurors aforesaid, on their oaths afore-

said, do find and say that the said *Jacob Stahl*, *Samuel Knight*, and *James Gibson*, being county commissioners as aforesaid, are guilty of misconduct in office in the manner and form aforesaid. Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Ohio*.

[(*Signature and indorsements as in Form No. 10713.*)][1]

d. Against Judge or Magistrate.[2]

(1) For Committing to Prison Without Jurisdiction So to Do.

Form No. 16774.

(Whart. Prec. Ind. & Pl. (1857), No. 897.)

(*Commencing as in Form No. 10678*) that on (*Here state time*) at (*Here state place*), one *Charles Hatch*, then being one of the constables of the said parish, brought one *Wilbur White* before *Jeremiah Mason*, Esquire, then and yet being one of the justices of our said Lady the Queen, assigned to keep the peace of our said Lady the Queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdeeds committed in the said county; and the said *Wilbur White* then and there was charged before the said *Jeremiah Mason* with having committed a certain supposed misdemeanor, in having vilified the character and hurt the trade of one *Samuel Small*, of the parish aforesaid, miller; and the said *Wilbur White* was then and there examined before the said *Jeremiah Mason*, as such justice aforesaid, touching the said supposed offense so to him charged as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said *Jeremiah Mason*, late of the parish aforesaid, in the county aforesaid, Esquire, being such justice as aforesaid, wickedly and maliciously contriving and intend-

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **Insufficient Indictment Against Magistrate for Demanding Excessive Costs.** — In Oliveira *v.* State, 45 Ga. 555, is set out the following indictment:

"*Georgia* — *Chatham* County:

The grand jurors, chosen, selected and sworn for the county of *Chatham*, to-wit: ——; in the name and behalf of the citizens of *Georgia*, charge and accuse *William D. Oliveira*, a Notary Public and ex officio Justice of the Peace of the county and state aforesaid, with the offense of malpractice in office. For that the said *William D. Oliveira*, in the county of *Chatham* and state of *Georgia* aforesaid, on the *16th* day of *May*, 1870, while exercising the functions, and in the administration and under color of his said office of Notary Public and ex officio Justice of the Peace, did then and there willfully and knowingly demand of and from one *James Jenkinson* the sum of $*9.48* in the paper currency of the United States, as costs in a certain cause, wherein a possessory warrant for the recovery of a Newfoundland dog had been sued out against the said *James Jenkinson* by one *Frank Lyons*, and which had been heard and judgment rendered by him, the said *William D. Oliveira*, as Notary Public and ex officio Justice of the Peace, and which said sum of $*9.48* was more costs than he was entitled to by law for the said services rendered by him in said cause, contrary to the laws of said state, the good order, peace and dignity thereof."

This indictment was held insufficient for failing to state what the legal costs were, and how much he took more than legal costs. The court said: "Properly it ought to be stated what service was done and the cost for each item as fixed by law, and then allege that he took more and how much more."

ing to oppress, injure and aggrieve the said *Wilbur White* in this behalf, and to put him to great charge and expense, and to cause him to undergo and suffer great pain, torture and anguish of body and mind, afterwards, to wit, on the day and year aforesaid, at (*Here state place*), did order and direct that the said *Wilbur White* should find sureties for his personal appearance at the next General Court *of Sessions of the Peace* of our said Lady the Queen to be holden in and for the said county of (*Here state county*), to answer the said charge; and because the said *Wilbur White* did not and could not conveniently find such sureties as aforesaid, he, the said *Jeremiah Mason*, being such justice as aforesaid, wickedly and maliciously contriving and intending as aforesaid, wrongfully, unjustly and maliciously and contrary to the laws of this realm, then and there (by virtue and color of a certain warrant under his hand and seal as such justice as aforesaid) did commit the said *Wilbur White* a prisoner to a certain prison called the House of Correction, situate at the parish aforesaid, in the county aforesaid, to be there safely kept until he, the said *Wilbur White*, should find such sureties as aforesaid, and until he should be fully examined according to the premises; and then and there ordered, directed and commanded the said keeper of the said prison to keep the said *Wilbur White* under close confinement in the said prison, and to deny him the use of pen, ink and paper, and to allow no letter to be delivered to or from the said *Wilbur White*, and also to allow no person to see or speak to him the said *Wilbur White*. And the jurors aforesaid, upon their oaths aforesaid, do further present that the said *Jeremiah Mason*, by virtue of and under color of the warrant aforesaid, afterwards, to wit, on the day and year aforesaid, and from thence for a long space of time, to wit, for the space of *ten* days then next following, at the parish aforesaid, in the county aforesaid, wrongfully, unjustly and maliciously, and contrary to the laws of this realm, did cause and procure the said *Wilbur White* to be closely confined and imprisoned in the said prison, and to be denied the use of pen, ink and paper, and to be restrained from all communication with his relations and friends, to wit, at the parish aforesaid, in the county aforesaid, whereby the said *Wilbur White*, during all that time underwent and suffered great pain, torture and anguish of body and mind, and was deprived of his liberty and prevented from finding such sureties as aforesaid, and was put to great charge and expense in and about obtaining his discharge and release from the said commitment and imprisonment; to the great scandal of the administration of justice in this kingdom, in contempt of our said Lady the Queen and her laws, to the evil example of all others, and against (*concluding as in Form No. 10679*).

(2) For Failing to File Abstract of Misdemeanors Tried.

Form No. 16775.[1]

1. *Arkansas.*— Sand. & H. Dig. (1894), §§ 1756, 1758, provide for punishment of any justice of the peace who fails to file abstract of all the misdemeanors tried before him, with the clerk of his county, on or before the first day of the succeeding term of the circuit court.

(Precedent in McClure *v.* State, 37 Ark. 427.)[1]

[(*Title of court and cause as in Form No. 10682.*)][2]

The grand jurors of the state of *Arkansas*, duly selected, empaneled, sworn and charged to inquire in and for the body of the county of *Nevada*, on their oath, present that one *W. R. McClure*, late of said county, on the *first* day of *August*, 1881, with force and arms, in the county aforesaid, then and there being a Justice of the Peace of *Caney* township, in said county, did, on or before said day, the same being the day fixed by law for the commencement of the *Circuit* Court of said county, for the present term thereof, and since hitherto has failed to file with the county clerk of said county an abstract of all misdemeanors tried before him, the said *W. R. McClure*, as said Justice of the Peace, since the last term of said court, giving the style of the case, the nature of the offense, how he obtained jurisdiction thereof, whether the offender was acquitted or convicted, and if convicted, the amount of the fine or punishment imposed.

And the grand jurors aforesaid, on their oaths aforesaid, do say that the said *W. R. McClure*, as Justice of the Peace as aforesaid, is guilty of nonfeasance in office, in manner and form aforesaid, contrary [to the form of the statute in such cases made and provided, and against the peace (*concluding as in Form No. 10682*).][3]

(3) For Failing to Proceed Against Person Carrying Weapons.

Form No. 16776.[4]

(*Venue and title of cause as in Form No. 10682.*)

The grand jury of *Izard* county, in the name and by the authority of the state of *Arkansas*, accuse *John Doe* of the crime of nonfeasance in office, committed as follows, viz:

That said *John Doe* on the *first* day of *January*, one thousand eight hundred and *ninety-nine*, in the county and state aforesaid, then and there being a duly elected, commissioned and qualified justice of the

1. A demurrer to the indictment in this case was held correctly overruled by the trial court, on the ground that indictment contained "an averment of every fact necessary to constitute the offense, and with sufficient certainty and distinctness."

2. The matter to be supplied within [ ] will not be found in the reported case.

3. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

4. *Arkansas.* — Any justice of the peace in the state, who, from his own knowledge, or from legal information, knows or has reasonable grounds to believe any person guilty of a violation of the provisions of an act relating to the carrying of weapons, and shall fail or refuse to proceed against such person, shall be deemed guilty of a nonfeasance in office. Sand. & H. Dig. (1894), § 1502.

This form is substantially the indictment in State *v.* Graham, 38 Ark. 519. Some changes have been made, however, to meet the objections of the court to that indictment, which was held insufficient.

Source of Defendant's Information. — Where the defendant has no personal knowledge of the commission of the offense, the indictment must charge that information of the commission of the offense was given defendant on the oath of some person, and to charge in the words of the statute that defendant had legal information is insufficient. State *v.* Graham, 38 Ark. 519.

peace in *Melborne* township, in said county and state, and then and there having personal knowledge that one *Richard Roe*, within said township of *Melborne*, committed the offense of carrying as a weapon a bowie-knife, contrary to the statute of the state of *Arkansas* in such case made and provided, unlawfully did fail to proceed against the said *Richard Roe*, as required by law, against (*concluding as in Form No. 10682*).

(4) For Issuing Warrant Without Oath, Using Falsely the Name of Third Party as Prosecutor.

Form No. 16777.[1]

(Whart. Prec. Ind. & Pl. (1857), No. 900.)

(*Commencement as in Form No. 10724*) that *Abraham Kent*, being a justice of the peace in and for the county of *Albemarle*, duly commissioned and sworn, on (*Here state time*), at (*Here state place*), out of malice and evil disposition towards a certain *Irving Copeland*, a surveyor of the highway, and with a wicked and malicious intent to disquiet, defraud and oppress the said *Irving Copeland*, and falsely, wickedly and maliciously to cause the said *Irving Copeland* to be put to costs and expenses, unjustly, wickedly, maliciously and unlawfully wrote, signed and issued under his own hand, as such justice of the peace, a certain warrant or summons, to a constable directed, commanding him to summon the said *Irving Copeland* to appear before him, the said *Abraham Kent*, to answer to a certain complaint and information of a certain *James Kirby*, made against him the said *Irving Copeland*, for not keeping a road (*describing it*), in repair, and upon that warrant or summons caused the said *Irving Copeland* to appear before him, the said *Abraham Kent*, as such justice of the peace, to answer the complaint aforesaid, and upon a hearing therein did not acquit the said *Irving Copeland* of the complaint aforesaid, but unlawfully, corruptly and wickedly adjudged the said *Irving Copeland* to pay the costs of the same; whereas, in truth and in fact, the said *James Kirby* never did make to the said *Abraham Kent*, nor to any other justice of the peace, the complaint or information aforesaid against the said *Irving Copeland*, nor did the said *James Kirby* nor any other person direct the said prosecution, but the said *Abraham Kent* falsely and wickedly used the name of the said *James Kirby* without his knowledge, and against his directions, in contempt of his the said *Abraham Kent's* oath and duty, as a justice of the peace, to the evil example of persons in authority, and against (*concluding as in Form No. 10724*).

(5) For Neglecting to Read the Riot Act.

Form No. 16778.

(Whart. Prec. Ind. & Pl. (1857), No. 898.)

(*Commencing as in Form No. 10812*) that on (*Here state time*) at

1. This is the indictment in the case of Wallace *v.* Com., 2 Va. Cas. 130. In that case there was a judgment against the defendant.

(*Here state place*), divers wicked, seditious and evil disposed persons to the number of *fifty* and more, whose names are at present unknown to the said attorney-general, with force and arms unlawfully, riotously and tumultuously assembled themselves together, to the disturbance of the public peace, tranquillity, order and government of this realm, and to injure and destroy the properties of divers quiet and peaceable subjects of our said lord the king; and being so assembled, did then and there unlawfully, riotously, tumultuously and with force, feloniously and against the form of the statute in such case made and provided, begin to demolish and pull down the dwelling-house of *Robert Roe*, there situate and being, and did also then and there unlawfully, riotously and tumultuously injure and destroy the household furniture and effects of divers quiet and peaceable subjects of our said lord the king, whose names are at present unknown to the said attorney-general, and commit and perpetrate other outrages and enormities; and the said attorney-general of our said lord the king for our said lord the king, giveth the court here to understand and be informed that *James Green*, late of *London* aforesaid, esquire, at the time of the said unlawful, riotous and tumultuous assembly, to wit, on (*Here state time*) and before and afterwards, was mayor of the City of *London* aforesaid, and also one of the keepers of the peace and justices of our said lord the king, assigned to keep the peace and also to hear and determine divers felonies, trespasses and other misdemeanors committed within the said City of *London*, that is to say, at (*Here state place*); and that the said *James Green*, being such mayor and justice of the peace as aforesaid, well knew of and was personally present at the time and place of the said unlawful, riotous and tumultuous assembly, and whilst the said persons so unlawfully, riotously and tumultuously assembled were committing and perpetrating the aforesaid felony, injuries, outrages and enormities, to wit, on (*Here state time*), at (*Here state place*); and it was then and there the duty of the said *James Green*, as such mayor and justice of the peace as aforesaid, for the dispersing of the persons so unlawfully, riotously and tumultuously assembled as aforesaid, and the suppressing and putting an end to the said unlawful, riotous and tumultuous assembly, to have then and there made or caused to be made proclamation in the manner prescribed and directed in and by an act of Parliament, made in the Parliament of the lord George the First, late king of Great Britain, etc., at a session thereof holden at Westminster in the county of Middlesex, in the first year of his reign, entitled "an act for preventing tumults and riotous assemblies, and for the more speedy and effectual punishing the rioters." And the said attorney-general of our said lord the king for our said lord the king, giveth the court here further to understand and be informed, that the said *James Green*, being such mayor and justice of the peace as aforesaid, and well knowing of the said unlawful and tumultuous assembly, and being so present as aforesaid, but disregarding his duty as such mayor and justice of the peace as aforesaid and the directions contained in the said act of Parliament for the suppressing of tumults and riots, did not at any time during the said unlawful, riotous and tumultuous assembly, make or cause to be made proc-

lamation in the manner prescribed and directed by the said act of Parliament, but then and there, to wit, on (*Here state time*) at (*Here state place*), wilfully, obstinately, and contemptuously neglected, refused and omitted to make or cause to be made proclamation in the manner prescribed and directed by the said act of Parliament, and thereby then and there unlawfully permitted and suffered the said persons so unlawfully, riotously and tumultuously assembled as aforesaid, to be and continue there unlawfully, riotously and tumultuously assembled as aforesaid, for divers, to wit, *four* hours, doing, committing and perpetrating the said felony, injuries, outrages and enormities, contrary to the duty of him the said *James Green* as such mayor and justice of the peace as aforesaid, in contempt (*concluding as in Form No. 10812*).

(6) For Refusing to Deliver Transcript to Party Demanding It.

Form No. 16779.[1]

(Precedent in Bailey *v.* Com., 5 Rawle (Pa.) 59.)[2]

[(*Title of court as in Form No. 10716.*)][3]

The grand inquest [of the commonwealth of Pennsylvania, inquiring in and for the body of the county of *Bucks*, upon their oaths and solemn affirmations respectively,][4] do present, that *William Bailey*, late of the county aforesaid, *yeoman*, being a justice of the peace in and for the district numbered *six*, composed of the townships of *Buckingham* and *Solebury*, in the said county of *Bucks*, duly commissioned and sworn to do the duties of the said office with fidelity and according to law, a certain suit was commenced and instituted before him, as such, of which suit, and of the cause of action thereof, he lawfully had jurisdiction and cognizance, wherein a certain *John Bye* was plaintiff, and a certain *Francis Campbell* was defendant, and in which suit the said *William Bailey*, as a justice of the peace, entered judgment; and that on the *14th* day of *July*, in the year of our Lord 18*36*, at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., he the said *William Bailey*, as a justice of the peace, did unlawfully refuse to make out a copy of his proceedings at large in the said suit and deliver the said copy duly certified by him to the said *Francis Campbell*, the defendant in the suit; he the said *Francis Campbell*, having then and there required and demanded the same of the said *William Bailey* as a justice, and he the said *Francis Campbell* then and there did tender unto him the said *William Bailey*, as a justice of the peace, *eighteen and three-quarter* cents, the just and legal fee of him, the said *William*, for his services in that behalf aforesaid: to the great hindrance and obstruction of public justice, contrary to the form of the act of assembly in such case made and provided, and against the peace and dignity of the commonwealth of *Pennsylvania*.

[(*Signature and indorsements as in Form No. 10716.*)][3]

1. *Pennsylvania.* — Bright. Pur. Dig. (1894), p. 1143, § 111.

2. There was a conviction under this indictment.

3. The matter to be supplied within [ ] will not be found in the reported case.

4. The matter enclosed by [ ] will not be found in the reported case.

e. Against Juror, for Not Appearing at Coroner's Inquest When Summoned.

Form No. 16780.

(Whart. Prec. Ind. & Pl. (1857), No. 917.)

(*Commencing as in Form No. 10678*) that on (*Here state time*) at (*Here state place*), one *Jonathan White* died within the limits of the borough of *Reading*, in the county of *Berks*, a sudden and violent and not natural death, and that the body of the said *Jonathan White* then lay dead in the parish of *St. Giles*, within the limits of the borough aforesaid, whereof information had been then and there duly given to *William Green*, Esquire, who was then the coroner of the borough aforesaid.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that thereupon the said *William Green*, so being such coroner aforesaid, to wit, on the said *tenth* day of *May* in the year aforesaid, in the parish of *St. Giles*, within the limits of the borough aforesaid, duly made his certain warrant in writing, under his hand and seal, and, as such coroner as aforesaid, directed the constables and wardens of the said borough, whereby the said coroner, in Her Majesty's name, charged and commanded them that on sight thereof, they should summon and warn *twenty-four* able and sufficient men of their constable-wick personally to appear before him on the said *twentieth* day of *May*, at *ten* o'clock in the *fore*noon, at the house known by the sign of the four, in *King* street, in the said borough, then and there to do and execute all such things as should be given them in charge, on behalf of our sovereign lady, the queen's majesty, touching the death of the said *Jonathan White*, and that they should make a return of those whom they should so summon.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that *Richard Roe*, of the parish of *St. Giles*, within the borough aforesaid, on the said *tenth* day of *May*, in the year aforesaid, and long before, was an inhabitant householder of the parish of *St. Giles* aforesaid, within the borough aforesaid, and a person able and sufficient to do and execute all such things as might and should be given to him in charge on behalf of our said lady the queen, touching the death of the said *Jonathan White*, and that he, the said *Richard Roe*, then and there was duly summoned and warned personally to appear before the said *William Green*, so being such coroner as aforesaid, at the time and place aforesaid, to do and execute all such things as there might be given to him in charge touching the premises aforesaid. Nevertheless, the said *Richard Roe*, wholly neglecting his duty in that behalf, did not nor would personally appear before the said *William Green*, so being such coroner as aforesaid, but so to do and to do his duty on that behalf then and there totally did neglect and wilfully, obstinately and contemptuously did make default, against the form and effect of the said warrant and summons, in contempt of our said lady the queen, and her laws, and against (*concluding as in Form No. 10678*).

f. Against Member of Board of Legislation of City, for Soliciting Bribe.[1]

Form No. 16781.[2]

(Precedent in State *v.* Bauer, 1 Ohio Dec. 200.)[3]

The State of *Ohio*, *Hamilton* County.

The Court of *Common Pleas* of *Hamilton* County — Term of *July*, in the year eighteen hundred and *ninety-three*. *Hamilton* county, ss:

The grand jurors of the county of *Hamilton*, in the name and by the authority of the state of *Ohio*, upon their oaths, present that on the *tenth* day of *May*, in the year eighteen hundred and *ninety-three*, with force and arms, at the county of *Hamilton* aforesaid, [*Daniel Bauer*] being an officer of the city of *Cincinnati*, county and state aforesaid, to wit, a member of the *Board of Legislation* of said city of *Cincinnati*, duly elected, appointed and qualified, unlawfully and corruptly did solicit from one *Joseph P. Peurrung*, certain money of the amount and value of $*200*, for the purpose and with the intent to influence him, the said *Daniel Bauer*, with respect to his official duty, to wit, with respect to his action, vote, opinion and judgment in a matter then being and pending before him, the said *Daniel Bauer*, as such officer, and the said *Board of Legislation* of said city, of which said *Board of Legislation* the said *Daniel Bauer* was a member, as aforesaid, to wit, the ordinance, theretofore, to wit, upon the *twenty-eighth* day of *April*, in the year 1*893*, offered and presented before said *Board of Legislation* to authorize the *Cleveland, Cincinnati, Chicago and St. Louis Railway Company*, a corporation, to lay a railroad track across *Sixth* street, west of *Carr* street, in said city, and into the building situated upon the southwest corner of *Sixth* and *Carr* streets, which said building was then and there occupied and used by *Peurrung Bros. & Co.*, a firm doing business in the state of *Ohio*, of which said firm the said *Joseph P. Peurrung* was then and there a member, said matter then and there being within the legislative power and authority of said *Board of Legislation*, contrary to the form of statute in such case made and provided, and against the peace and dignity of the state of *Ohio*.

[(*Signature and indorsement as in Form No. 10713.*)][4]

1. For other forms in proceedings against public officers for bribery see the title BRIBERY, vol. 4, p. 1.

2. *Ohio.* — Whoever, being a state or other officer, either before or after his election, solicits or accepts any valuable thing to influence him with respect to his official duty, or to influence him with respect to his act, vote, opinion or judgment, in any matter pending before him, shall be imprisoned. Bates' Anno. Stat. (1897), § 6900.

3. A motion to quash the indictment in this case was overruled. The indictment was held sufficient to charge the offense.

Means of solicitation need not be set out. State *v.* Bauer, 1 Ohio Dec. 199.

Duplicity. — It was held that the use of the four words "action," "vote," "opinion" and "judgment" did not render the indictment bad for duplicity, although at common law probably it would. State *v.* Bauer, 1 Ohio Dec. 199.

4. The matter to be supplied within [ ] will not be found in the reported case.

g. Against Mayor.

(1) For Failing to Notify County Attorney of Violation of Liquor Law.

Form No. 16782.[1]

(Precedent in State *v.* Gluck, 49 Kan. 538.)[2]

[(*Commencing as in Form No. 10825*)][3] on the *7th* day of *April*, 1891, in said county of *Ford* and state of *Kansas*, one *Adolph Gluck* was duly elected mayor of the city of *Dodge City*, *Kas.*, and thereafter said *Adolph Gluck* duly qualified as required by law and entered upon the discharge of the duties of mayor of said city — said city of *Dodge City* then and there being a city of the *second* class, duly organized and incorporated under the laws of *Kansas*; that on the *20th* day of *June*, 1891, the said *Adolph Gluck* was, and ever since has been, the duly-acting and qualified mayor of *Dodge City*, *Kas.*; that on or about the *27th* day of *June*, 1891, in the county of *Ford* and state of *Kansas*, said *Adolph Gluck* became possessed of actual notice and knowledge that one *Chas. Heinz* and one *Chas. Wright* were then and there keeping and maintaining and operating certain rooms on the second floor of the brick building located on the east *19* feet of lot *34* and the east *6* feet of lot *32*, *Front* street, *Dodge City*, *Ford* county, *Kansas*, (the property of said *Adolph Gluck*), as a place where intoxicating liquor was sold, bartered and given away contrary to law, and as a place where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage, and as a place where intoxicating liquors were kept for sale, barter and delivery in violation of law; that said *A. Gluck* then and there and afterwards became possessed of actual knowledge of the persons by whom said described violation of law could be proven; that said *Adolph Gluck* continued to receive, and now has, actual notice and knowledge of said violation of law; that said *Adolph Gluck* has, in said county and state, unlawfully, wholly and entirely failed and neglected to notify the county attorney of *Ford* county of said described violation of law, or to furnish said county attorney with the names of persons by whom said violation could be proven, [contrary to (*concluding as in Form No. 10825*).][4]

(2) For Oppression Under Color of Office by Causing Arrest Without Justification.

1. *Kansas.* — It shall be the duty of a mayor of any city or town, having notice or knowledge of any violation of the provisions of the act relating to intoxicating liquors, to notify the county attorney of the fact of such violation, and to furnish him the names of any witnesses within his knowledge by whom such violation can be proved. Gen. Stat. (1897), c. 101, § 38.

2. The information in this case was held sufficient. The defendant was convicted.

Name of County Attorney. — It is not necessary to allege the particular person who is acting as county attorney. State *v.* Gluck, 49 Kan. 533.

3. The matter to be supplied within [ ] will not be found in the reported case.

4. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

Form No. 16783.[1]

(Precedent in State *v.* Ragsdale, 59 Mo. App. 596.)[2]

[(*Venue as in Form No. 10856.*)][3]

Wm. Palmer, prosecuting attorney within and for the county of *Randolph*, state of *Missouri*, informs the court upon the affidavit of *Joel K. Twyman*, that *James W. Ragsdale*, on or about the *thirtieth* day of *June*, 1893, at the city of *Moberly*, the county of *Randolph* and state of *Missouri*, being then and there the mayor of the said city of *Moberly*, in said county and state, wickedly intending and contriving to injure and oppress affiant and one *A. J. Edwards*, did then and there under color of his said office of mayor of said city of *Moberly*, unlawfully, willfully, maliciously and corruptly order and command one *John Penn*, a policeman of said city of *Moberly*, the said *Penn* in the discharge of his duty as a policeman of said city, being then and there subject to the orders of said *James W. Ragsdale*, as mayor of said city, to arrest and imprison in the city prison of said city this affiant, and the said *A. J. Edwards*; and that in obedience to said unlawful, willful, malicious and corrupt order and command of said *J. W. Ragsdale*, mayor as aforesaid, said policeman, *John Penn*, did unlawfully arrest and take into custody both affiant and said *A. J. Edwards*, said *J. W. Ragsdale* being then and there present; and that while affiant and said *A. J. Edwards* were so unlawfully held in custody by said *John Penn* as aforesaid, said *James W. Ragsdale*, under color of his said office, did unlawfully, willfully and maliciously assault affiant and said *A. J. Edwards*, without legal cause or excuse, with a large cane, and did unlawfully, willfully and maliciously, under color of his said office, then and there disturb the peace of affiant and said *A. J. Edwards* by cursing them in a loud and angry manner, and by threatening to assault them with said cane, and by applying to them the following vile epithets, in the presence of the said *John Penn* and divers other persons, in a loud tone of voice, to wit: "Lock them up,

1. *Missouri.* — Every person exercising or holding any office of public trust who shall be guilty of willful and malicious oppression, partiality, misconduct, or abuse of authority in his official capacity, or under color of his office, shall, on conviction, be deemed guilty of a misdemeanor. Rev. Stat. (1889), § 2100.

2. An objection to the information in this case, on the ground that it charged four distinct statutory offenses in one count punishable under different statutes, and that therefore it was bad for duplicity, was not sustained. The court said: "The information clearly charges but one offense, to wit, willful and malicious oppression in office." The court further said: "The several specific acts relied on as constituting the offense are alleged in the information with sufficient particularity to meet the requirements of the rule of criminal pleading, which is to the effect that if the statute creating the offense, as is the case here, does not specifically define or describe it, then the information or indictment must set out in full all acts of the defendant constituting the offense."

That the acts were corruptly done, and from an improper motive, need not be charged in an information drawn under the above statute. State *v.* Ragsdale, 59 Mo. App. 590; State *v.* Latshaw, 63 Mo. App. 620.

Wilful and Malicious. — The particular act of oppression, misconduct and abuse of authority charged in the indictment or information should be preceded by the allegation that the defendant wilfully and maliciously committed such act. State *v.* Latshaw, 63 Mo. App. 620.

3. The matter to be supplied within [] will not be found in the reported case.

the God damned thieving sons of bitches;" "get in there, you God damned thieving sons of bitches," meaning affiant and said *A. J. Edwards*, which said vile and abusive language said *J. W. Ragsdale* then and there repeatedly bestowed upon affiant and said *A. J. Edwards*, and after so assaulting and insulting affiant and said *A. J. Edwards*, the said *J. W. Ragsdale*, mayor of the city of *Moberly* as aforesaid, without reasonable or justifiable cause therefor, and under color of his said office of mayor as aforesaid, did then and there willfully, unlawfully, maliciously and corruptly imprison and cause to be imprisoned in the city prison of the said city of *Moberly*, this affiant and said *A. J. Edwards* for a long time, to wit, for the space of about one hour and a half; the said *James W. Ragsdale*, mayor as aforesaid, well knowing at the time that he so ordered and commanded the said *John Penn*, policeman, as aforesaid, to arrest affiant and said *Edwards*, and imprison them, and at the time of their arrest and imprisonment in said city prison of said city of *Moberly* as aforesaid, that neither he, the said *Jas. W. Ragsdale*, nor the said *John Penn*, policeman as aforesaid, had any legal warrant for the arrest of this affiant and said *Edwards* or either of them, and that he, the said *Ragsdale*, well knew that this affiant and the said *Edwards*, nor either of them, had committed any violation of law or offense against the laws of the said city of *Moberly*, or the state of *Missouri*, and that they were at said time in the peace of said city and state, and unoffending against the peace and dignity of the state.

Wm. Palmer, Prosecuting Attorney.

[(*Jurat as in Form No. 10856.*)][1]

(3) For Receiving Promise of a Reward for Procuring Appointment to Office.

Form No. 16784.[2]

(*Commencing as in Form No. 10683, and continuing down to* *) the said *John Doe*, on the *first* day of *June*, one thousand eight hundred and *ninety-nine*, at the county and state aforesaid, was then and there an executive officer, namely, the duly elected, qualified and acting mayor of the *city and* county of *San Francisco*, and by virtue of said office president of the board of election commissioners of said city and county, he, the said *John Doe*, did, acting in his official capacity as president of said board of election commissioners, ask, receive and agree to receive, a promise of a reward, to wit, the sum of *one hundred* dollars, lawful money of the United States of America, upon an understanding and agreement that he, the said *John Doe*, in his capacity as president of said board of election commissioners, would procure the appointment of one *Richard Roe* to a position in the office

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *California.* — Every executive or ministerial officer who knowingly asks or receives any emolument, gratuity or reward, or any promise thereof, excepting such as may be authorized by law, for doing any official act, is guilty of a misdemeanor. Pen. Code (1897), § 70.

That the official act was induced by a reward or the promise thereof must be shown. People *v.* Kalloch, 60 Cal. 116.

of the register of voters in said *city and* county of *San Francisco*, said promise not being authorized by law and being for the doing of an official act, as the said defendant then and there well knew, contrary (*concluding as in Form No. 10683*).

h. Against Officer of Court, for Disclosing Fact that an Indictment had been Found by the Grand Jury.

Form No. 16785.[1]

(Ala. Crim. Code (1896), § 4923, No. 36.)

(*Commencing as in Form No. 10680, and continuing down to* *) *John Doe*, an officer of the court, to wit, a deputy-sheriff (*or* a grand juror, *as the case may be*), disclosed the fact that an indictment had been found by the grand jury of said county against one *Richard Roe* before the defendant had been arrested, or had given bail for his appearance to answer thereto, against (*concluding as in Form No. 10680*).

i. Against Person, for Refusing to Serve as Overseer of the Poor.

Form No. 16786.

(Whart. Prec. Ind. & Pl. (1857), No. 918.)

(*Commencing as in Form No. 10678*) that on (*Here state time*) at (*Here state place*), *Abraham Kent*, Esq., and *Willard Jones*, Esq., then and yet being two of the justices of our said lady the queen, assigned to keep the peace of our said lady the queen, in the county of *Monmouth*, and also to hear and determine divers felonies, trespasses and other misdemeanors committed in the same county (one of them being of the quorum), and both dwelling near the said parish of *Abergavenny*, in the county of *Monmouth* aforesaid, did, under their hands and seals, nominate and appoint *Richard Roe*, late of (*Here state place*), then being a substantial householder in the said parish of *Abergavenny*, in the county aforesaid, to be overseer of the poor of the said parish for the year then ensuing, according to the form of the statute in such case made and provided. And that afterwards, to wit, on (*Here state time*) at (*Here state place*) he, the said *Richard Roe*, had due notice of the said nomination and appointment, and was duly and legally served therewith; yet he, the said *Richard Roe*, in the parish aforesaid, in the county aforesaid, *yeoman*, on the said *tenth* day of *May*, in the year aforesaid, and continually afterwards until the day of the taking of this inquisition, during all which time he, the said *Richard Roe*, was and continued and yet is an inhabitant and householder within the same parish, in the county aforesaid, at (*Here state place*), unlawfully, obstinately, and contemptuously did, and yet doth neglect and refuse to take upon himself the execu-

1. *Alabama.* — Any judge, solicitor, clerk, or other officer of court, or any grand juror, who discloses the fact that an indictment has been found, before the defendant has been arrested or has given bail for his appearance to answer thereto, may be indicted. Crim. Code (1896), § 5047.

tion of the said office of overseer of the poor of the said parish of *Abergavenny*, in the said county of *Monmouth*, to which he was so nominated and appointed as aforesaid, or to intermeddle or act therein; against the form of the statute in such case made and provided, and against (*concluding as in Form No. 10678*).

j. Against Public Guardian, for Failure to Make Annual Report to Court.

Form No. 16787.[1]

(Precedent in State *v.* Green, 52 S. Car. 522.)[2]

The State of *South Carolina*,
County of *Georgetown*.

At a Court *of General Sessions*, begun and holden in and for the county of *Georgetown*, in the state of *South Carolina*, at *Georgetown* Court House, in the county and state aforesaid, on the *second* Monday of *February*, in the year of our Lord 1897, the jurors of and for the county aforesaid, upon their oath, present that *Zachariah D. Green*, late of the county and state aforesaid, on the *13th* day of *February*, in the year of our Lord 1896, with force and arms, at *Georgetown*, in the county and state aforesaid, being the judge of probate of said county, and by virtue of said office being the public guardian, and having in his charge certain estates, to wit: the estate of *Robert Spencer*, and the estate of *W. F. Elliott*, deceased, did [wilfully] fail and neglect to make his annual report to the Court *of Common Pleas* in and for said county, at the *first* term thereof, to wit: the *February*, 1896, term, of all his actings and doings as such public guardian, against the form of the statutes in such case made and provided, and against the peace and dignity of the same state aforesaid.

John S. Wilson, solicitor.

1. *South Carolina.* — Any judge of probate who shall wilfully fail or neglect to discharge all the duties and perform all the services which are required of him by law, shall be liable to be indicted as for a misdemeanor. Crim. Stat. (1893), § 308.

Rev. Stat. (1893), §§ 2179, 2183, provide that judge of probate shall be required to act as guardian of the estates of minors, idiots and lunatics in certain cases, and in such cases shall annually, at the first term of the court of common pleas, submit a report.

2. The indictment in this case was quashed because it did not allege that the failure or neglect to make the report was wilful. This defect does not exist in the form set out in the text.

That defendant was a public officer, elected or appointed and duly qualified and commissioned as judge of probate for the county, need not be alleged. The court will take judicial notice of this fact. State *v.* Green, 52 S. Car. 520.

That defendant's authority was limited to a single election or judicial district need not be shown. The court will take judicial notice of the territorial limits within which jurisdiction may be exercised. State *v.* Green, 52 S. Car. 520.

That defendant has been impeached and removed from office need not be shown. Jurisdiction or power to try the defendant does not depend upon such fact. State *v.* Green, 52 S. Car. 520.

That fund was the estate of a minor, idiot or lunatic need not be expressly shown. It is sufficient to allege that it was in defendant's hands as public guardian. This necessarily implies that it was the property of a minor, lunatic or idiot. State *v.* Green, 52 S. Car. 520.

k. Against Revenue Collector, for Soliciting Political Subscription.

Form No. 16788.[1]

(*Commencing as in Form No. 10731, and continuing down to* *) then and there being an employee of a department of the executive service of the United States, to wit, being then and there a duly appointed collector of internal revenue for the *fifth* internal revenue collection district of the state of *Kentucky*, was then and there unlawfully concerned in soliciting a contribution of the lawful money of the United States of America, to wit, a contribution of *one thousand eight hundred and eight* dollars of said money, indirectly, from divers persons whose names are to the grand jurors aforesaid unknown, which said persons were then and there officers of the United States, to wit, internal revenue storekeepers and internal revenue gaugers, and internal revenue storekeepers and gaugers, duly appointed and acting as such within and for the *fifth* internal revenue collection district of the state of *Kentucky*, and the names and numbers of said officers, to wit, said internal revenue storekeepers and said internal revenue gaugers and said internal revenue storekeepers and gaugers are to the grand jurors aforesaid unknown, for a political purpose, to wit, a contribution for the use of the *republican* party; a further description of said political purpose is to the grand jurors aforesaid unknown and cannot therefore be set out. And the said *John Doe* then and there well knew that said contribution which he so then and there was concerned in receiving had been contributed by said storekeepers and said gaugers and said storekeepers and gaugers in said district for the political purpose aforesaid, against the peace (*concluding as in Form No. 10731*).

1. *United States.* — No senator or representative or territorial delegate of the congress, or senator, representative or delegate elect, or any officer or employee of either of said houses, and no executive, judicial, military or naval officer of the United States, and no clerk or employee of any department, branch or bureau of the executive, judicial or military or naval service of the United States, shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription or contribution for any political purpose whatever, from any officer, clerk or employee of the United States, or any department, branch or bureau thereof, or from any person receiving any salary or compensation from moneys derived from the treasury of the United States. Rev. Stat. (Supp. 1883), p. 395, c. 27, § 11.

This indictment is the first count in the indictment in U. S. *v.* Scott, 74 Fed. Rep. 213, in which case the indictment was held sufficient.

Knowledge of Purpose of Contribution. — To charge one with soliciting a contribution from United States officers for a political purpose carries with it by implication a charge that the accused knew the purpose for which the contribution was solicited. U. S. *v.* Scott, 74 Fed. Rep. 213.

Failure to state how defendant was unlawfully concerned in receiving or soliciting the political contributions does not make the description of the offense insufficient. "Being concerned in" is not a legal term or conclusion which needs a specification of facts for completeness of description. U. S. *v.* Scott, 74 Fed. Rep. 213.

Failure to name the particular storekeepers and gaugers from whom contributions were solicited or received does not make the indictment indefinite, where it charges that the names of those persons were to the grand jury unknown. U. S. *v.* Scott, 74 Fed. Rep. 213.

l. Against Road Overseer, for Failing to Make a Public Road Suitable for Travel.

Form No. 16789.[1]

(Precedent in State *v.* Walker, 82 Mo. 489.)[2]

[(*Commencement as in Form No. 10703*)][3] that *James Walker* was on the *1st* day of *October*, 1881, at the county and state aforesaid, and still is road overseer of road district number *six*, in *Moreland* township in said county, and as such had charge of and was overseer on that part of a certain public road leading from *Benton* to *Sylvania*, situate and lying in said road district, and it then and there became and was the duty of the said *James Walker* to keep that part of said public road in said district in proper repair, free of obstructions or other hindrances to the convenient use of the same by the public, and that the small water-courses and wet grounds and washes and gullies in said part of said public road were not bridged or causewayed or filled up in such manner as to enable carriages and wagons to pass with safety in the proper use of said public road as a public highway. And the said *James Walker*, being such road overseer, as aforesaid, unlawfully and willfully failed and neglected to bridge or causeway the wet grounds and to bridge the small water-courses and streams and to fill up the gullies and washes in said public road in such manner as to enable horsemen, carriages and wagons to pass with safety, whereby and by reason whereof the said *James Walker* did unlawfully and willfully fail and neglect to perform and discharge his duties as such road overseer as aforesaid, against the peace and dignity of the state.

[(*Signature and indorsement as in Form No. 10703.*)][3]

m. Against Secretary of State Senate, for Secreting a Bill Passed by the Legislature.

Form No. 16790.[4]

(*Title of court and cause as in Form No. 10704.*)

John Doe is accused by the grand jury of the county of *Lewis and Clarke*, by this indictment, of the crime of secreting a public record, committed as follows:

1. *Missouri.*— Rev. Stat. (1899), §§ 9412, 9664, 9670.

2. The indictment in this case was held to set forth with sufficient certainty an offense under the statute.

3. The matter to be supplied within [] will not be found in the reported case.

4. *Montana.* — Every officer having the custody of any record, map or book, or of any paper or proceeding of any court filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, wilfully destroying, mutilating, defacing, altering or falsifying, removing or secreting the whole or any part of such record, map, book, paper or other proceeding, or who permits any other person so to do, is punishable. Pen. Code (1895), § 230.

This indictment is based upon the facts in the case of State *v.* Bloor, 20 Mont. 574. The indictment in that case was held to charge an offense under section 230 of the penal code.

Manner of Secretion. — An omission to set forth in what manner the legislative bill was secreted by defendant does not render the indictment defective. State *v.* Bloor, 20 Mont. 574.

The said *John Doe* was on the *fourth* day of *January*, A. D. 1897, duly and regularly elected by the Senate of the Fifth Legislative Assembly of the state of *Montana* to the office of Secretary of said Senate, and on said *fourth* day of *January*, A. D. 1897, did take and subscribe the oath prescribed by law to be taken and subscribed by such officer; that on the *fourth* day of *March*, A. D. 1897, at the county of *Lewis and Clarke* aforesaid, said *John Doe* as the duly elected, qualified and acting Secretary of said Senate as aforesaid, had in his custody, possession and control, under and by virtue of his office as secretary aforesaid, a certain record, bill or paper of said Fifth Legislative Assembly of the state of *Montana*, to wit, "Substitute for House Bill No. 185, a bill for an act amending sections 4594 and 4596 of the Political Code of the state of Montana, relative to and reducing the annual compensation of salary for services of county officers in the various classes of counties," which said bill had theretofore been introduced by the ways and means committee of the house of representatives of said fifth legislative assembly of the state of *Montana* and had then and there, at the date aforesaid, to wit, the *fourth* day of *March*, A. D. 1897, duly and regularly passed both houses of the legislative assembly aforesaid, and had come into and was then and there in the hands of the said *John Doe* as secretary as aforesaid, for the purpose of being by him, the said *John Doe*, by virtue of his office as secretary aforesaid, transmitted to the house of representatives of the fifth legislative assembly aforesaid, and he, the said *John Doe*, did then and there, at the county aforesaid, on said *fourth* day of *March*, A. D. 1897, wilfully and feloniously secrete the said record, bill or paper, contrary to (*concluding as in Form No. 10704*).

n. Against Superintendent of Penitentiary, for Failing to Turn Over to His Successor Moneys Received from Hire of Convicts.

Form No. 16791.[1]

(Precedent in State *v.* Neal, 59 S. Car. 259.)[2]

[(*Venue and title of court as in Form No. 10718.*)][3]

At a Court *of General Sessions*, begun and holden in and for the county of *Richmond*, in the state of *South Carolina*, at *Columbia Court House*, in the county and state aforesaid, on the *third Monday* of

1. *South Carolina.* — It shall be the duty of every sheriff, judge of probate, clerk of the court of common pleas, county treasurer, and any other city or county officer entrusted with funds by virtue of his office, upon retiring from office to turn over to his successor all moneys received by him as such officer and remaining in his hands as such officer within thirty days from the time when his successor shall have entered upon the duties of his office, and any public officer neglecting or refusing obedience to the requisition herein contained shall be held guilty of a misdemeanor, and upon conviction shall be liable to a fine of one thousand dollars and imprisonment not exceeding twelve months. Crim. Stat. (1893), § 304.

2. It was held that the ruling of the trial court in sustaining a demurrer to this indictment and ordering the indictment quashed was error. The ruling was reversed.

3. The matter to be supplied within [ ] will not be found in the reported case.

October in the year of our Lord 1899. The jurors of and for the county aforesaid, in the state aforesaid, upon their oath, present that *William A. Neal*, late of the county and state aforesaid, on the *15th* day of *March*, in the year of our Lord 1899, and on divers other days, since said day and up to and including the *15th* day of *April*, in said last mentioned year, with force and arms, at *Columbia Court House*, in the county and state aforesaid, did commit a misdemeanor in this: That he, the said *William A. Neal*, was duly elected superintendent of the state penitentiary, located in said state and county, on the *26th* day of *November*, in the year of our Lord 1892, and duly qualified as such on the *3d* day of *January*, in the year of our Lord 1893, and entered upon and continued to discharge the duties of said office, being elected and qualified from time to time, up to and until the *15th* day of *March*, in the year of our Lord 1899, at which time one *D. J. Griffith* duly and legally succeeded him as superintendent of the state penitentiary aforesaid and entered upon the discharge of duties of said office; and that on the *15th* day of *March*, in the year of our Lord 1899, the said *William A. Neal*, as superintendent as aforesaid, had and held remaining in his hands, entrusted to him by virtue of his office, certain funds and sums of money, to wit: $500, which had been received by him, the said *William A. Neal*, as superintendent as aforesaid, from one *J. S. Fowler* on the *9th* day of *December*, in the year of our Lord 1895, and $244, which he, the said *William A. Neal*, received from the said *J. S. Fowler* by virtue of his office as aforesaid, on the *24th* day of *February*, in the year of our Lord 1897, and $300, which had been received by him, the said *William A. Neal*, by virtue of his office, from one *W. Q. Hammond*, on the *24th* day of *February*, 1897; and $500, which had been received by him, the said *William A. Neal*, by virtue of his said office, from the said *W. Q. Hammond*, on the *27th* day of *November*, in the year of our Lord 1895. All of which said funds and sums of money being derived from the hire of convicts of said penitentiary, the said *William A. Neal*, upon the succession to him of the said *D. J. Griffith* to the office aforesaid on the said *15th* day of *March*, in the year of our Lord 1899, and within *thirty* days thereafter, did neglect and refuse to turn over to his successor in office as superintendent aforesaid, to wit: the said *D. J. Griffith*, at *Columbia*, in the county and state aforesaid, against the form of the statute in such case made and provided, and against the peace and dignity of the state.

J. Wm. Thurmond, Solicitor.

[(*Indorsements.*)[1]][2]

o. Against Supervisor, for Ordering Erection of Bridges, the Cost of Which would Exceed a Certain Sum, Without First Submitting Proposition to Legal Voters.

Form No. 16792.[3]

1. **Indorsements.** — For forms of the proper indorsement to be made upon the indictment see the title INDICTMENTS, vol. 9, Forms Nos. 10746-10791.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. *Iowa.* — The board of supervisors

(Precedent in State *v.* Conlee, 25 Iowa 238.)[1]

[(*Title of court and cause as in Form No. 10693*)][2]

The grand jury of the county of *Webster*, in the name and by the authority of the state of *Iowa*, accuse *Josiah Conlee*, *John Wilson*, *A. Graves*, *G. T. Richey*, *John Linn*, *N. H. Hart*, *A. S. White*, *C. C. Carter*, *D. C. Russell*, *D. W. Prindle*, *C. W. Maher* and *J. M. Henderson*, of the crime of willful misconduct in office in ordering the erection of bridges at a cost of more than $5,000 each, without first submitting a proposition therefor to the legal voters of said county; committed as follows: The said *Josiah Conlee* and others (*naming them*), on the *4th* day of *September*, A. D. 1866, in the county aforesaid, then and there being the supervisors of the county of *Webster*, in the state of *Iowa*, and being convened in session as the board of supervisors of said county, wrongfully, unlawfully and willfully, did order the erection of *three* several bridges within the limits of said county, at a cost exceeding the sum of $5,000 each, and then and there, wrongfully, unlawfully and willfully, did appropriate, of the public money of said county, the sum of $5,000 each, for the erection of *three* several bridges within the limits of said county, and the further sum of $5,000 each, for the abutments and trestle work on said bridges, being a part, parcel and portion of said bridges, without first submitting any proposition therefor to the legal voters of the county of *Webster*, contrary to the prohibition of the statute in such cases made and provided, and in violation of their official duties.

[(*Signature and indorsements as in Form No. 10693.*)][2]

p. Against Chairman of Board of Trustees, for Refusing to Permit Attorney at Law to Cross-examine Witness.

Form No. 16793.[3]

State of *Missouri*, } ss. In the *Circuit* Court of *Knox* County, *Missouri*, *December* Term, A. D. 1896.
County of *Knox*. }

The grand jurors for the state of *Missouri*, summoned from the body of the county of *Knox*, duly impaneled, sworn and charged to

shall not order the erection of a court-house, jail, poor-house, or other building or bridge, when the probable cost would exceed five thousand dollars, until a proposition therefor shall have been first submitted to the legal voters of the county and voted for by a majority of all persons voting for or against such proposition at a general or special election. Code (1897), § 423.

1. Judgment of the district court sustaining a demurrer to the indictment in this case was overruled in the supreme court.

That defendants "were duly elected, legally organized as a board, and legally convened at a legal session," is sufficiently shown by the allegation that the defendants "then and there being the supervisors of the county of Webster, in the state of Iowa, and being convened in session as a board of supervisors of said county, did," etc. State *v.* Conlee, 25 Iowa 237.

That bridges would "probably cost over $5,000 each" is satisfied by an indictment which alleges the actual appropriation of $10,000 to each of three bridges. Although this is not the precise language of the statute, it is equivalent language, and it is enough that equivalent language be used. State *v.* Conlee, 25 Iowa 237.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. *Missouri.* — Every person exercising or holding any office of public trust who shall be guilty of wilful and

inquire within and for the body of the county of *Knox* and state of *Missouri*, on their oath present and charge that *John Doe*, late of the county of *Knox* and state of *Missouri* aforesaid, on the *fifth* day of *December*, A. D. 1896, at and in the county of *Knox* and state of *Missouri* aforesaid, being then and there the duly elected, qualified and acting chairman of the board of trustees of the town of *Hurdland*, in said county of *Knox* and state of *Missouri*, did then and there, at and in the county aforesaid, in his official capacity, and under color of his said office of chairman of the board of trustees of the said town of *Hurdland*, wickedly intending and contriving to injure and oppress one *Richard Roe*, unlawfully, wilfully, maliciously, knowingly and corruptly refuse to allow and permit one *Jeremiah Mason*, a regularly licensed and practising attorney at law of the courts of said state of *Missouri*, to cross-examine a witness produced on the part of the said town of *Hurdland* in a case then pending before the said *John Doe* in his capacity as chairman of the said board of trustees, wherein the said town of *Hurdland* was plaintiff and said *Richard Roe* was defendant, he, the said *John Doe*, then and there well knowing that the said *Jeremiah Mason* was a regularly licensed attorney at law in said state of *Missouri*, and was then and there employed by the said *Richard Roe* as his attorney to defend him, the said *Richard Roe*, in said case, and he, the said *John Doe*, as chairman of the board of trustees as aforesaid, without reason and justifiable cause therefor, and under color of his said office as chairman of the board of trustees aforesaid, did then and there wilfully, unlawfully, maliciously, knowingly and corruptly threaten to impose a fine upon the said *Jeremiah Mason* if he, the said *Jeremiah Mason*, persisted in his attempt to cross-examine the said witness, and he, the said *John Doe*, under color of his said office of chairman of the board of trustees as aforesaid, did then and there, by wilful, unlawful and malicious threats and gross conduct toward the said *Jeremiah Mason*, compel him, the said *Jeremiah Mason*, to withdraw from the defense of the said case, contrary (*concluding as in Form No. 10703*).

III. REMOVAL OR SUSPENSION OF PUBLIC OFFICERS.

1. Affidavit or Information.[1]

a. For Drunkenness.

malicious oppression, partiality, misconduct, or abuse of authority in his particular capacity, or under color of his office, shall, on conviction, be deemed guilty of a misdemeanor. Rev. Stat. (1899), § 2100.

1. Requisites of affidavit or information, Generally. — For the formal parts of an affidavit or information in a particular jurisdiction see the titles AFFIDAVITS, vol. 1, p. 548; INFORMATIONS IN CRIMINAL CASES, vol. 9, p. 768.

Facts showing violation of official duty or other ground for removal must be specifically set forth. Ledbetter *v.* State, 10 Ala. 241; Callahan *v.* State, 2 Stew. & P. (Ala.) 379; Board of Aldermen *v.* Darrow, 13 Colo. 460; Benson *v.* People, 10 Colo. App. 175; Com. *v.* Arnold, 3 Litt. (Ky.) 327; Com. *v.* Rodes, 1 Dana (Ky.) 595; Burt *v.* Iron County, 108 Mich. 523; People *v.* Therrien, 80 Mich. 187; Dullam *v.* Willson, 53 Mich. 392; State *v.* Walker, 68 Mo. App. 110; State *v.* Smith, 35 Neb. 13; State *v.* Sheldon, 10 Neb. 452; People *v.* McGuire, 27 N. Y. App. Div. 593; People *v.* Humphrey, 156 N. Y. 231.

Form No. 16794.[1]

(Precedent in State *v.* Savage, 89 Ala. 2.)[2]

To the Honorable the *Supreme* Court of *Alabama*:

William L. Martin, Attorney-General of the state of *Alabama*, who, for and in the name of the said state in this behalf, prosecutes in his own proper person, comes into the said Hon. *Supreme* Court at *Montgomery*, on the *6th* day of *September*, 1889; and for the said state, and upon the report[3] of a grand jury of the county of *Cherokee* in said state, duly elected, impanelled and sworn, at a regular term of the *Circuit* Court of said county of *Cherokee*, begun and held in all respects according to law, on the *second Monday* in *July*, 1889, which said report was duly made and presented to said court, and was entered on the minutes of said court, a certified copy of which report was, by the clerk of said court, duly transmitted to the said Attorney-General,—gives the court to understand and be informed that *R. R. Savage*, judge of probate in and for the county of *Cherokee*, in the state of *Alabama*, unmindful of the duties of his said office, while in such office, prior to and down to the time of making said report of said grand jury, has become an habitual drunkard, in this: Specification 1. That said *R. R. Savage* has, since the commencement of his term of office as such judge of probate, been addicted to the use of ardent spirits, and has become an habitual drunkard. Specification 2. That the said *R. R. Savage* has, since the commencement of his term of office as such judge of probate, and prior to the making of said report, been addicted to the use of intoxicating liquors, and has become an habitual drunkard. Specification 3. That the said *R. R. Savage*,

1. *Alabama.* — It shall be the duty of the attorney-general to institute proceedings and prosecute the same against any officer liable to impeachment, when it appears from the report of any grand jury that such officer ought to be removed from office for any statutory cause. Crim. Code (1896), § 4887.

2. A motion was made to quash the information in this case, whereupon the plaintiff filed a demurrer to all but four of the objections raised in the motion to quash, and the demurrer and motion were submitted together for the decision of the court. The motion was overruled as to the objections not demurred to and the demurrer was sustained.

Instituted in Name of the State.— Impeachment proceedings shall be instituted in the name of the state of Alabama. Ala. Crim. Code (1896), § 4866.

Commenced by Information.— Impeachment proceedings shall be in the nature of an information. Ala. Crim. Code (1896), § 4866.

Address. — Information shall be addressed to the court before which the trial is to be had. Ala. Crim. Code (1896), § 4868.

Contents. — Information shall specify, with reasonable certainty, the offense, offenses, or other grounds of impeachment, charged against the officer, and shall contain a succinct statement of the facts constituting the matters complained of and a proper prayer for process and relief. Ala. Crim. Code (1896), § 4868.

Signature. — Information shall be signed by the attorney-general or solicitor or by counsel, as the case may be. Ala. Crim. Code (1896), § 4868.

3. **The report of the grand jury** on which the information was based was as follows: "In the discharge of our duties as a grand jury, we find, and do hereby report, that R. R. Savage, judge of probate in and for the county of Cherokee, ought to be impeached and removed from such office, for and on account of his habitual drunkenness while in such office, prior to and down to the time of making this

since the commencement of his term of office as such judge of probate, and prior to the making of said report of said grand jury, has frequently indulged in the excessive use of intoxicating liquors, and from such frequent and excessive use and indulgence thereof has become, and at the date of said report has become, an habitual drunkard. Specification 4. That said *R. R. Savage*, after the commencement of his term of office as such judge of probate, and before the making of said report of said grand jury, was guilty of habitual drunkenness. Wherefore, the Attorney-General aforesaid, for and in the name of the state of *Alabama*, prays the consideration of the court of the premises above set out; that due process of law be awarded against the said *R. R. Savage*, judge of probate as aforesaid, in this behalf; that an order may be made requiring him to appear at a place, and on a day specified in said order, to answer this information; and that the court, upon the hearing hereof, shall render its judgment herein, impeaching the said *R. R. Savage* as judge of probate as aforesaid, and removing him from said office of judge of probate of said county of *Cherokee*, or such other judgment as may seem to the court meet and proper.

[*William L. Martin*, Attorney-General.][1]

b. For Official Misconduct.

Form No. 16795.[2]

(Precedent in Yoe *v.* Hoffman, 61 Kan. 266.)[3]

The state of *Kansas*, county of *Riley*, ss.:

H. A. Perkins, of lawful age, being by me first duly sworn, deposes and says: That he is a resident of *Riley* county, in the state of *Kansas*; that the *Kansas State Agricultural College* is located at *Manhattan*; that *John N. Limbocker* and *C. B. Hoffman* are regents of the *Kansas State Agricultural College*, and have been such regents since *January*, 1897; that the said *John N. Limbocker* and *C. B. Hoffman*, while acting as regents of the said *Kansas State Agricultural College*, have violated the laws governing said body in this, to wit: That the said *John N. Limbocker* has drawn from the treasury as payment for his said services the sum of *fifteen* dollars per month for services in providing means for the students at the college; that said service is not within the act making provision for the payment of the said regents, and said sum has been drawn unlawfully and wrongfully by the said *Limbocker*, all of which the said *Limbocker* well knew; that the said *C. B. Hoffman*, regent as aforesaid, and while acting in such a capacity, aided and abetted the said *John N. Limbocker* in drawing said sum of *fifteen* dollars per month for his alleged services in con-

report." This report was held sufficient. The court said: "No greater fullness of description of the acts, and less accuracy of statement, is required in such report than in an indictment."

1. The matter enclosed by [ ] will not be found in the reported case.

2. *Kansas.* — Gen. Stat. (1897), c. 6, § 33 *et seq.*

3. By reason of the facts stated in the affidavit in this case, the regents were removed from office. The form of notice of removal is set out *infra*, Form No. 16801.

ducting a place where students and others were fed at the said college; that the said *John N. Limbocker* is the president of the board of regents of the said college, and *C. B. Hoffman* its treasurer, and were at the time of drawing the said sums from the treasury; that the said *John N. Limbocker* and *C. B. Hoffman*, while acting as regents of the *Kansas State Agricultural College*, and during the month of *June*, 1897, did with others transact business of vital importance to the said college without a quorum, secretly and unlawfully in this: That they hired teachers, fixed their salaries, made appropriations and did and transacted such other business as came before them without at any time having a quorum to transact business, all in violation of law, and with the full intent and purpose of overriding and thwarting the will of the majority of the members of the board who prior to that time had been present; that said action was in violation of law; that said meetings so held and for the purpose aforesaid, were held, or preliminary meetings were held at the hotel in *Manhattan* and afterwards were entered upon the books of the college; that the records of the said college were so kept by the secretary, *Thos. E. Will*, who is also president of the college, and a subservient tool of the said *Hoffman* and *Limbocker*, that they purport to show on their face that the said meetings were legal and lawful and that a full quorum was present, whereas, in truth and in fact, no such quorum was present, and by this means the said members of the board have falsified the records. And further affiant saith not.

H. A. Perkins.

H. A. Perkins, of lawful age, being duly sworn, says that the matter and statements set out in the foregoing affidavit are true in substance and in fact, as he verily believes.

H. A. Perkins.

Sworn to before me and subscribed in my presence this ——— day of *March*, 1899.

John Clark Hessin, Notary Public.

c. On Account of Disease.

Form No. 16796.[1]

(*Venue and title of cause as in Form No. 10815.*)

Miller County, ss. Be it remembered that *Daniel Webster*, Esquire, prosecuting attorney for the *ninth* judicial circuit of the state of *Arkansas*, who prosecutes for the state of *Arkansas* in this behalf, in his proper person comes here into the said *Miller Circuit* Court, in the county of *Miller* aforesaid, and gives the court here to understand and be informed that on the *third* day of *September*, A. D. 1900, at the general election then and there held in the state of *Arkansas* for the election of the various state officers of said state, and also the various officers of the different counties in said state, as was then

1. This is substantially the form of information set out in State *v.* Whitlock, 41 Ark. 403. A general demurrer to that information was sustained in the circuit court, but the judgment sustaining the demurrer was reversed in the supreme court.

and there required and authorized by the law of said state, *John Doe* was duly elected a justice of the peace of *Texarkana* township in said county of *Miller* for the term of *two* years from the date of such election; that thereafter, to wit, on the *third* day of *October*, A. D. 19*00*, a commission as justice of the peace for said *Texarkana* township was duly granted to the said *John Doe* by *Henry Jackson*, the governor of said state of *Arkansas*; that on said *third* day of *October*, A. D. 19*00*, the said *John Doe* duly qualified as such justice of the peace and took the oath of said office as required by law, and entered upon the discharge of the duties of said office; that the said *John Doe* at the time of his election to said office of justice of the peace as aforesaid, was not and is not now a proper person to be invested with the power and authority of a justice of the peace within the spirit and meaning of the constitution of said state of *Arkansas* and the laws thereunder, in this, that the said *John Doe* is totally and utterly incompetent to hold said office and to exercise the function thereof by reason of the following causes: The said *John Doe*, during the past *twenty* years has been and yet is subject to fits of epilepsy, which are of frequent occurrence; that such fits and afflictions are of so violent a nature as to wholly and entirely incapacitate the said *John Doe* to discharge the duties devolving upon him as such justice with that certainty and efficiency at all times which is indispensable to protect the lives and property and the liberty guaranteed to the citizens of said township of *Texarkana*, and of the said county of *Miller*, against the peace (*concluding as in Form No. 10815*).

Form No. 16797.[1]

(Precedent in Com. *v.* Cooley, 1 Allen (Mass.) 358.)[2]

To the Honorable the justices of the *supreme judicial* court now holden at *Boston*, within the county of *Suffolk* and for the commonwealth of *Massachusetts*:

Be it remembered that, on the *fourteenth* day of *January*, in the year one thousand eight hundred and *sixty-one*, *Stephen Henry Phillips*, the attorney general of the commonwealth, comes into court here and gives this honorable court to be informed that, having been directed by his excellency *John Albion Andrew*, governor of the commonwealth, to inquire into the condition of *George W. Cooley*, the district attorney of the commonwealth for the *Suffolk* district, and to proceed thereon as the interests of the commonwealth and public justice may require, upon due inquiry he finds that, by a derangement and enfeebling of the intellect, the said *George W. Cooley* has been rendered unable to perform any of the duties of his said office for the space of more than *three* months now last past, and that there is no reasonable ground to hope that he will ever be restored to such a condition as will enable him to perform the duties of his

1. *Massachusetts.* — Pub. Stat. (1882), c. 150, § 4, provides for removal on bill, petition or other process to the supreme court, of a district attorney, if sufficient cause be shown therefor and it appears that the public good requires it.

2. A decree was entered in this case, removing respondent from the office of

said office, and therefore that his longer continuance therein is likely to embarrass the administration of public justice.

And the said attorney general further informing showeth unto your honors that it is necessary to the welfare of this commonwealth and the citizens thereof that all its officers should severally perform the high and important functions assigned them by the constitution and laws with promptness and efficiency, and that whenever, by reason of age or infirmity, they are unable so to do, they ought to retire to private life, that their places may be filled by new appointments.

And the said attorney general further informing showeth unto your honors that, in and by the statutes of this commonwealth, district attorneys, as well as other public officers therein specially named, may be removed from office by a majority of the justices of the *supreme judicial* court upon bill, petition or other process, if sufficient cause is shown therefor, and it appears that the public good requires such removal.

Wherefore the said attorney general further informing shows that sufficient cause does exist for the removal of said *George W. Cooley*, and that the public good requires the same; and he prays this honorable court, after due notice given, and a hearing of such proofs as may be exhibited to them, will be pleased to cause said *George W. Cooley* to be removed from the office of district attorney of the said commonwealth for the *Suffolk* district; and that the process of this honorable court may also forthwith issue requiring said *Cooley*, or such person as this court may order to appear in his behalf, to appear at a time and place therein to be named, to show cause, if any there is, why said *Cooley* should not be removed as aforesaid.

Stephen H. Phillips, Attorney General.

2. Citation by Governor to Show Cause Why Public Officer should Not be Removed.

Form No. 16798.

(Precedent in Att'y Gen. *v.* Jochim, 99 Mich. 363.)[1]

Executive Office,

Lansing, *February 6*, 1894.

To *John W. Jochim*, Secretary of State, *Joseph F. Hambitzer*, State Treasurer, and *John G. Berry*, Commissioner of the State Land Office, Composing the Board of State Canvassers.

Gentlemen: Public charges have been made, and have come to my knowledge, that gross errors were made in the canvass of the returns of votes given in the various counties at the election held in this state on the *first Monday* in *April*, A. D. 1893, for and against the adoption of Joint Resolution No. 10, approved *March 9*, 1893, entitled "Joint

district attorney. The decree is set out *infra*, Form No. 16800.

1. The defendants were removed by the governor, and upon a refusal to surrender their respective offices, informations in the nature of quo warranto were filed, which culminated in judgments of ouster.

Resolution proposing an amendment to section one (1), article nine (9), of the Constitution of this state, relative to the salaries of state officers," by which it was made to appear that such amendment to the Constitution had been ratified and approved by a majority of the electors voting thereon, whereas, it is alleged that, by a true and correct canvass of the returns of such votes, the said amendment was defeated. Under the power granted and duty imposed upon me, as Governor of this state, by section eight (8) of article twelve (12) of the Constitution, it became necessary to inquire into the administration and condition of your several offices, and especially into the manner in which you have, severally and collectively, performed the duties of the Board of State Canvassers, of which you are ex officio members, for the purpose of determining whether you have been guilty of gross neglect of duty in the matter of canvassing the said returns.

You are therefore severally cited and required to appear before me, at the executive office in the city of *Lansing*, on the *15th* day of *February*, 1894, at *1* o'clock in the *after*noon, then and there to answer to the following specific charges, viz:

1. That you, the said *John W. Jochim*, Secretary of State, *Joseph F. Hambitzer*, State Treasurer, and *John G. Berry*, Commissioner of the State Land Office, who are the Board of State Canvassers under the Constitution and laws of this state, were, each and every one of you, guilty of gross neglect of duty, in this: That you did not, nor did either of you, examine the statements of returns of votes from the several counties, filed in the office of the Secretary of State, showing the number of votes cast for and against said proposed amendment to the Constitution relative to the salaries of State officers, by the electors in this state at the election in *April*, 1893.

2. That you were severally guilty of gross neglect of duty, in this: That you did not, nor did either of you, ascertain and determine the result of such vote, nor perform with due and proper care the duties relating to canvassing the statements and returns from the several counties of the votes given at such election for and against said proposed amendment to the Constitution, required of and imposed upon you, as members of the said Board of State Canvassers, by the Constitution and laws of this state.

3. That you were severally guilty of gross neglect of duty, in this: That you made, and suffered to be made, gross errors in the canvass of the statements and returns filed in the office of the Secretary of State of the votes given in the several counties at said election in *April*, 1893, for and against said proposed amendment to the Constitution, by which it was falsely made to appear that such proposed amendment had been approved and ratified by a majority of the electors voting thereon, whereas, by a true and correct canvass of the said statements and returns, the said proposed amendment was defeated.

4. You are further required, then and there, to show cause, why you, and each of you, should not be removed from office for gross neglect of duty.

John T. Rich, Governor.

3. Decree or Judgment Removing Public Officer from Office.

a. For Misconduct in Office.

Form No. 16799.[1]

(Sand. & H. Dig. Ark. (1894), p. 1670, No. 197.)

State of Arkansas, plaintiff,
against
Albert Schwartze, Sheriff of *Pulaski* County, defendant.

It appearing by the verdict that the defendant had been guilty of an offense which creates a forfeiture of his office of sheriff of *Pulaski* County, it is adjudged that the defendant be removed from his office of sheriff of *Pulaski* County, and said office is hereby adjudged to be vacant by said removal.

(*If any other punishment is affixed to the offense, judgment for that punishment should precede the judgment of removal.*)

b. On Account of Disease.

Form No. 16800.[2]

(Precedent in Com. *v.* Cooley, 1 Allen (Mass.) 360.)

Suffolk, ss. *Supreme Judicial* Court, *January* Term, A. D. 1861.

Commonwealth of Massachusetts, by the Attorney General,
v.
George W. Cooley.

And now this *fourth* day of *February*, A. D. 1861, the order of notice upon the above entitled information is returned; and the Honorable *George T. Bigelow*, chief justice of said court, the Honorable *Charles A. Dewey*, the Honorable *Theron Metcalf*, the Honorable *Ebenezer R. Hoar*, the Honorable *Reuben A. Chapman*, associate justices thereof, being present and sitting, it is made to appear to said court that due service hath been made of said order of notice in the manner therein ordered, but said *George W. Cooley*, the respondent therein named, doth not appear, and *Benjamin F. Butler*, Esquire, a counsellor of this court, is by said court appointed guardian ad litem, to appear on behalf of said respondent and represent his interests in the matter of said information, and testimony is heard to prove the allegations thereof. And all and singular the premises being seen and understood, and it being made to appear to said court that the allegations of said information are proved to be true, and that sufficient cause is shown for the removal of said *George W. Cooley* from his said office of district attorney of the Commonwealth for the *Suffolk* district, and that the public good requires said

1. *Arkansas.* — Sand. & H. Dig. (1894), § 2296. The petition in this case is set out *supra*, Form No. 16797.

2. *Massachusetts.* — Pub. Stat. (1882), c. 150, § 4.

removal, therefore it is considered by said court, all of said justices concurring, and they being a majority of the justices of said court, that the said *George W. Cooley* do not in any manner concern himself further about the holding of or exercising the said office of district attorney of the Commonwealth for the *Suffolk* district, but that he be and hereby is removed therefrom, and forejudged and excluded from holding or exercising the same office.

[(*Signature as in Form No. 12069.*)][1]

4. Notice of Removal of Public Officer by Governor.

Form No. 16801.[2]

(Precedent in Yoe *v.* Hoffman, 61 Kan. 269.)

Executive Department, State of *Kansas.*

In the matter of the charges against *John N. Limbocker* and *C. B. Hoffman*, Regents of the *Kansas State Agricultural College.*

Notice of Removal.

In pursuance of law and the findings and report of the committee heretofore appointed to investigate charges in writing made against you by *H. A. Perkins*, filed in this office on the *29th* day of *March*, A. D. 1899, calling in question your official conduct as one of the regents of the *Kansas State Agricultural College*, you are hereby discharged and dismissed from further service as a member of the board of regents of the said *Kansas State Agricultural College.*

Dated at *Topeka*, *Kansas*, this *fifth* day of *May*, A. D. 1899.

W. E. Stanley, Governor.

[(*Address.*)][1]

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *Kansas.* — Gen. Stat. (1897), c. 6, § 33 *et seq.*

The affidavit upon which the removal is based is set out *supra*, Form No. 16795.

PUIS DARREIN CONTINUANCE.[1]

By Harold N. Eldridge.

CROSS-REFERENCES.

For other Pleas Puis Darrein Continuance, see the title ENTRY, WRIT OF, vol. 7, p. 703.

1. Definition and Nature of Plea. — The plea puis darrein continuance is an old French phrase signifying "since the last continuance." McKeen *v.* Parker, 51 Me. 389. And is so called with reference to the ancient practice of continuing a cause by formal entries on the record, the matter of defense being stated to have arisen since the last continuance of the cause. Waterbury *v.* McMillan, 46 Miss. 635. It is applied to a pleading which sets up some matter of defense which has arisen after plea pleaded. Feagin *v.* Pearson, 42 Ala. 332; Irion *v.* Hume, 50 Miss. 419; Waterbury *v.* McMillan, 46 Miss. 635; Pool *v.* Hill, 44 Miss. 306; Whitfield *v.* Whitfield, 44 Miss. 254; Heirn *v.* Carron, 11 Smed. & M. (Miss.) 361; Pemigewasset Bank *v.* Brackett, 4 N. H. 557; Hart *v.* Meeker, 1 Sandf. (N. Y.) 623; Jackson *v.* Ramsay, 3 Cow. (N.Y.) 75; Jackson *v.* M'Connel, 11 Johns. (N. Y.) 424; Longworth *v.* Flagg, 10 Ohio 300; Chattanooga *v.* Neely, 97 Tenn. 527. And not matter which, existing before plea pleaded, has just come to the knowledge of the party. Lee *v.* Dozier, 40 Miss. 477. It has never been allowed after the issue has been decided. State *v.* Peck, 60 Me. 498; Palmer *v.* Hutchins, 1 Cow. (N. Y.) 42. Or when the matter of defense set forth arose before the last continuance and before plea pleaded. Kenyon *v.* Sutherland, 8 Ill. 99. It can be pleaded only in bar of the further prosecution or maintenance of the suit. Hilliker *v.* Simpson, 92 Me. 590; Stilphen *v.* Stilphen, 58 Me. 508; Bailey *v.* March, 2 N. H. 522; Boyd *v.* Weeks, 2 Den. (N. Y.) 321; Corpening *v.* Grinnell, 10 Ired. L. (32 N. Car.) 15; Smithwick *v.* Ward, 7 Jones L. (52 N. Car.) 64; Lee *v.* Levy, 4 B. & C. 390.

Necessity for Plea. — Where the matter of defense arose before the commencement of the suit, actio non is generally the proper commencement of the plea, but no matter of defense arising after action brought can properly be pleaded generally, but ought to be pleaded in bar of the further maintenance of the suit, and if matter of defense arise after issue joined it must be pleaded puis darrein continuance. Dryer *v.* Lewis, 57 Ala. 551; Wright *v.* Evans, 53 Ala. 103; Wilson *v.* Bothwell, 50 Ala. 378; McDougald *v.* Rutherford, 30 Ala. 253; Brown *v.* Brown, 13 Ala. 208; Burns *v.* Hindman, 7 Ala. 531; Sadler *v.* Fisher, 3 Ala. 200; Canfield *v.* Eleventh School Dist., 19 Conn. 529; Chicago *v.* Babcock, 143 Ill. 358; Mount *v.* Scholes, 120 Ill. 394; Kenyon *v.* Sutherland, 8 Ill. 99; Straight *v.* Hanchett, 23 Ill. App. 584; Hilliker *v.* Simpson, 92 Me. 590; Rowell *v.* Hayden, 40 Me. 582; Semmes *v.* Naylor, 12 Gill & J. (Md.) 358; U. S. Bank *v.* Merchants Bank, 7 Gill (Md.) 415; Agnew *v.* Gettysburg Bank, 2 Har. & G. (Md.) 478; Rogers *v.* Odell, 39 N. H. 452; Boyd *v.* Weeks, 2 Den. (N. Y.) 321; Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64; Elms *v.* Beers, 3 McCord L. (S. Car.) 1; Yeaton *v.* Lynn, 5 Pet.

I. PLEA THAT LAND SOUGHT TO BE RECOVERED HAD, ON DAY OF LAST CONTINUANCE, BEEN SOLD TO DEFENDANT.

(U. S.) 224; 1 Chit. Pl. (3d Am. from 2d Lond. ed.) 635; 1 Chit. Pl. (3d Am. from 2d Lond. ed.)531.

Effect of Plea. — Plea puis darrein continuance is a waiver or relinquishment of all previous pleas. Lacy *v.* Rockett, 11 Ala. 1002; Scott *v.* Brokaw, 6 Blackf. (Ind.) 241; Augusta *v.* Moulton, 75 Me. 551; Jewett *v.* Jewett, 58 Me. 234; Johnson *v.* Kibbee, 36 Mich. 269; Waterbury *v.* McMillan, 46 Miss. 635; Tanner *v.* Roberts, 1 Mo. 416; True *v.* Huntoon, 54 N. H. 121; Wisheart *v.* Legro, 33 N. H. 177; Webb *v.* Steele, 13 N. H. 230; Pemigewasset Bank *v.* Brackett, 4 N. H. 557; Culver *v.* Barney, 14 Wend. (N. Y.) 161; Kimball *v.* Huntington, 10 Wend. (N. Y.) 675; Dauchy *v.* Van Alstyne, (Supreme Ct.) 3 How. Pr. (N. Y.) 100; Greer *v.* Sheppard, 1 Hayw. (2 N. Car.) 96; Wilson *v.* Hamilton, 4 S. & R. (Pa.) 238; Lyon *v.* Marclay, 1 Watts (Pa.) 271; Simonton *v.* Younge, 1 Strobh. L. (S. Car.) 17; Sanderlin *v.* Dandridge, 3 Humph. (Tenn.) 99; Peirce *v.* State Bank, 1 Swan (Tenn.) 265; Lincoln *v.* Thrall, 26 Vt. 304; Adams *v.* Filer, 7 Wis. 306; Adler *v.* Wise, 4 Wis. 159; Good *v.* Davis, Hempst. (U. S.) 16; Wisdom *v.* Williams, Hempst. (U. S.) 460; Wallace *v.* McConnell, 13 Pet. (U. S.) 136; 1 Chit. Pl. (3d Am. from 2d Lond. ed.) 636; Barber *v.* Palmer, 1 Ld. Raym. 693; Dunn *v.* Hill, 11 M. & W. 470. And is pleaded by way of substitution. Manly *v.* Union Bank, 1 Fla. 110; Waterbury *v.* McMillan, 46 Miss. 635; Woods *v.* White, 97 Pa. St. 222. Except where changed by statute. Lacy *v.* Rockett, 11 Ala. 1002; Manly *v.* Union Bank, 1 Fla. 110; Susong *v.* Jack, 1 Heisk. (Tenn.) 415. After the filing of such a plea, all previous pleas are in contemplation of law stricken from the record, and everything is confessed except the matter contested by this plea. East St. Louis *v.* Renshaw, 153 Ill. 491; Hilliker *v.* Simpson, 92 Me. 590. This rule is based on the hypothesis that the plaintiff by his plea abandons the original defenses set up and substitutes in place of them the defense contained in the plea. Rayner *v.* Dyett, 2 Wend. (N. Y.) 300; Davis *v.* Burgess, 18 R. I. 85. Hence it does not apply to its full extent when the defense set up in the plea puis darrein continuance is only partial, but applies only so far as the evidence so pleaded is intended as a defense. Morris *v.* Cook, 19 Wend. (N. Y.) 699; Davis *v.* Burgess, 18 R. I. 85. So too, when the defense thus pleaded merely affects the remedy. Rayner *v.* Dyett, 2 Wend. (N. Y.) 300; Davis *v.* Burgess, 18 R. I. 85. But see *contra*, to the effect that a plea since the last continuance is a waiver of all prior defenses pleaded, where the plea last pleaded goes to the whole or part only of plaintiff's demand, Sanderlin *v.* Dandridge, 3 Humph. (Tenn.) 99.

Not a Departure. — A plea puis darrein continuance is not a departure from the first plea. McKeen *v.* Parker, 51 Me. 389; Waterbury *v.* McMillan, 46 Miss. 635; Simonton *v.* Younge, 1 Strobh. L. (S. Car.) 17; 1 Chit. Pl. (3d Am. from 2d Lond. ed.) 636.

When Pleaded — *Generally.* — Regularly a plea puis darrein continuance is pleaded after the last continuance, and at the term next succeeding the time when the matter of the plea arose. Wisheart *v.* Legro, 33 N. H. 177; Rangely *v.* Webster, 11 N. H. 299; Vittum *v.* Stevens, 13 N. Bruns. 217. The very name of the plea indicates this. Jackson *v.* Rich, 7 Johns. (N. Y.) 194; Wilson *v.* Hamilton, 4 S. & R. (Pa.) 238. And it should be pleaded on the first day of the term. Sandford *v.* Sinclair, 3 Den. (N. Y.) 269. A continuance must not come between the happening and the pleading of new matter. Stevens *v.* Thompson, 15 N. H. 410; Tuffs *v.* Gibbons, 19 Wend. (N. Y.) 639; Hostetter *v.* Kaufman, 11 S. & R. (Pa.) 146; Wilson *v.* Hamilton, 4 S. & R. (Pa.) 238. And if there be no intervening continuance, plea is a matter of right and the court cannot refuse to receive it. Stevens *v.* Thompson, 15 N. H. 410; Sandford *v.* Sinclair, 3 Den. (N. Y.) 269; Broome *v.* Beardsley, 3 Cai. (N. Y.) 172; Wilson *v.* Pharr, 2 Jones L. (47 N. Car.) 451; Wyatt *v.* Richmond, 4 Humph. (Tenn.) 365; Paris *v.* Salkeld, 2. Wils. C. Pl. 139.

After Continuance has Intervened. — Whether a plea of puis darrein continuance shall be offered after a continuance has intervened is in the discretion of the court. If the plaintiff neglect to plead matter which has arisen since the last continuance at the next term, he cannot claim a right to plead it at a subsequent term, but the court in its

discretion may grant leave to plead it *nunc pro tunc*, and, when it thus exercises its discretion, may impose the payment of costs. It is in the discretion of the court to receive the plea or not, even after more than one continuance has intervened, and its discretion will be governed by circumstances extrinsic and which cannot appear on the face of the plea. Cummings *v.* Smith, 50 Me. 568; Rowell *v.* Hayden, 40 Me. 582; Thomas *v.* Van Doren, 6 Mo. 203; Wisheart *v.* Legro, 33 N. H. 177; Stevens *v.* Thompson, 15 N. H. 410; Rangely *v.* Webster, 11 N. H. 299; Sandford *v.* Sinclair, 3 Den. (N. Y.) 269; Tuffs *v.* Gibbons, 19 Wend. (N. Y.) 639; Morgan *v.* Dyer, 10 Johns. (N. Y.) 161; Hostetter *v.* Kaufman, 11 S. & R. (Pa.) 146; Lyon *v.* Marclay, 1 Watts (Pa.) 271; Wyatt *v.* Richmond, 4 Humph. (Tenn.) 365; Vittum *v.* Stevens, 13 N. Bruns. 217.

May be in Abatement or in Bar. — Plea puis darrein continuance may be either in abatement or in bar. McKeen *v.* Parker, 51 Me. 389; Grosslight *v.* Crisup, 58 Mich. 531; Waterbury *v.* McMillan, 46 Miss. 635; Woods *v.* White, 97 Pa. St. 222; Spafford *v.* Woodruff, 2 McLean (U. S.) 191; 1 Chit. Pl. (3d Am. from 2d Lond. ed.) 636. Like a plea at any other stage of the action, it must conform to the case. If the fact, had it originally existed, must have been pleaded in abatement, or, if it must have been pleaded in bar, it must be pleaded in the same way at the next term, if it occurs while the suit is pending. If it could originally have been pleaded either in abatement or in bar, it may be pleaded in either way puis darrein continuance. McKeen *v.* Parker, 51 Me. 389. And it may be in abatement though there has been a plea in bar, because the latter plea waives only matters in abatement that existed at the time of pleading, and not matter which arose afterward. McKeen *v.* Parker, 51 Me. 389; Waterbury *v.* McMillan, 46 Miss. 635; 1 Chit. Pl. (3d Am. from 2d Lond. ed.) 636. But if matter in abatement be pleaded puis darrein continuance, the judgment against the defendant should be peremptory as well on demurrer as on trial. McKeen *v.* Parker, 51 Me. 389.

Requisites of Plea, Generally. — For the formal parts of a plea in a particular jurisdiction see the title PLEAS, vol. 13, p. 918.

Great certainty is required in pleas puis darrein continuance. Ross *v.* Nesbit, 7 Ill. 252; Augusta *v.* Moulton, 75 Me. 551; Jewett *v.* Jewett, 58 Me. 234; Vicary *v.* Moore, 2 Watts (Pa.) 451; Wilson *v.* Hamilton, 4 S. & R. (Pa.) 238; Spafford *v.* Woodruff, 2 McLean (U. S.) 191; Dunn *v.* Hill, 11 M. & W. 470; 1 Chit. Pl. (3d Am. from 2d Lond. ed.) 637. Both in the form and substance. Hilliker *v.* Simpson, 92 Me. 590; Field *v.* Cappers, 81 Me. 36. This is because they have a tendency to delay, in which respect they are like pleas in abatement. Mount *v.* Scholes, 120 Ill. 394; Straight *v.* Hanchett, 23 Ill. App. 584.

Commencement — *In Abatement.* — A plea puis darrein continuance in abatement begins like a plea of the same kind when pleaded in the first instance. Waterbury *v.* McMillan, 46 Miss. 635.

In Bar. — A plea puis darrein continuance in bar begins with saying that the plaintiff ought not further to maintain his action. Straight *v.* Hanchett, 23 Ill. App. 584; McGowan *v.* Hoy, 4 J. J. Marsh. (Ky.) 223; Agnew *v.* Gettysburg Bank, 2 Har. & G. (Md.) 478; Waterbury *v.* McMillan, 46 Miss. 635; Bailey *v.* March, 2 N. H. 522. And where the plea is actio non it is defective. Straight *v.* Hanchett, 23 Ill. App. 584; McGowan *v.* Hoy, 4 J. J. Marsh. (Ky.) 223. For actio non goes to the commencement of the action and not to the time of plea pleaded. Agnew *v.* Gettysburg Bank, 2 Har. & G. (Md.) 478. And the dictum of Lord Mansfield in Sullivan *v.* Montague, 1 Dougl. 102, that actio non goes in every case to the time of pleading, not to the commencement of the action, has been overruled. Bailey *v.* March, 2 N. H. 522.

Plea must answer the whole declaration. Where it answers only a part of it, it is demurrable. Broughton *v.* Bradley, 34 Ala. 694; Stein *v.* Ashby, 30 Ala. 363; Bryan *v.* Wilson, 27 Ala. 208; McGowan *v.* Hoy, 4 J. J. Marsh. (Ky.) 223.

Time when plea is filed need not be stated in the plea. Keene *v.* Mould, 16 Ohio 12.

Day of Last Continuance. — In pleading a thing after last continuance, it is not good to plead "quod ultimatum continuance" such a thing happened: the day of the happening must be alleged precisely, as from such a day to such a day. Ross *v.* Nesbit, 7 Ill. 252; Field *v.* Cappers, 81 Me. 36; Jewett *v.* Jewett,

58 Me. 234; Cummings *v.* Smith, 50 Me. 568; Vicary *v.* Moore, 2 Watts (Pa.) 451; Chitty's Pl. (3d Am. from 2d Lond. ed.) 637; Ewer *v.* Moile, Yelv. 140. This is so that the court may see on its face the sufficiency of the plea. Gibson *v.* Bourland, 13 Ill. App. 352. And a plea which makes no averment of the day of continuance is fatally defective. Jewett *v.* Jewett, 58 Me. 234; Augusta *v.* Moulton, 75 Me. 551.

Time when and place where matter of defense arose must be alleged. Gibson *v.* Bourland, 13 Ill. App. 352; Ross *v.* Nesbit, 7 Ill. 252; Jewett *v.* Jewett, 58 Me. 234; Cummings *v.* Smith, 50 Me. 568; Spafford *v.* Woodruff, 2 McLean (U. S.) 191; 1 Chit. Pl. (3d Am. from 2d Lond. ed.) 637. So that the court may see their sufficiency on the face of the pleas. Gibson *v.* Bourland, 13 Ill. App. 352.

That matter of defense arose after last continuance must be alleged in the plea. Straight *v.* Hanchett, 23 Ill. App. 584; McGowan *v.* Hoy, 4 J. J. Marsh. (Ky.) 223; Spafford *v.* Woodruff, 2 McLean (U. S.) 191.

Conclusion — *In Abatement.* — A plea puis darrein continuance in abatement concludes like a plea of the same kind when pleaded in the first instance. Waterbury *v.* McMillan, 46 Miss. 635. And must pray judgment of the writ and that the same be quashed, or, if the writ abates *de facto*, by praying judgment if the court will further proceed. Ross *v.* Nesbit, 7 Ill. 252; 1 Chit. Pl. (3d Am. from 2d Lond. ed.) 637.

In Bar. — A plea puis darrein continuance in bar concludes by praying judgment if the plaintiff ought further to maintain his action. Waterbury *v.* McMillan, 46 Miss. 635; Gibson *v.* Bourland, 13 Ill. App. 352; 1 Chit. Pl. (3d Am. from 2d Lond. ed.) 637.

Verification. — Pleas puis darrein continuance should be verified by affidavit. Ala. Civ. Code (1896), § 3296; Evans *v.* Cincinnati, etc., R. Co., 78 Ala. 341; McCall *v.* McRae, 10 Ala. 313; Mount *v.* Scholes, 120 Ill. 394; Ross *v.* Nesbit, 7 Ill. 252; Gibson *v.* Bourland, 13 Ill. App. 352; Pool *v.* Hill, 44 Miss. 306; West *v.* Stanley, 1 Hill (N. Y.) 69; Broome *v.* Beardsley, 3 Cai. (N. Y.) 172; Morrow *v.* Morrow, 3 Brev. (S. Car.) 394; Caldwell *v.* Richmond, 1 Heisk. (Tenn.) 468; 1 Chit. Pl. (3d Am. from 2d Lond. ed.) 638.

In *England*, this is required by the 4th and 5th Anne, c. 16, which statute requires every dilatory plea to be verified by affidavit. Before the passage of this statute, the law in England did not require such pleadings to be so verified. Crutchfield *v.* Carman, Tappan (Ohio) 86. But in Bancker *v.* Ash, 9 Johns. (N. Y.) 250, in which pleas puis darrein continuance were pleaded, the court said: "These were not pleas in abatement, but in bar, and an affidavit verifying them is not required by the statute. If necessary to give them validity, it must be in consequence of the course and practice of the court as derived from the English authorities; but the cases, and the reason on which they are founded, do not apply to such pleas, unless they are pleaded at the circuit, and then it seems to be in the discretion of the judge. The rule requiring a plea puis darrein continuance to be verified by affidavit accrued out of the practice of tendering such a plea at the assizes, or the circuit, and was intended to prevent the abuse of interposing such a plea for delay, as the circuit judge had no authority to try it. If probable cause of its truth be shown to the circuit judge, he may receive it without oath. It rests in his sound discretion." And see to the same effect McGowan *v.* Hoy, 4 J. J. Marsh. (Ky.) 223; Pool *v.* Hill, 44 Miss. 306; La Farge *v.* Carrier, 1 Wend. (N. Y.) 89. See also Crutchfield *v.* Carman, Tappan (Ohio) 86, which is to the effect that pleas puis darrein continuance in bar need not be verified, and that only pleas in abatement need be verified by affidavit.

Precedents. — "And now at this day, that is to say, on —— next after ——, in this term, until which day the plea aforesaid was last continued, the defendant says that the plaintiff ought not further to have or maintain his said action against him, because he says that, after the last continuance of this cause, that is to say, after —— next after ——, in this same term, from which day this cause was last continued, and before this day, to wit, on the —— day of ——, he, the plaintiff (*Here state the release or subject-matter of the plea*), and this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought further to have or maintain his said action against him." 2 Rev. Swift's Dig., p. 673; 2 Chit. Pl. (3d Am. from 2d Lond. ed.) p. 724.

In Broughton *v.* Bradley, 34 Ala.

694, is set out the following plea puis darrein continuance:

"Now, at this term of the court, comes the defendant, and pleads in short by consent, that the plaintiff, at the time of the commencement of this suit, had never been appointed administrator of the estate of *Edward Broughton*, deceased, by any court in the state of *Alabama*, and had never qualified or had letters testamentary issued to him, as executor of the last will and testament of said *Edward Broughton*, by any court in the state of *Alabama*; and defendant avers, that since the last term of this court, to-wit, on the *2d* day of *November*, 1858, this defendant was duly appointed, by the *probate* court of *Lowndes* county in this state, the administrator of the estate of said *Edward Broughton*, deceased; and that he has duly qualified as such administrator, and has entered on the discharge of the duties of said administration; and that he is now the legal and duly qualified administrator of the estate of said *Edward Broughton*, deceased, within the state of *Alabama*; all of which he is ready to verify. Wherefore," etc.

It was objected to this plea, on demurrer, that it proposed to be in bar of the entire action, when the facts stated in it did not bar the entire action. The court said: "The plea in the present case professes to be in short by consent. It contains no such words as actio non, nor in bar of this action. Neither does it, in terms, propose to bar the entire suit. True, it omits the word further, which is usually employed in pleas puis darrein continuance; but we think it contains no averment which is inconsistent with such a plea. It simply sets out the facts. This, we think, * * * amounts to a good partial defense to the action."

In Webster *v.* Wyser, 1 Stew. (Ala.) 184, is set out the following amended plea:

"Now, at this term, to-wit, etc., until which day the plea aforesaid was last continued, came plaintiffs and defendants, etc., and defendants say that after *March 2*, 1824, when this case was last continued, to the present term, to-wit, on *March 20*, 1824, etc., *R. L. Kennon*, *J. L. Tindall*, *J. Owen*, *M. Williams* and *L. Powell*, trustees of the *Tuscaloosa* Academy, executed their agreement in writing, etc., as follows: 'Whereas, upon an examination of the accounts of *J. J. Webster*, by *J. Wyser*, *W. R. Colgin* and *W. McGehee*, commissioners duly appointed by the stockholders of the *Tuscaloosa* Academy, there appears to be a balance due said *Webster* of $*152.60*, for building said academy. Now be it known, that the undersigned, in order to make payment of said sum, and also in consideration of said *Webster* withdrawing, at his own individual costs, all legal proceedings which he may have instituted against said commissioners (meaning said defendants), and all right of hereafter sustaining any such suit against them as trustees of said academy, to pay over to said *Webster* all moneys that have or may hereafter accrue to them as trustees from rent, use or occupation of said academy, after deducting contingent expenses, and which they may collect, until said claim (meaning the claim of said *Webster* for building said academy), is discharged.'" Averring that said writing was duly delivered to said Webster, who was then copartner of Smith, and that Webster, as copartner of Smith, received said writing from said trustees, in full satisfaction and discharge of the premises in declaration mentioned, and all damages and sums of money thereon accrued, etc., verification, etc., and duly sworn.

On demurrer, this plea was held clearly good and sufficient.

In Gray *v.* Real Estate Bank, 5 Ark. 93, is set out the following plea: "That the said plaintiff ought not further to maintain this action against them, because they say that since the commencement of this suit, and since the first day of the term of this court, which was begun and held on the *first Monday* in *March*, A. D. 1842, from which time until the *first Monday* in *September*, A. D. 1842, this cause is continued, and before this day, to-wit: on the *2d* of *April*, A. D. 1842, at the county aforesaid, the said plaintiff assigned, transferred and made over unto *James S. Conway*, *Sam C. Roane*, *Carey A. Harris*, *Daniel T. Witter*, *George Hill*, *Enoch J. Smith*, *Henry L. Biscoe*, *Wm. F. Moore*, *John Preston, Jr.*, *John Drennon*, *Robert S. Gibson*, *Lorenzo N. Clark*, *Sanford C. Faulkner*, *Anthony H Davies* and *Silas Craig*, the said bill of exchange, in writing, mentioned in said declaration, for value received, and then and there delivered the same to them, who then and there acquired thereby, and still have, the vested right to sue for and implead the said defendants of the said bill of exchange,

Form No. 16802.

(Precedent in Hilliker *v.* Simpson, 92 Me. 591.)[1]

[(*Venue, title of court and cause as in Form No. 15220.*)][2]

And now said defendant, *Melville P. Simpson*, at this day, to wit, on the *5th* day of said term, the court in the exercise of its discretion permitting this plea to be filed at this term, comes and says that the said demandant ought not to have or further maintain her said action against him, because he says after plea filed by said defendant in this cause, and on the day of the last continuance of this cause, that is to say, on the *twenty-sixth* day of last *October* term of said court, being the *third* day of *November*, A. D. 1897, from which day of said *October* term of this court this cause was last continued, and before commencement of this present term, to wit, at *Levant*, in said county of *Penobscot*, on the said *third* day of *November*, A. D. 1897, at about the same hour of said *third* day of *November*, 1897, that said con-

and whatever of damages, interest, costs and charges that may have accrued thereon, without this, that the said plaintiff hath any present legal right or title in or to the said bill of exchange; and this the said defendants are ready to verify; wherefore they pray judgment if the said plaintiff ought further to maintain her action against them."

On demurrer, the plea was held to be a good bar to the further maintenance of the suit by or in the name of the bank. An objection to the plea for the reason that it did not allege that the assignment was written or indorsed on the bill, or show whether it was by deed or by parol, was not sustained, because there was an omission to assign this specifically as cause of demurrer.

In Miller *v.* McCormick Harvesting Mach. Co., 84 Ill. App. 571, was set out the following plea:

"That the plaintiff ought not further to maintain its aforesaid action thereof against him, because that since the last continuance of this cause, to wit: since the *first* day *February*, 1898, from which day this cause was last continued, to wit: on the *11th* day of *March*, 1898, at the county of *Hamilton*, and State of *Illinois*, in a cause of action then pending in the *Circuit* Court of said *Hamilton* County, wherein the plaintiff in this cause, the *McCormick Harvesting Machine Company*, was plaintiff, and *Frank Laster*, *John T. Barnett*, *William J. Rice*, *J. S. Wycaugh* and *D. F. Sandusky* were defendants, which action was for the same cause of action set forth in the declaration herein, judgment was duly given and entered, on the verdict of a jury duly impaneled to try the issues in said cause, against the plaintiff and for the defendants for the costs of suit.

And the defendant says: That the said cause of action so pending in said *Circuit* Court of *Hamilton* County in which said judgment was so rendered, was a cause of action brought upon a bond to secure the performance of the same duties and obligations, by the same principal party in said bond, given to the same plaintiff for the same period of time and upon the same issues as is charged in the declaration in this cause."

The court said: "In our opinion it is bad and does not present a defense, because it fails to allege that the judgment set up in the plea was between the same parties, or their privies, as in the case at bar, or that the former judgment was the result of a trial upon the merits, or that at the time the plea was filed the judgment was not appealed from, reversed or satisfied, and was in full force and effect."

1. The plea in this case was filed in a real action to recover an undivided half of the homestead farm of George Simpson, the plaintiff's father, deceased, and which descended to her and the defendant as decedent's heirs at law upon his death, September 6, 1895, subject to the payment of debts and the widow's dower. On general demurrer, it was held to fulfil all the requirements indicated by the forms approved for a century past and to be sufficient both in form and substance.

See, generally, *supra*, note 1, p. 133.

2. The matter to be supplied within [] will not be found in the reported case.

tinuance of said cause actually took place, or, at all events, at an hour of said *third* day of *November*, 1897, too late for the said defendant, *Melville P. Simpson*, to have filed this plea in court, *Simon G. Jerrard*, of said *Levant*, who was on said *third* day of *November*, 1897, the legal administrator of the goods and estate of *George Simpson*, late of said *Levant*, deceased, duly and legally appointed and qualified and acting as such administrator and clothed with full and lawful power as such administrator, (said *George Simpson* having died, seised and possessed in fee simple of the whole of the real estate described in said demandant's writ and declaration, *one* undivided *half* of which, said demandant has brought said action to recover) made, subject to widow's dower in his said capacity to said defendant, *Melville P. Simpson*, a sale and deed, in due and legal form of law, for a valuable consideration, to wit, *eight hundred and fifty* dollars ($850.00) paid to said administrator by said defendant, of all the real estate described in the said demandant's writ and declaration, duly signed, sealed, acknowledged and delivered to said defendant on said *third* day of *November*, A. D. 1897, and on the *fourth* day of *November*, 1897, duly recorded in said *Penobscot* Registry of Deeds, Book *640*, p. *212*, and here in court to be produced; said administrator having duly and legally obtained a license to make such sale and conveyance from the Honorable *James H. Burgess*, judge of probate, within and for the said county of *Penobscot*, a court having jurisdiction thereof, at the *May* term of said court, A. D. 1897, and said sale and conveyance having been duly and legally made in pursuance of said license and in accordance with law; whereby and by force of said sale, conveyance and deed from said administrator, said defendant acquired title to all said real estate in fee simple, and he, said defendant, became entitled thereby to the lawful and exclusive possession and occupancy of the whole of said real estate, and the title to all the said real estate on said *third* day of *November*, A. D. 1897, became vested in him, said defendant, in fee simple, and that ever since said *third* day of *November*, 1897, he has held and now holds said title to all said real estate in fee simple, and that he made said purchase of said real estate in good faith, and by reason of all the same on the *third* day of *November*, A. D. 1897, said demandant became and is wholly divested of all right to the title and interest in all said real estate, and to the seisin and possession of all said real estate, and this the said defendant is ready to verify; wherefore he prays judgment if the said demandant ought further to have or maintain her said action against him. By his attorney, *M. Laughlin.*

II. PLEA THAT DEFENDANT, SINCE LAST CONTINUANCE, HAD BEEN REMOVED FROM THE POSITION OF ADMINISTRATRIX, AND DID NOT RETAIN SUFFICIENT ASSETS TO SATISFY PLAINTIFF'S ACTION.

Form No. 16803.

(Precedent in Manly *v.* Union Bank, 1 Fla. 111.)[1]

1. The plea in this case was held to be drawn with sufficient legal correctness and nicety, setting up a good and substantial defense by way of barring the action.
See, generally, *supra*, note 1, p. 133.

[(*Venue, title of court and cause as in Form No. 15218.*)][1]

And the said *Martha Ann*, sued as administratrix of *Samuel Parkhill*, deceased, for further plea in this behalf, by leave of the Court, first had and obtained, by *Brockenbrough* and *Archer*, her attorneys, comes and defends the wrong and injury, when, etc.; and protesting that at the time of the commencement of this suit, she had no goods, effects, or credits, lands or tenements of the said *Samuel Parkhill*, deceased, in her hands to be administered, subject to the plaintiff's action, for plea, prays judgment if the said plaintiff, its action aforesaid thereof against her, ought further to have and maintain; because she says that since the commencement of plaintiff's action, to wit, at the county aforesaid, on the *19th* day of *December*, 1843, the Honorable *Willam M. Gibson*, at that time Judge of the *County* Court of said County, and as such having and exercising jurisdiction as a Court of Probate, and being competent thereto, and having jurisdiction in that behalf, at the request and motion, and upon the petition of the said *Union* Bank of *Florida*, and against the will of this defendant for cause shown, revoked and annulled, the letters of administration before that time granted to this defendant, from which decision and order, this defendant appealed to the *Superior* Court of *Leon* County, exercising and having jurisdiction in that behalf; and the said *Superior* Court afterwards, and since the last continuance, and before the commencement of this term, to wit, on the *18th* day of *March*, 1844, in the county aforesaid, confirmed the said order of the said *William M. Gibson*, Judge of the *County* Court, as aforesaid, and then and there revoked, and annulled the said letters of administration before that time, granted to defendant, and had and held by her at the time of the institution of the suit, and this defendant, was then and there divested; and put out of possession of all the estate, rights, credits and effects, or assets of said *Samuel* deceased, then in her hands, to be administered, and this defendant was not allowed to retain, and did not retain in her hands enough thereof, to satisfy said plaintiff's action, or any part thereof; but the whole of said assets, rights, credits, and effects so remaining in her hands unadministered, were then and there, by order of said *Superior* Court, taken away from the possession of said defendant, and against the will of said defendant, and committed to the care, custody and control of the Marshal of the said *Superior* Court, who then and there took possession of the same, and the said letters of administration, so had and held by this defendant at commencement of this action, were revoked and annulled, and said defendant did not and could not retain in her hands, as administratrix, as aforesaid, effects sufficient to pay the plaintiff's claim, or any part thereof; and this she is ready to verify; wherefore she prays judgment if the said plaintiff, its action aforesaid, thereof, against her, ought further to have and maintain, etc.

[(*Signature and verification as in Form No. 15218.*)][1]

1. The matter to be supplied within [ ] will not be found in the reported case.

QUAKERS.

See the title AFFIDAVITS, vol. 1, p. 548.

QUANTUM MERUIT.

See the title ASSUMPSIT, vol. 2, p. 294.

QUANTUM VALEBANT.

See the title ASSUMPSIT, vol. 2, p. 294.

QUARANTINE.

By Harold N. Eldridge.

CROSS-REFERENCES.

For Forms relating to Diseased Animals, see the title DISEASED ANIMALS, vol. 6, p. 921.

For Form of Indictment for Exposing Person Infected with a Contagious Disease, see the title NUISANCES, vol. 13, *Form No. 14545.*

For Forms relating to Unwholesome and Adulterated Foods, see the title UNWHOLESOME AND ADULTERATED FOODS.

I. INDICTMENT OR INFORMATION.[1]

1. Against Master of Vessel, for Anchoring Outside of Quarantine Limits.

Form No. 16804.[2]

(2 Rev. Swift's Dig., p. 876)

(*Commencement as in Form No. 10685*) that, at a meeting of the Board of Health for the town of *New Haven*, lawfully held on the *first* day of *May*, A. D. 1900, an order was made by said board that a certain portion within said town, of the harbor of said town, to wit, the space included between a line running from (*Here state beginning of line*) to (*Here state terminus of line*) across said harbor, and a line running from (*Here state beginning of line*) to (*Here state terminus of line*) across said harbor, be the place where vessels arriving or coming into the limits of such town should perform quarantine; that *John Doe*, of said *New Haven*, was afterwards, to wit, on the *tenth* day of *June*, in said year, the master of a vessel, which, between the *first* day of *June* and the *first* day of *November*, A. D. 1900, came directly from the port of *Savannah*, in *Georgia*, a port south of the capes of the *Delaware*, to the said harbor; that the said master unlawfully then came to anchor in a part of said harbor not within the limits aforesaid, although wind and water permitted, and said vessel might have come to anchor within the said limits, contrary to (*concluding as in Form No. 10685*).

2. Against Person Conducting Vessel Into Port, for Quitting It Before It was Discharged from Quarantine.

Form No. 16805.

(2 Chit. Crim. L. (5th Am. from 2d Lond. ed.) 551.)

Michaelmas Term, in the *sixth* year of the reign of king *George the Fourth.*

Middlesex, to wit: Be it remembered that *Andrew Jackson*, esquire, attorney general of our sovereign lord the now king, who for our said lord the king prosecuteth in this behalf in his proper person, comes here into the court of our said lord the king, before the king himself, at *Westminster*, in the county of *Middlesex*, on ——— next after ———, in this same term, and for our said lord the king gives the court here to understand and be informed, that on the *tenth* day of *January*, in the *sixth* year of the reign of our sovereign lord *George the Fourth*, by the grace of God of the United Kingdom of Great Britain and Ireland king, defender of the faith, an order was made by the king in council, whereby it was ordered that if any pilot or other person should go on board any ship or vessel obliged

1. **For the formal parts of an indictment** or information in a particular jurisdiction consult the titles INDICTMENTS, vol. 9, p. 615; INFORMATIONS IN CRIMINAL CASES, vol. 9, p. 768.

2. *Connecticut.* — Gen. Stat. (1888), §§ 2594, 2609.

to perform quarantine such pilot or other person should perform quarantine in like manner as any person coming in such ship or vessel should be obliged to perform the same; That the order was published in the *Gazette* in the same month, and has ever since been in force. That *John Doe*, late of the parish *St. Paul, Covent Garden*, in the county of *Middlesex*, *yeoman*, well knowing the premises, but having no regard for the laws and statutes of this realm, afterwards, to wit, on the *twentieth* day of *February* in said year, at (*Here state place*) with force and arms went on board a certain ship called the *Stephen*, which was obliged to perform quarantine, in order to conduct the same into the port of *Bristol*, and did not perform quarantine in like manner as any person coming in said ship or vessel was obliged to perform the same, but that the said *John Doe*, on said *twentieth* day of *February*, at said (*Here state place*), with force and arms, unlawfully quitted the said ship by going on board a certain other ship or vessel in a certain place within his majesty's dominions, before the ship *Stephen* had fully performed and been discharged from such quarantine, he, the said *John Doe*, not being in any manner, or in case, or by any license directed or permitted by any order made by his majesty in council so to do, in contempt of our said lord the king and his laws, to the evil example of all others, against the peace of our said lord the king, his crown and dignity, and also against the form of the statute in such case made and provided.

Whereupon the said attorney general, who for our said lord the king in this behalf prosecutes for our said lord the king, prays the consideration of the court here in the premises, and that due process of law may be awarded against the said *John Doe* in this behalf to make him answer to our said lord the king touching and concerning the premises aforesaid, etc.

Andrew Jackson, Attorney general.

3. Against Person, for Moving Cattle Beyond Quarantine Line.

Form No. 16806.[1]

(Precedent in Coggin *v.* State, 38 Tex. Crim. 40.)[2]

[(*Commencement as in Form No. 10838*)][3] that heretofore, to wit: On or about the *21st* day of *April*, 1896, in the said county of *Fisher* and State of *Texas*, one *Thomas Coggin* did then and there unlawfully violate, disregard, and evade the rules, regulations, orders, and directions of the *Live Stock Sanitary Commission of Texas*, establishing and governing live stock quarantine, without being authorized so to do either by any provision of the law contained in chapter 56 of the General Laws of the Twenty-third Legislature of *Texas*, or by the said *Live Stock Sanitary Commission*; the said rules, regulations,

1. *Texas.* — Rev. Stat. (1895), art. 5043*a et seq.*

2. There was a conviction under this information.

3. The matter to be supplied within [ ] will not be found in the reported case.

orders, and directions of the said *Live Stock Sanitary Commission* and the quarantine line hereinafter described having been heretofore determined by the said commissioners, and having been duly proclaimed by the Governor of the State of *Texas*, by his proclamation issued after having been duly notified thereof by said Commission. And the said *Thomas Coggin* did then and there drive and move a herd of domestic animals, to wit, *twenty* head of cattle, from the area of country south and east of the said quarantine line, into the area of country north and west of said line, and into *Fisher* County, *Texas*, the said quarantine line then and there being in conformity with the Federal quarantine line established by the United States Department of Agriculture; and the rules, regulations, orders, and directions of said *Live Stock Sanitary Commission*, and the said quarantine line being as follows, to wit: " *The Live Stock Sanitary Commission of Texas* are reliably informed that cattle located in that certain area of *Texas* which is situated south and east of the quarantine line hereinafter described, and which is the same line heretofore fixed and established by the Honorable United States Secretary of Agriculture as a quarantine line against Southern or splenetic fever within the State of *Texas* for the year 1896, are liable to communicate a contagious and infectious disease known as Southern or splenetic fever to the cattle located north and west of said line within the State, should said cattle from said infected area come in contact with the said cattle on the north and west of said line; or should said cattle, located on the south and east of said line be driven over or be grazed over the land situated west and north of said line:

Now, therefore, the *Live Stock Sanitary Commission of the State of Texas*, by virtue of the law under which they are appointed, and which prescribes their duties, in order to prevent the spreading or communicating said disease, now hereby make, fix, and establish a quarantine line in this State, as follows: Beginning at the southwest corner of the county of *Pecos*, on the bank of the *Rio Grande* River; thence following the western boundary of *Pecos* County to the southeast corner of *Reeves* County; thence following the boundary line between the counties of *Pecos* and *Reeves* to the *Pecos* River; thence southeasterly following the *Pecos* River to the northwestern corner of *Crockett* County; thence easterly along the northern boundary of *Crockett* and *Schleicher* counties to the southeastern corner of *Irion* County; thence northerly along the eastern boundary of *Irion* County to the northeast corner of said county; thence northerly to the southern boundary of *Coke* County; thence westerly to the southwest corner of *Coke* County; thence northerly along the western boundary of *Coke* County to the southern boundary of *Mitchell* County; thence easterly to the southeastern corner of *Mitchell* County; thence northerly along the western boundary of *Nolan* County to the northwestern corner of *Nolan* County; thence easterly along the northern boundary of said county to the southwestern corner of *Jones* County; thence northerly along the western boundary of *Jones* County with the northern boundary of *Stonewall* County; thence eastward along the northern boundaries of *Jones* and *Shackelford* counties to the southwest corner of *Throckmorton* County;

thence northerly along the western boundaries of *Throckmorton*, *Baylor*, and *Wilbarger* counties to the *Red* River; thence continuing along *Red* River in a southeasterly direction to the southeastern corner of the county of *Greer*, thence northerly following the course of the *North* Fork of the *Red* River to its intersection with the eastern boundary line of *Wheeler* County; thence north with the eastern boundary line of *Wheeler*, *Hemphill*, and *Lipscomb* counties to the northeast corner of *Lipscomb* County; thence in a westerly direction with the northern boundary line of *Lipscomb*, *Ochiltree*, *Hansford*, *Sherman*, and *Dallam* counties to the northwestern corner of *Dallam* County to the eastern line of *New Mexico*, intersecting the present Federal quarantine at said point. And now hereby make the following rule and regulation: That from the *15th* day of *February*, 1*896*, to the *15th* day of *November*, 1*896*, no cattle are to be transported by rail, driven or moved in any manner whatever from said area south and east of said line herein last above described, to any portion of the State of *Texas*, situated north or west of said line. Contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State.

[(*Signature and indorsements as in Form No. 10838.*)][1]

II. WARRANT.[2]

1. Against Master of Vessel, for Refusing to Answer Inquiries Relating to Infectious Diseases on Board Vessel.

Form No. 16807.[3]

Commonwealth of *Virginia*, } to wit:
Norfolk County. }

To *Charles Hatch*, Constable of the said county:

Whereas *Samuel Black*, a health officer of the town of *Portsmouth*, has this day complained on oath before me, *Abraham Kent*, a justice of the peace of the said county, that he did on the *twentieth* day of *June*, A. D. 1*900* (or *on this day*), in the county of *Norfolk*, inquire of *Richard White*, the master of a vessel called the *Stephen*, now lying in the port of *Portsmouth* (*state inquiry*), and that he, said *Richard White*, then refused to answer the said inquiry, the said *Samuel Black* then supposing there was an infectious disease, to wit, the *cholera*, on board the said vessel (or *then believing that the said vessel came from Savannah, Georgia, a port where the cholera, a dangerous and infectious disease, prevails*): These are, therefore, in the name of the commonwealth, to command you forthwith to apprehend and bring before me, or some other justice of the said county, the body of the said *Richard White*, to answer the said complaint, and to be further dealt with according to law.

Given under my hand and seal, this *twenty-second* day of *June*, A. D. 1*900*. *Abraham Kent*, J. P. (SEAL)

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **For the formal parts of a warrant** in a particular jurisdiction consult the title WARRANTS.

3. *Virginia.*— Code (1887), § 1738.

2. Against Master of Vessel, for Failing to Deliver Bills of Health.

Form No. 16808.[1]

(*Venue as in Form No. 16807.*)

To *Charles Hatch*, Constable of said County:

Whereas *Samuel Black* has this day made complaint on oath before me, *Abraham Kent*, a justice of the said county, that on the *twentieth* day of *May*, A. D. 19*00*, in said county, *Richard White*, then the health officer for the town of *Portsmouth*, ordered *William Green*, the master of a certain vessel called the *Stephen*, then lying in the port of *Portsmouth* (or *then in the James river, and coming to the port of Portsmouth*), to perform quarantine with his said vessel within the quarantine ground of the said town, and that he, the said *Samuel Black*, an officer appointed to see that the said vessel and her crew performed quarantine according to the said order, on the *twenty-first* day of *May*, A. D. 19*00*, in said county, required the said *William Green*, as master of said vessel, to deliver to him, the said *Samuel Black*, his bills of health and manifests, and his log-book and journal, and that he the said *William Green*, as master as aforesaid, failed and refused to do so: These are (*concluding as in Form No. 16807*).

3. Against Person, for Escaping from Vessel Ordered to Perform Quarantine.

Form No. 16809.[2]

(*Venue as in Form No. 16807.*)

To *Charles Hatch*, Constable of said County:

Whereas *Samuel Black* has this day complained on oath before me, *Abraham Kent*, a justice of the said county, that *William Green*, a person on board of the vessel called the *Stephen*, lying in the port of *Portsmouth*, was, to wit, on the *twentieth* day of *May*, A. D. 19*00*, in the said county, ordered by *Richard White*, the health officer of the town of *Portsmouth*, to perform quarantine within the quarantine ground of the said town, and that he did, after the said order, to wit, on the *twenty-first* day of *May*, in the said year, escape from the said vessel, and that he is now going at large in the said county, and without the bounds of the said quarantine ground: These are (*concluding as in Form No. 16807*).

1. *Virginia.* — Code (1887), § 1739.
2. *Virginia.* — Code (1887), § 1740.

QUASHAL.

By Harold N. Eldridge.

CROSS-REFERENCES.

For Forms relating to the Quashing of a Writ of Execution, see the title EXECUTIONS AGAINST PROPERTY, vol. 8, *Form No. 9294 et seq.*

I. Motion to Quash or Set Aside.

1. Indictment or Information.[1]

1. Statutes relating to the quashing or setting aside of indictments exist in the following states, to wit.

Arizona. — Rev. Stat. (1887), § 1513.

Arkansas. — Sand. & H. Dig. (1894), § 2126.

California. — Pen. Code (1897), § 995.

Colorado. — Mills' Anno. Stat. (1891), § 1504.

Florida. — Rev. Stat. (1892), § 2893.

Idaho. — Rev. Stat. (1887), § 7730 *et seq.*

Illinois. — Starr & C. Anno. Stat. (1896), c. 38, par. 594.

Indiana. — Horner's Stat. (1896), §§ 1756 *et seq.*, 1882.

Iowa. — Code (1897), § 5319.

Kansas. — Gen. Stat. (1897), c. 102, §§ 81, 82.

Maine. — Rev. Stat. (1883), c. 131, § 12.

Maryland. — Pub. Gen. Laws (1888), art. 27, § 286.

Massachusetts. — Pub. Stat. (1882), c. 213, § 16.

Michigan. — Comp. Laws (1897), § 11920.

Minnesota. — Stat. (1894), § 7282 *et seq.*

Mississippi. — Anno. Code (1892), § 1355.

Missouri. — Rev. Stat. (1899), § 2532.

Montana. — Pen. Code (1895), §§ 1910, 1911.

Nebraska. — Comp. Stat. (1899), §§ 7164, 7165.

Nevada. — Comp. Laws (1900), § 4240.

New Hampshire. — Pub. Stat. (1891), c. 253, § 13.

New Jersey. — Gen. Stat. (1895), p. 1130, § 53.

North Carolina. — Code (1883), § 1183.

North Dakota. — Rev. Codes (1895), § 8082 *et seq.*

Ohio. — Bates' Anno. Stat. (1897), §§ 5175, 5337, 7248, 7249.

Oklahoma. — Stat. (1893), § 5109.

Oregon. — Hill's Anno. Laws (1892), § 1314 *et seq.*

Pennsylvania. — Bright. Pur. Dig. (1894), p. 549, § 19.

a. In General.

South Carolina. — Crim. Stat. (1893), § 56.

South Dakota. — Dak. Comp. Laws (1887), § 7283 *et seq.*

Virginia. — Code (1887), § 3999.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 6890 *et seq.*

Wyoming. — Rev. Stat. (1887), §§ 3260, 3261.

Motion Discretionary with Court. — The quashing of an indictment or information is, in the absence of statute, discretionary with the court. It may quash a defective indictment or it may require the party to plead or demur. State *v.* Hurley, 54 Me. 562; State *v.* Maher, 49 Me. 569; State *v.* Burk, 38 Me. 574; State *v.* Taggart, 38 Me. 298; State *v.* Putnam, 38 Me. 296; State *v.* Haines, 30 Me. 65; State *v.* Barnes, 29 Me. 561; Com. *v.* McGovern, 10 Allen (Mass.) 193; State *v.* Beard, 25 N. J. L. 384; State *v.* Dayton, 23 N. J. L. 49; State *v.* Flowers, 109 N. Car. 841; *Ex. p.* Bushnell, 8 Ohio St. 599; Com. *v.* Church, 1 Pa. St. 105; State *v.* McCarty, 4 R. I. 82. And the motion will be sustained only upon the clearest and plainest grounds. People *v.* Eckford, 7 Cow. (N. Y.) 535; Com. *v.* Haggerty, 3 Brews. (Pa.) 285; Respublica *v.* Cleaver, 4 Yeates (Pa.) 69; Jones *v.* State, 6 Humph. (Tenn.) 435; Click *v.* State, 3 Tex. 282; U. S. *v.* Wardell, 49 Fed. Rep. 914. As where the court can see that the indictment is so defective that it would not support a verdict. Com. *v.* Eastman, 1 Cush. (Mass.) 189; Com. *v.* Hawkins, 3 Gray (Mass.) 463; People *v.* Winner, 80 Hun (N. Y.) 130. Or where the indictment is so defective that no judgment could legally be rendered in the event of a conviction. State *v.* Robinson, 29 N. H. 274. And, as a general rule, in the absence of statute, no indictment which charges the higher offenses, as treason or felony, will be quashed upon motion. State *v.* Rector, 11 Mo. 28; State *v.* Dayton, 23 N. J. L. 49; People *v.* Walters, (Supreme Ct. Gen. T.) 5 Park. Crim. (N. Y.) 661; State *v.* Colbert, 75 N. Car. 368; State *v.* Young, 30 S. Car. 399; Bell *v.* Com., 8 Gratt. (Va.) 600.

Nature of Motion. — A motion to quash an indictment is in the nature of a demurrer. Jackson *v.* State, 64 Ga. 344; Thomasson *v.* State, 22 Ga. 499; Nichols *v.* State, 46 Miss. 284; State *v.* Reeves, 97 Mo. 668. And is usually used in place of it, since it is a more easy and effectual mode of getting at the whole matter. Nicholls *v.* State, 5 N. J. L. 621.

Requisites of Motion, Generally. — For the formal parts of a motion in a particular jurisdiction consult the title MOTIONS, vol. 12, p. 938.

Must be in Writing. — Motion to set aside information or indictment must be in writing. Mont. Pen. Code (1895), § 1911; N. Dak. Rev. Codes (1895), § 8083.

Founded on Facts Apparent in Record. — A motion to quash must be founded on facts apparent on the face of the indictment or elsewhere in the record. Broward *v.* State, 9 Fla. 422; Jackson *v.* State, 64 Ga. 344; Swiney *v.* State, 119 Ind. 478; State *v.* Zeigler, 46 N. J. L. 307; State *v.* Rickey, 9 N. J. L. 293; Whiting *v.* State, 48 Ohio St. 220; State *v.* Ward, 60 Vt. 142. Or admitted and shown by the plaintiff's own proofs. State *v.* Ward, 60 Vt. 142. But see *contra*, to the effect that an indictment may be quashed for matters *de hors* the record as well as for defects occurring on its face, State *v.* Wall, 15 Mo. 208; Com. *v.* Williams, 149 Pa. St. 54; Com. *v.* Bradney, 126 Pa. St. 199; Com. *v.* Bartilson, 85 Pa. St. 482.

In *Mississippi*, by reason of the code, objections to the indictment for defects appearing on the face thereof must be taken by demurrer, and not otherwise. Gates *v.* State, 71 Miss. 874.

Ground of Objection must be Clearly Specified. — Motion to set aside an information or indictment must specify clearly the ground of objection thereto. Mont. Pen. Code (1895), § 1911; N. Dak. Rev. Codes (1895), § 8083.

Subscribed by Defendant or Attorney. — Motion to set aside information or indictment must be subscribed by the defendant or his attorney. Mont. Pen. Code (1895), § 1911; N. Dak. Rev. Codes (1895), § 8083.

Precedents. — In Garnett *v.* Guynn, 7 Kan. App. 414, is set out the following motion:

"Now comes *Thomas Guynn*, while in custody of the officer, and, before plea entered, moves the court to quash the complaint and set aside the warrant for the reason: That said complaint is not sworn to as required by law; that no criminal charge is stated in said complaint and warrant, as required by law. *Manford Schoonover*,
Attorney for Defendant."

Form No. 16810.[1]

(Precedent in State *v.* Reno, 41 Kan. 677.)[2]

[The State of *Kansas*, *Finney* County. } ss. In the *District* Court.

State of *Kansas* against *Clinton Reno.* } Motion *to Quash Information.*][3]

Comes now the above-named defendant, *Clinton Reno*, and asks the court to quash the information filed against him in said cause, for the following reasons:

First, that said information does not state facts sufficient to constitute a public offense under the laws of the state of *Kansas*.

Second, that said information is not verified as by law required.

Third, that said information is indefinite and uncertain, and does not inform defendant of the nature of the offense charged against him.

[*Jeremiah Mason*, Attorney for Defendant.][3]

b. For Defect in Drawing Grand Jury.

Form No. 16811.[4]

(Precedent in State *v.* Hale, 44 Iowa 96.)[5]

It was held that the court erred in overruling this motion.

In State *v.* Van Nice, 7 S. Dak. 104, is set out the following motion: "Comes now the defendant, in the above-entitled action, and moves the court to set aside the indictment returned in the said action against the said defendant, on the *15th* day of *March*, 1893, and alleges as the ground of his said motion the following facts, to wit: (1) That the list of names from which were drawn the names of the persons composing the grand jury by whom the said indictment was found and returned was not maintained at the full number of *two hundred* names, as required by law; and that the said grand jury was drawn from a list containing less than *two hundred* names. (2) That it nowhere appears in or upon the face of the said indictment that it was found or returned by a grand jury of the county of *Moody*. (3) That said indictment was not signed or subscribed by the foreman of the grand jury, nor by the state's attorney or by his deputy, nor by any member or officer of the grand jury, or any officer of the court. That said motion is made upon all the records and files of the above-entitled action, and upon the records of the court in the custody of the clerk of said court for the *March*, 1893, term thereof, and the record book kept by the said clerk, which shows the list of persons from which jurors were drawn for the said *circuit* court for the said county of *Moody* from *January 1*, 1891, to the present time."

It was held that if this motion were established it would be fatal to the verdict, and the ruling of the trial court in refusing to entertain the motion was reversed.

For another form of motion to quash indictment see Sinclair *v.* State, 34 Tex. Crim. 453.

1. *Kansas.* — Gen. Stat. (1897), c. 102, § 82.

See also, generally, *supra*, note 1, p. 147.

2. No objection was made to the form of the motion in this case, but it was overruled because none of the grounds set out were held tenable.

3. The matter enclosed by [ ] will not be found in the reported case.

4. *Iowa.* — Code (1897), § 5319, provides that a motion to set aside an indictment can be made where the grand jury is not selected, drawn, summoned, impaneled or sworn as prescribed by law.

See also, generally, *supra*, note 1, p. 147.

5. No objection was made to the form of the motion in this case.

The State of Iowa v. *Madame Hale.* } *District* Court, *Polk* County.

Comes now the defendant and moves the court to set aside the indictment filed in this case, for that:

The grand jury which found the said indictment was not legally selected, drawn and summoned, and was not selected, drawn and summoned according to the requirements of the statute, in this:

That the sheriff did not assist in the selection and drawing, and summoning of said jury, as the statute provides, but the deputy sheriff, one *Chas. S. Schofield*, did assist and take part in the selection, drawing and summoning of said grand jury, contrary to the provisions of the statute; and, in this, that the selection and drawing were not made at the same time, and as by law provided. And the defendant refers to the annexed stipulation and evidence, and makes the same a part of this motion.

Bissell & Crane, Defendant's Attorney.

c. For Failure to Set Out Any Offense Punishable by Statute.

Form No. 16812.

(Precedent in Com. *v.* Brown, 7 Pa. Dist. 117.)[1]

[(*Title of court and cause as in Form No. 6947.*)

And now, to wit, *November 27*, 1897, defendant moves the court to quash the indictment in the above case and assigns in support of said motion the following reasons:][2]

That the said defendant was arrested under the Acts of *June 11*, 1891, P. L. *297*, and *June 26*, 1895, P. L. *317*, and that since that time and before the arrest of said *Charles Brown*, to wit, on *June 18*, 1897, there was an Act of Assembly passed by the legislature and approved by the governor of the State of *Pennsylvania* which repealed the aforesaid Acts in so far as this is concerned; the said last mentioned Act containing provisions totally inconsistent with the first mentioned Acts, viz., only requiring *1 1-2* per centum by weight of cider vinegar solids, while the Acts under which the defendant was arrested required *2* per centum; and further, being inconsistent in this, that the first mentioned Acts gave the justice of the peace no other alternative than that of binding over the defendant for his appearance at court, if a prima facie case is made out, while the Act of *June 18*, 1897, gives the justice of the peace the authority to hear and determine the case upon its merits, and the former Acts being inconsistent in the penal provisions thereof.

[*Jeremiah Mason*, Attorney for Defendant.][3]

2. Writ of Mandamus.

1. The motion in this case was sustained.

See also, generally, *supra*, note 1, p. 147.

2. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

3. The matter supplied within [ ] will not be found in the reported case.

Form No. 16813.

(Precedent in Dwelling-House Ins. Co. *v.* Wilder, 40 Kan. 565.)[1]

[In the *Supreme* Court of the State of *Kansas.*

The Dwelling-house Insurance Company of Massachusetts, plaintiff,
against
D. W. Wilder, as Superintendent of Insurance, defendant.
The Western Home Insurance Company of Iowa, plaintiff,
against
D. W. Wilder, as Superintendent of Insurance, defendant.
} Motion.][2]

Now comes said defendant and moves the court now here to quash and set aside the alternative writ of mandamus bearing teste and issued herein, *6th* of *April*, 1*888*, for the reason that said writ does not state nor recite facts sufficient to entitle the plaintiff to the relief demanded, nor to any relief whatever, as against the supposed grievances in said writ averred.

[*Jeremiah Mason*, Attorney for Defendant.][2]

Form No. 16814.

(Precedent in State *v.* School Dist. No. 1, 79 Mo. App. 108.)[3]

[(*Venue and title of court and cause as in Form No. 14261.*)

Now comes the defendant and moves the court to quash the writ in the above case:][4]

1st. Because said suit was prematurely begun, in this that when said suit was instituted the time had not yet arrived when said defendant directors may, can, or could, under the statutes, make an estimate for the assessment of a tax upon the taxable property of said districts, for the purpose of said writ or for any other purpose.

2d. Because the allegations in said writ respecting the supposed selection of the land in question, for a school house site by defendant district, is not a statement, but a statement of a conclusion of law.

3d. Because it does not appear by said writ that the condemnation proceedings mentioned therein were instituted with proper authority, or that the directors of said district had any legal right to cause the same to be instituted at the time they were begun.

4th. Because said writ does not state facts sufficient to constitute a cause of action.

[*Jeremiah Mason*, Attorney for Defendant.][2]

1. The remedy of mandamus was refused in this case.
2. The matter supplied within [ ] will not be found in the reported case.
3. The motion in this case was sustained.
4. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

II. Order Quashing or Setting Aside.[1]

1. Indictment.

Form No. 16815.

(Sand. & H. Dig. Ark. (1894), p. 1668, No. 191.)[2]

State of Arkansas, plaintiff,
against
John Smith, defendant.

The defendant moved the court to set aside the indictment, on the ground that the jury had been illegally summoned and impaneled (*or other grounds, according to the facts*), and, the court being sufficiently advised, it is ordered that the indictment be set aside, and the charge against the defendant submitted to another grand jury, and the defendant be committed to jail to await the action of such grand jury (*or that the defendant be admitted to give bail in the sum of one thousand dollars for his appearance to answer the charge*).

2. Writ of Garnishment.

Form No. 16816.

(Precedent in *In re* Mudsill Min. Co., 31 U. S. App. 115.)[3]

[In the *Circuit* Court *of the United States* for the *Eastern* District of *Michigan.*][4]

The Mudsill Mining Company, Limited, and *Walter McDermott*,
v.
Orville A. Watrous and *Stewart A. Van Dusen*, Principal Defendants,
and
Willard I. Brotherton, *Henry E. Watrous* and *Henry W. Jennings*, Garnishee Defendants.

On reading and filing the motion of the said garnishee defendants to quash the writ of garnishment heretofore issued in this cause, and

1. **For the formal parts** of an order in a particular jurisdiction see the title Orders, vol. 13, p. 356.

Order Quashing Service of Summons. — In Reedy *v.* Howard, 11 S. Dak. 160, the order quashing service of summons, omitting formal parts, was as follows: "Ordered, that said motion be, and the same is hereby, sustained, and the service of said summons herein is quashed and set aside, and said action is hereby dismissed, at plaintiff's cost of this motion, viz., filing and entering the same, to be taxed by the clerk, *one* and *25-100* dollars."

2. *Arkansas.*—Sand. & H. Dig. (1894), § 2127, provides that if a motion to set aside the indictment be sustained, the court shall make an order that the case be submitted to another grand jury, to be assembled at that or the next term of the court, and the defendant, if in custody, shall be remanded to jail, or if on bail the bail shall be liable for the defendant's appearance to answer a new indictment, if one be found.

3. The quashing of the writ in this case was held proper by the circuit court of appeals.

4. The matter supplied within [ ] will not be found in the reported case.

after hearing counsel for both parties, on motion of *Chester L. Collins*, Esq., of counsel for said garnishee defendants, it is ordered, That the writ of garnishment issued in said cause at the instance of the plaintiffs be, and the same is hereby, quashed and held for nought; but the effect of this order is hereby suspended, pending a review of the order, until the further order of this court directing that it become absolute.

Henry H. Swan, District Judge.

QUASHING.

See the title QUASHAL, ante, p. 147.

QUIA TIMET.

See the titles BILLS DE BENE ESSE, vol. 3, p. 406; *BILLS OF PEACE*, vol. 3, p. 509; *INDEMNITY CONTRACTS*, vol. 9, p. 589; *INTERPLEADER*, vol. 10, p. 391; *PERPETUATION OF TESTIMONY*, vol. 13, p. 869; *PRINCIPAL AND SURETY, OR GUARANTOR*, vol. 14, p. 167; *QUIETING TITLE AND REMOVING CLOUD*, *post*, p. 154; *RESCISSION, REFORMATION AND CANCELLATION; TRUSTS AND TRUSTEES; WILLS.*

QUIETING TITLE AND REMOVING CLOUD.

By Harold N. Eldridge.

CROSS-REFERENCES.

For Forms of Bills of Peace to Quiet Title, see the title BILLS OF PEACE, vol. 3, p. 509.
For other Forms of Disclaimer, see the title DISCLAIMER, vol. 6, p. 838.
For Forms in Proceedings to Quiet Title to Mining Lands, see the title MINES AND MINING, vol. 12, p. 319.
For Form of Complaint to Quiet Title to Land Obtained by Grant from the United States, see the title PUBLIC LANDS, ante, p. 76.
See also the GENERAL INDEX to this work.

I. DIRECT PROCEEDINGS TO QUIET TITLE OR REMOVE CLOUD.[1]

1. Statutory provisions relating to the quieting of title and the removal of cloud exist in the following states:
Alabama. — Civ. Code (1896), § 809 *et seq.*
Arizona. — Rev. Stat. (1901), § 4104 *et seq.*
Arkansas. — Sand. & H. Dig. (1894), § 6120 *et seq.*
California. — Code Civ. Proc. (1897), § 738 *et seq.*
Colorado. — Mills' Anno. Code (1896), § 255 *et seq.*
Connecticut. — Laws (1893), c. 66.
Georgia. — 2 Code (1895), §§ 4892, 4893.
Idaho. — Rev. Stat. (1887), §§ 4538, 4539.
Illinois. — Starr & C. Anno. Stat. (1896), c. 22, par. 50; Laws (1897), p. 199.
Indiana. — Horner's Stat. (1896), § 1070.
Iowa. — Code (1897), § 4223 *et seq.*
Kansas. — Gen. Stat. (1897), c. 96, § 1.
Maine. — Rev. Stat. (1883), c. 104, §§ 47, 48; Stat. (Supp. 1895), c. 104.
Massachusetts. — Stat. (1897), c. 522,

1. Bill, Complaint or Petition.[1]

as *amended* Stat. (1898), c. 457; Stat. (1893), c. 340; Stat. (1889), c. 442, as *amended* Stat. (1890), c. 427; Stat. (1882), c. 237 as *affected* by Stat. (1885), c. 283; Stat. (1890), c. 427.

Michigan. — Comp. Laws (1897), § 448.

Minnesota. — Stat. (1894), § 5817.

Mississippi. — Anno. Code (1892), §§ 500, 501.

Missouri. — Rev. Stat. (1899), § 647.

Montana. — Code Civ. Proc. (1895), §§ 1310, 1311.

Nebraska. — Comp. Stat. (1899), §§ 4150, 4151.

Nevada. — Comp. Laws (1900), § 3351.

New Jersey. — Gen. Stat. (1895), p. 3486, § 1.

New York. — Code Civ. Proc., § 1638 *et seq.*

North Dakota. — Rev. Codes (1895), §§ 5904, 5905.

Ohio. — Bates' Anno. Stat. (1897), § 5779.

Oklahoma. — Stat. (1893), § 4491.

Oregon. — Hill's Anno. Laws (1892), § 504, as *amended* Laws (1899), p. 227.

South Dakota. — Dak. Comp. Laws (1887), §§ 5449, 5450.

Utah. — Rev. Stat. (1898), § 3511 *et seq.*

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 5500 *et seq.*

Wisconsin. — Stat. (1898), § 3186.

Wyoming. — Rev. Stat. (1887), § 2985.

Effect of statute has been to greatly simplify the pleadings in the proceeding. Castro *v.* Barry, 79 Cal. 443; Marot *v.* Germania Bldg., etc., Assoc., Number 2, 54 Ind. 37; Broderick *v.* Cary, 98 Wis. 419. But not to abolish or take away the previously existing equitable remedies. Westbrook *v.* Schmaus, 51 Kan. 558; Grove *v.* Jennings, 46 Kan. 366; Douglass *v.* Nuzum, 16 Kan. 515; Ormsby *v.* Barr, 22 Mich. 80.

1. Requisites of Bill, Complaint or Petition, Generally. — For the formal parts of a bill, complaint or petition in a particular jurisdiction see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; PETITIONS, vol. 13, p. 887.

Compliance with Statute. — Where the proceeding is brought under the statute, every statutory requirement must be complied with. Johnson *v.* Taylor, 106 Ind. 89. And every fact requisite to enable the court to judge whether or not plaintiff has a cause of action arising under the statute must be stated. Churchill *v.* Onderdonk, 59 N. Y. 134; Austin *v.* Goodrich, 49 N. Y. 266; Walker *v.* Pease, (Supreme Ct. Spec. T.) 17 Misc. (N. Y.) 415.

Where a complaint is clearly to remove a specified cloud upon the title of real estate, it cannot, if it fails to state facts sufficient to sustain an action for such specific purpose, be sustained, although it alleges facts sufficient to constitute an action under the statute to determine adverse claims to real estate. Bovey-De Laittre Lumber Co. *v.* Dow, 68 Minn. 273; Knudson *v.* Curley, 30 Minn. 433; Walton *v.* Perkins, 28 Minn. 413.

Where the statute, instead of prescribing a special procedure, requires that the ordinary course in civil suits be followed, it does not mean that the rules of pleading in ordinary cases shall be so closely observed as to defeat the main purpose of the statute itself, but that the general civil procedure adjusted to the peculiar action be followed. Huff *v.* Laclede Land, etc., Co., 157 Mo. 65.

Interest of Plaintiff — *Generally.* — Plaintiff's claim, interest, title or estate in or to the lands in controversy must be stated. Adler *v.* Sullivan, 115 Ala. 582; Ariz. Rev. Stat. (1901), § 4105; Adams *v.* Crawford, 116 Cal. 495; Fudickar *v.* East Riverside Irrigation Dist., 109 Cal. 29; Stratton *v.* California Land, etc., Co., 86 Cal. 353; Johnson *v.* Vance, 86 Cal. 128; Gruwell *v.* Seybolt, 82 Cal. 7; Castro *v.* Barry, 79 Cal. 443; Souter *v.* Maguire, 78 Cal. 543; Heeser *v.* Miller, 77 Cal. 192; Hancock *v.* Plummer, 66 Cal. 337; Rough *v.* Simmons, 65 Cal. 227; Stoddart *v.* Burge, 53 Cal. 394; Ferrer *v.* Home Mut. Ins. Co., 47 Cal. 416; Garwood *v.* Hastings, 38 Cal. 216; Turner *v.* White, 73 Cal. 299; Weston *v.* Estey, 22 Colo. 334; Wall *v.* Magnes, 17 Colo. 476; Conn. Laws (1893), c. 66, § 2; Pease *v.* Sanderson, 188 Ill. 597; Walker *v.* Converse, 148 Ill. 622; Snow *v.* Counselman, 136 Ill. 191; Rucker *v.* Dooley, 49 Ill. 377; Parke *v.* Brown, 12 Ill. App. 291; Chapman *v.* Jones, 149 Ind. 434; Stanley *v.* Holliday, 130 Ind. 464; Johnson *v.* Murray, 112 Ind. 154; Rausch *v.* United Brethren, etc., 107 Ind. 1; Johnson *v.* Taylor, 106 Ind. 89; Locke *v.* Catlett, 96 Ind. 291; Mitter *v.*

a. In General.

Fouch, 86 Ind. 451; Hays *v.* Carr, 83 Ind. 275; Iowa Code (1897), § 4224; Brinton *v.* Seevers, 12 Iowa 389; Entreken *v.* Howard, 16 Kan. 551; Packard *v.* Beaver Valley Land, etc., Co., 96 Ky. 249; Whipple *v.* Earick, 93 Ky. 121; Webb *v.* Adams, (Ky. 1900) 58 S. W. Rep. 585; Mass. Stat. (1893), c. 340; Hanscom *v.* Hinman, 30 Mich. 419; Wheeler Winnebago Paper Mills, 62 Minn. 429; Wakefield *v.* Day, 41 Minn. 344; Herrick *v.* Churchill, 35 Minn. 318; Myrick *v.* Coursalle, 32 Minn. 153; Pierce *v.* Hunter, 73 Miss. 754; Ricks *v.* Baskett, 68 Miss. 250; Shackelford *v.* Smith, 61 Miss. 5; Scarborough *v.* Myrick, 47 Neb. 794; Brewer *v.* Merrick County, 15 Neb. 180; Monighoff *v.* Sayre, 41 N. J. Eq. 113; Andrus *v.* Wheeler, (Supreme Ct. Tr. T.) 18 Misc. (N. Y.) 646; Pearce *v.* Moore, 114 N. Y. 256; Barnard *v.* Simms, 42 Barb. (N. Y.) 304; Clark *v.* Hubbard, 8 Ohio 382; Thomas *v.* White, 2 Ohio St. 540; Lamb *v.* Boyd, 2 Ohio Cir. Dec. 672; Mayfield *v.* Musquez, 1 Tex. Unrep. Cas. 221; Ballinger's Anno. Codes & Stat. Wash. (1897), § 5508; Wagner *v.* Law, 3 Wash. 500; Harr *v.* Shaffer, 45 W. Va. 709; Wis. Stat. (1898), § 3186; Broderick *v.* Cary, 98 Wis. 419; Brauns *v.* Green Bay, 55 Wis. 113; Smith *v.* Sherry, 54 Wis. 114; Pier *v.* Fond du Lac, 38 Wis. 470; Shaffer *v.* Whelpley, 37 Wis. 334; Wals *v.* Grosvenor, 31 Wis. 681; Lee *v.* Simpson, 29 Wis. 333; Durell *v.* Abbott, 6 Wyo. 265; Frost *v.* Spitley, 121 U. S. 552; Holland *v.* Challen, 110 U. S. 15; Metzgar *v.* McCoy, 105 Fed. Rep. 676; Guarantee Trust, etc., Co. *v.* Delta, etc., Co., 104 Fed. Rep. 5; Kennedy *v.* Elliott, 85 Fed. Rep. 832; Blythe *v.* Hinckley, 84 Fed. Rep, 228; Southern Pac. R. Co. *v.* Goodrich, 57 Fed. Rep. 879; Southern Pac. R. Co. *v.* Stanley, 49 Fed. Rep. 263; Orton *v.* Smith, 18 How. (U. S.) 263; Bayerque *v.* Cohen, McAll. (U. S.) 113, 2 Fed. Cas. No. 1134; Stark *v.* Starrs, 6 Wall. (U. S.) 402.

It must be shown whether plaintiff's estate is one of inheritance, for life, or for years not less than ten. Dyer *v.* Baumeister, 87 Mo. 134; King *v.* Townshend, 78 Hun (N. Y.) 380.

In McMannus *v.* Smith, 53 Ind. 211, it is said that where an estate in lands less than fee simple is pleaded it must be particularly described or it would not appear what part of the fee simple it was, either in quantity of estate, time of its duration, or whether in severalty, coparceny or in common, or what one of the numerous parcels in which the fee simple may be divided. However, where the facts stated show the interest of the plaintiff, that is sufficient. The plaintiff need not specially allege that he has a valid interest or right to the possession of the land. Wagner *v.* Law, 3 Wash. 500.

For statutory requisites as to allegations of plaintiff's interest see list of statutes cited *supra*, note 1, p. 155.

Source of plaintiff's title need not be stated in the absence of a statutory requirement. Millett *v.* Lagomarsino, (Cal. 1894) 38 Pac. Rep. 308. And this rule applies where title is acquired by adverse possession. Millett *v.* Lagomarsino, (Cal. 1894) 38 Pac. Rep. 308.

In Goldsmith *v.* Gilliland, 10 Sawy. (U. S.) 606, the court said: "Generally, I think it will be found sufficient for the plaintiff to allege his possession and interest or estate in the land, as that he is the owner thereof in fee, for life or for years; and that he claims the same by a regular chain of conveyances from some recognized and undisputed source of title * * * without setting out such conveyances or stating them in detail. But when there is reason to believe * * * that the rightfulness of the defendant's claim depends on the validity or legal effect of some link or links in the conveyances under which the plaintiff claims title, it is very convenient, if not necessary, that the statement of the plaintiff's case should contain the facts fully and in detail, at that point in the chain of his title where it conflicts with the claim of the defendant."

Copy of deed need not be set out in the complaint. Carver *v.* Carver, 97 Ind. 497; Stribling *v.* Brougher, 79 Ind. 328; Lash *v.* Perry, 19 Ind. 322.

Whether title is legal or equitable must be shown. Stanley *v.* Holliday, 130 Ind. 464; Grissom *v.* Moore, 106 Ind. 296; Salisbury *v.* Miller, 14 Mich. 160; Chiles *v.* Champenois, 69 Miss. 603; Blalock *v.* Hardy, 37 Miss. 615; Harrill *v.* Robinson, 61 Miss. 153; Handy *v.* Noonan, 51 Miss. 166; Huntington *v.* Allen, 44 Miss. 654; Jayne *v.* Boisegerard, 39 Miss. 796; Toulmin *v.* Heidelberg, 32 Miss. 268; Williamson *v.* Louisville, etc., R. Co., (Miss. 1889) 6 So. Rep. 205. And if it be an equitable

title, all the facts which go to maintain it may be shown. Grissom *v.* Moore, 106 Ind. 296.

Where Land is Vacant. — In an action to determine an adverse claim, where the land is vacant and unoccupied, the plaintiff must allege that he has some title to or interest in the land; otherwise he has no standing in court and his action must be dismissed. Wheeler *v.* Winnebago Paper Mills, 62 Minn. 429; Wakefield *v.* Day, 41 Minn. 344.

Alleging Record Title. — That petitioner has a record title to the land in controversy need not be alleged, under a statute which applies only to a record title clouded by an adverse claim, but describes what the petitioner must set forth in his petition, namely, his interest, a description of the premises, the claims, and the possible adverse claimants so far as known to him. The statute states the jurisdictional facts and if these are set forth it is enough. Blanchard *v.* Lowell, 177 Mass. 501.

Possession Not Sufficient. — Notwithstanding the statute that any person "in possession" of real property may maintain a suit to determine an adverse claim thereto, the better opinion is that the mere naked possession is not sufficient, but the same must be accompanied by a claim of right or title. Goldsmith *v.* Gilliland, 10 Sawy. (U. S.) 606.

Seisin on day of filing bill must be alleged. And where the bill alleges that plaintiff was seised of title more than two years and a half before the bill was filed, the allegation will not justify an inference that he was so seised on the day the bill was filed. Parke *v.* Brown, 12 Ill. App. 291.

That plaintiff is owner, or is owner in fee, or is owner and seised in fee, is sufficient averment of title. Fudickar *v.* East Riverside Irrigation Dist., 109 Cal. 29; Stratton *v.* California Land, etc., Co., 86 Cal. 353; Johnson *v.* Vance, 86 Cal. 128; Souter *v.* Maguire, 78 Cal. 543; Heeser *v.* Miller. 77 Cal. 192; Turner *v.* White, 73 Cal. 299; Rough *v.* Simmons, 65 Cal. 227; Ferrer *v.* Home Mut. Ins. Co., 47 Cal. 416; Garwood *v.* Hastings, 38 Cal. 216; Wall *v.* Magnes, 17 Colo. 476; Amter *v.* Conlon, 3 Colo. App. 185, 22 Colo. 150; District of Columbia *v.* Hufty, 13 App. Cas. (D. C.) 175; Stanley *v.* Holliday, 130 Ind. 464; Manifold *v.* Jones, 117 Ind. 212; Johnson *v.* Taylor, 106 Ind. 89; Gabe *v.* Root, 93 Ind. 256; Stumph *v.* Reger, 92 Ind. 286; McMannus *v.* Smith, 53 Ind. 211; Boyd *v.* Clarke, (Ky. 1900) 59 S. W. Rep. 511; Cook *v.* Friley, 61 Miss. 1; Wals *v.* Grosvenor, 31 Wis. 681; Gage *v.* Kaufman, 133 U. S. 471; Parley's Park Silver Min. Co. *v.* Kerr, 130 U. S. 256; Ely *v.* New Mexico, etc., R. Co., 129 U. S. 291; Union Mill, etc., Co. *v.* Warren, 82 Fed. Rep. 519. The chain of evidence by which he became the real owner of the land need not be set forth. Cook *v.* Friley, 61 Miss. 1; Wals *v.* Grosvenor, 31 Wis. 681. But while a general allegation of ownership is sufficient, if plaintiff is not content with this, but in addition undertakes to state facts constituting his ownership, he must state enough to constitute a good title, since the facts will operate as a limitation upon the general averment, which will become a conclusion merely. Gruwell *v.* Seybolt, 82 Cal. 7; Heeser *v.* Miller, 77 Cal. 192; Turner *v.* White, 73 Cal. 299; Pittsburg, etc., R. Co. *v.* O'Brien, 142 Ind. 218; Logansport *v.* McConnell, 121 Ind. 416; McPheeters *v.* Wright, 110 Ind. 519; Spencer *v.* McGonagle, 107 Ind. 410; Ragsdale *v.* Mitchell, 97 Ind. 458; Locke *v.* Catlett, 96 Ind. 291; Keepfer *v.* Force, 86 Ind. 81.

Ownership in fee implies sole ownership. King *v.* Townshend, 78 Hun (N. Y.) 380. It means title to the entire estate. Lane *v.* Schlemmer, 114 Ind. 296; Indiana, etc., R. Co. *v.* Allen, 113 Ind. 581; McMannus *v.* Smith, 53 Ind. 211. Where title is not specifically set forth. Lane *v.* Schlemmer, 114 Ind. 296. And plaintiff may introduce proof of any title, including that acquired by adverse possession. Millett *v.* Lagomarsino, (Cal. 1894) 38 Pac. Rep. 308; Rogers *v.* Miller, 13 Wash. 82; Raymond *v.* Morrison, 9 Wash. 156.

An allegation of possession, not only at the time of the commencement of the action, but for a sufficient length of time to show title in plaintiff, is equivalent to a direct allegation of ownership. Batchelder *v.* Baker, 79 Cal. 266.

Title of Common Grantor. — Where the plaintiff and defendant claim under a common grantor, the complaint need not allege that the grantor had title. Fudickar *v.* East River Side Irrigation Dist., 109 Cal. 29; Millis *v.* Roof, 121 Ind. 360; Jackson *v.* Tatebo, 3 Wash. 456.

Possession of Plaintiff — *Generally.* —

That plaintiff, at the time of the commencement of the suit, was in possession of the land must, as a general rule, be alleged, where the proceeding is brought under the old chancery practice, and in some states under statute this allegation is still essential. Freeman *v.* Brown, 96 Ala. 301; Echols *v.* Hubbard, 90 Ala. 309; Curry *v.* Peebles, 83 Ala. 225; Thorington *v.* Montgomery, 82 Ala. 591; Smith *v.* Cockrell, 66 Ala. 64; Baines *v.* Barnes, 64 Ala. 375; McLean *v.* Presley, 56 Ala. 211; Belcher *v.* Scruggs, 125 Ala. 336; Astiazaran *v.* Santa Rita, Land, etc., Co., (Ariz. 1889) 20 Pac. 189; Ely *v.* New Mexico, etc., R. Co., (Ariz. 1888), 19 Pac. Rep. 6; Brusie *v.* Gates, 80 Cal. 462; Pralus *v.* Jefferson Gold, etc., Min. Co., 34 Cal. 558; Ferris *v.* Irving, 28 Cal. 645; Lyle *v.* Rollins, 25 Cal. 437; Rico *v.* Spence, 21 Cal. 504; Reynolds *v.* Campling, 23 Colo. 105; Amter *v.* Conlon, 22 Colo. 150; Weston *v.* Estey, 22 Colo. 334; Richards *v.* Morris, 39 Fla. 205; Watson *v.* Holliday, 37 Fla. 488; Graham *v.* Florida Land, etc., Co., 33 Fla. 356; Patton *v.* Crumpler, 29 Fla. 573; Haworth *v.* Norris, 28 Fla. 763; Sloan *v.* Sloan, 25 Fla. 53; Illinois Land, etc., Co. *v.* Speyer, 138 Ill. 137; Glos *v.* Randolph, 133 Ill. 197; Johnson *v.* Huling, 127 Ill. 14; Wetherell *v.* Eberle, 123 Ill. 666; Gage *v.* Curtis, 122 Ill. 520; Gould *v.* Sternburg, 105 Ill. 488; Gage *v.* Schmidt, 104 Ill. 106; Gage *v.* Parker, 103 Ill. 528; Gage *v.* Griffin, 103 Ill. 41; Booth *v.* Wiley, 102 Ill. 84; Oakley *v.* Hurlbut, 100 Ill. 204; Gage *v.* Abbott, 99 Ill. 366; Whitney *v.* Stevens, 97 Ill. 482; Shays *v.* Norton, 48 Ill. 100; Alton M. & F. Ins. Co. *v.* Buckmaster, 13 Ill. 201; Monson *v.* Kill, 44 Ill. App. 306, 144 Ill. 248; Johnson *v.* McChesney, 33 Ill. App. 526; Holden *v.* Holden, 24 Ill. App. 106; Parke *v.* Brown, 12 Ill. App. 291; Cole *v.* Young, 24 Kan. 435; Whipple *v.* Earick, 93 Ky. 121; Boyd *v.* Clarke, (Ky. 1900) 59 S. W. Rep. 511; Webb *v.* Adams, (Ky. 1900) 58 S. W. Rep. 585; Coppage *v.* Griffith, (Ky. 1897) 40 S. W. Rep. 908; Helden *v.* Hellen, 80 Md. 616; Livingston *v.* Hall, 73 Md. 386; Polk *v.* Pendleton, 31 Md. 118; Kilgannon *v.* Jenkinson, 51 Mich. 240; Page *v.* Montgomery, 46 Mich. 51; Howell *v.* Merrill, 30 Mich. 282; Holbrook *v.* Winsor, 23 Mich. 394; Torrent *v.* Muskegon Booming Co., 22 Mich. 354; Ormsby *v.* Barr, 22 Mich. 80; Barron *v.* Robbins, 22 Mich. 35; Herrick *v.* Churchill, 35 Minn. 318; Conklin *v.* Hinds, 16 Minn. 457; Wilder *v.* St. Paul, 12 Minn. 192; Hamilton *v.* Batlin, 8 Minn. 403; Mason *v.* Black, 87 Mo. 329; Charm Mfg. Co. *v.* Donovan, 14 Mo. App. 591; Nixon *v.* Walter, 41 N. J. Eq. 103; Moores *v.* Townshend, 102 N. Y. 387; Peacock *v.* Stott, 104 N. Car. 154; Woodlief *v.* Merritt, 96 N. Car. 226; Pearson *v.* Boyden, 86 N. Car. 585; Busbee *v.* Macy, 85 N. Car. 329; Edgar *v.* Edgar, 26 Oregon 65; Zumwalt *v.* Madden, 23 Oregon 185; Silver *v.* Lee, (Oregon 1901) 63 Pac. Rep. 882; Herrington *v.* Williams, 31 Tex. 448; Mayfield *v.* Musquez, 1 Tex. Unrep. Cas. 221; Jackson *v.* Tatebo, 3 Wash. 456; Spithill *v.* Jones, 3 Wash. 290; Davis *v.* Settle, 43 W. Va. 17; Christian *v.* Vance, 41 W. Va. 754; Moore *v.* McNutt, 41 W. Va. 695; Clayton *v.* Barr, 34 W. Va. 290; McConnell *v.* Rowland, (W. Va. 1900) 37 S. E. Rep. 586; Wis. Stat. (1898), § 3186; Broderick *v.* Cary, 98 Wis. 419; Shaffer *v.* Whelpley, 37 Wis. 334; Lee *v.* Simpson, 29 Wis. 333; Durell *v.* Abbott, 6 Wyo. 265; Harding *v.* Guice, 42 U. S. App. 411; Frey *v.* Willoughby, 27 U. S. App. 417, 63 Fed. Rep. 865; Sanders *v.* Devereux, 19 U. S. App. 630, 60 Fed. Rep. 311; Northern Pac. R. Co. *v.* Amacker, 7 U. S. App. 33; Whitehead *v.* Shattuck, 138 U. S. 146; U. S. *v.* Wilson, 118 U. S. 86; Holland *v.* Challen, 110 U. S. 15; Metzgar *v.* McCoy, 105 Fed. Rep. 676; Kennedy *v.* Elliott, 85 Fed. Rep. 832; Blythe *v.* Hinckley, 84 Fed. Rep. 228; Gombert *v.* Lyon, 80 Fed. Rep. 305; Harding *v.* Guice, 80 Fed. Rep. 162; Read *v.* Dingess, 60 Fed. Rep. 21; Southern Pac. R. Co. *v.* Goodrich, 57 Fed. Rep. 879; Southern Pac. R. Co. *v.* Stanley, 49 Fed. Rep. 263; Union Pac. R. Co. *v.* Meier, 28 Fed. Rep. 9; Bayerque *v.* Cohen, 2 Fed. Cas. No. 1134, McAll. (U. S.) 113; Sharpleigh *v.* Surdam, 1 Flipp. (U. S.) 472. The reason for the allegation is that plaintiff, if out of possession, has ordinarily a remedy at law by an action of ejectment. Echols *v.* Hubbard, 90 Ala. 309; Sale *v.* McLean, 29 Ark. 612; Branch *v.* Mitchell, 24 Ark. 431; Apperson *v.* Ford, 23 Ark. 746; Stock-Growers' Bank *v.* Newton, 13 Colo. 245; Graham *v.* Florida Land, etc., Co., 33 Fla. 356; Haworth *v.* Norris, 28 Fla. 763; Gould *v.* Sternburg, 105 Ill. 488; Helden *v.* Hellen, 80 Md. 616; King *v.* Carpenter, 37 Mich. 363; Ormsby *v.* Barr, 22 Mich. 80; Barron *v.* Robbins,

22 Mich. 35; Snowden *v.* Tyler, 21 Neb. 199; O'Hara *v.* Parker, 27 Oregon 156; Davis *v.* Settle, 43 W. Va. 17; Lee *v.* Simpson, 29 Wis. 333; Frost *v.* Spitley, 121 U. S. 552; Sanders *v.* Devereux, 60 Fed. Rep. 311.

In *Tennessee*, it is the settled law that an adverse claimant out of possession, although he may bring ejectment for the land, may also go into equity and file a bill to remove the deeds which stand in his way as clouds on his title; and the court having jurisdiction for that purpose will, having canceled the deeds, put the plaintiff in possession. Steinkuhl *v.* York, 2 Flipp. (U. S.) 376 (*citing* Johnson *v.* Cooper, 2 Yerg. (Tenn.) 524; Jones *v.* Perry, 10 Yerg. (Tenn.) 59; Almony *v.* Hicks, 3 Head (Tenn.) 39; Anderson *v.* Talbot, 1 Heisk. (Tenn.) 407; Williams *v.* Talliaferro, 1 Coldw. (Tenn.) 37; Porter *v.* Jones, 6 Coldw. (Tenn.) 313; and also Hickman *v.* Cooke, 3 Humph. (Tenn.) 640, which was held to be somewhat contradictory to the other cases).

Under Statute.—In many of the states, however, the statutes have dispensed with the necessity of an allegation of possession by the plaintiff. Astiazaran *v.* Santa Rita Land, etc., Co., (Ariz. 1889) 20 Pac. Rep. 189; Ely *v.* New Mexico, etc., R. Co., (Ariz. 1888) 19 Pac. Rep. 6; Landregan *v.* Peppin, 94 Cal. 465; Brusie *v* Gates, 80 Cal. 462; McCaslin *v.* State, 99 Ind. 428; Lees *v.* Wetmore, 58 Iowa 170; Buena Vista County *v.* Iowa Falls, etc., R. Co., 55 Iowa 157; Lewis *v.* Soule, 52 Iowa 11; Fejervary *v.* Langer, 9 Iowa 159; Union Pac. R. Co. *v.* Meier, 28 Fed. Rep. 9; Ross *v.* McManigal, (Neb. 1900) 84 N. W. Rep. 610; Wagner *v.* Law, 3 Wash. 500; Jackson *v.* Tatebo, 3 Wash. 456; Spithill *v.* Jones, 3 Wash. 290; Whitehead *v.* Shattuck, 138 U. S. 146; Holland *v.* Challen, 110 U. S. 15; Guarantee Trust, etc., Co. *v.* Delta, etc., Co., 104 Fed. Rep. 5; Southern Pac. R. Co. *v.* Goodrich, 57 Fed. Rep. 879; Northern Pac. R. Co. *v.* Amacker, 49 Fed. Rep. 529; Southern Pac. R. Co. *v.* Stanley, 49 Fed. Rep. 263. But under this rule the plaintiff must bring himself under some head of equitable remedy and show that there is no clear and adequate remedy at law. Astiazaran *v.* Santa Rita Land, etc., Co., (Ariz. 1889) 20 Pac. Rep. 189; Ely *v.* New Mexico, etc., R. Co., (Ariz. 1888) 19 Pac. Rep. 6.

In *New York*, it must be shown that the property in controversy at the commencement of the action was, and for the year next preceding has been, in plaintiff's possession, or in the possession of himself and those from whom he derived his title, either as sole tenant or joint tenant or tenant in common with others. Code Civ. Proc., § 1639, subs. 1, 2; Pearce *v.* Moore, 114 N. Y. 256; King *v.* Townshend, 78 Hun (N. Y.) 380; Walker *v.* Pease, (Supreme Ct. Spec. T.) 17 Misc. (N. Y.) 415.

For statutory requisites as to allegations of plaintiff's possession see list of statutes cited *supra*, note 1, p. 155.

That plaintiff is seised in fee simple is a sufficient allegation of possession. District of Columbia *v.* Hufty, 13 App. Cas. (D. C.) 175; Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417; Gage *v.* Kaufman, 133 U. S. 471. Where land is unoccupied. Andrus *v.* Wheeler, (Supreme Ct. Tr. T.) 18 Misc. (N. Y.) 646.

Actual Possession.—That the plaintiff is in actual possession of the premises should be alleged. Thorington *v.* Montgomery, 82 Ala. 591; Robertson *v.* Wheeler, 162 Ill. 566; Lundy *v.* Lundy, 131 Ill. 138; Aldrich *v.* Boice, 56 Kan. 170; Westbrook *v.* Schmaus, 51 Kan. 558; Grove *v.* Jennings, 46 Kan. 366; Pierce *v.* Thompson, 26 Kan. 714; Douglass *v.* Nuzum, 16 Kan. 515; Giles *v.* Ortman, 11 Kan. 59; Brenner *v.* Bigelow, 8 Kan. 496; Eaton *v.* Giles, 5 Kan. 24; Cornelison *v.* Foushee, 101 Ky. 257; Packard *v.* Beaver Valley Land, etc., Co., 96 Ky. 249; Campbell *v.* Disney, 93 Ky. 41; Armitage *v.* Wickliffe, 11 B. Mon. (Ky.) 488; Smith *v.* White, (Ky. 1897) 41 S. W. Rep. 436; Weaver *v.* Bates, (Ky. 1896) 33 S. W. Rep. 1118; Gately *v.* Weldon, (Ky. 1890) 14 S. W. Rep. 680; Smith *v.* Gatliff, (Ky. 1887) 5 S. W. Rep. 558; Steele *v.* Fish, 2 Minn. 153; State *v.* Lindell R. Co., 151 Mo. 162; Northcutt *v.* Eager, 132 Mo. 265; Dyer *v.* Baumeister, 87 Mo. 134; Babe *v.* Phelps, 65 Mo 27; Rutherford *v.* Ullman, 42 Mo. 216; Von Phul *v.* Penn, 31 Mo. 333; Chaffin *v.* Clark, 33 Mo. App. 99; Allaire *v.* Ketcham, 55 N. J. Eq. 168; Clark *v.* Hubbard, 8 Ohio 382. Thomas *v.* White, 2 Ohio St. 540; O'Hara *v.* Parker, 27 Oregon 156; Coolidge *v.* Forward, 11 Oregon 118; Moore *v.* McNutt, 41 W. Va. 695; Ellis *v.* Northern Pac. R. Co., 77 Wis. 114; Gunderson *v.* Cook, 33 Wis. 551; Wals *v.* Grosvenor, 31 Wis. 681 (*overruling* Taylor *v.* Rountree, 28

Wis. 391; Krebs *v.* Dodge, 9 Wis. 1; Harding *v.* Guice, 42 U. S. App. 411). However, an allegation that plaintiff is the owner or owner in fee simple, and is in possession of the land in controversy, is sufficient. Weaver *v.* Bates, (Ky. 1896) 33 S. W. Rep. 1118; Shaffer *v.* Whelpley, 37 Wis. 334; Wals *v.* Grosvenor, 31 Wis. 681. That plaintiff is "legally" in possession of the land and entitled to its possession is not sufficient, being a conclusion of the pleader merely. Smith *v.* Gatliff, (Ky. 1887) 5 S. W. Rep. 558.

Peaceable Possession. — In some states it must be alleged that the plaintiff is in the peaceable possession of the premises. Loeb *v.* Wolff, 116 Ala. 273; Adler *v.* Sullivan, 115 Ala. 582; Oberon Land Co. *v.* Dunn, 56 N. J. Eq. 749; Allaire *v.* Ketcham, 55 N. J. Eq. 168; Whitlock *v.* Greacen, 48 N. J. Eq. 359; McCullough *v.* Absecon Beach Land, etc., Co., 48 N. J. Eq. 170; Beale *v.* Blake, 45 N. J. Eq. 668; Sheppard *v.* Nixon, 43 N. J. Eq. 627; DeHanne *v.* Bryant, (N. J. 1901) 48 Atl. Rep. 220.

Vacant Lands. — Where lands in controversy are vacant, possession need not be alleged, but the pleading must show such lands to be vacant, unoccupied or unimproved. Organ *v.* Memphis, etc., R. Co., 51 Ark. 235; Richards *v.* Morris, 39 Fla. 205; Watson *v.* Holliday, 37 Fla. 488; Graham *v.* Florida Land, etc., Co., 33 Fla. 356; Robertson *v.* Wheeler, 162 Ill. 566; Illinois Land, etc., Co. *v.* Speyer, 138 Ill. 137; Glos *v.* Randolph, 133 Ill. 197; Lundy *v.* Lundy, 131 Ill. 138; Johnson *v.* Huling, 127 Ill. 14; Gage *v.* Curtis, 122 Ill. 520; Gould *v.* Sternburg, 105 Ill. 488; Gage *v.* Parker, 103 Ill. 528; Gage *v.* Griffin, 103 Ill. 41; Booth *v.* Wiley, 102 Ill. 84; Oakley *v.* Hurlbut, 100 Ill. 204; Gage *v.* Abbott, 99 Ill. 366; Hardin *v.* Jones, 86 Ill. 313; Monson *v.* Kill, 44 Ill. App. 306, 144 Ill. 248; Johnson *v.* McChesney, 33 Ill. App. 526; Holden *v.* Holden, 24 Ill. App. 106; Parke *v.* Brown, 12 Ill. App. 291; Douglass *v.* Nuzum, 16 Kan. 515; O'Brien *v.* Creitz, 10 Kan. 202; Eaton *v.* Giles, 5 Kan. 24; Conklin *v.* Hinds, 16 Minn. 457; Spithill *v.* Jones, 3 Wash. 290; Broderick *v.* Cary, 98 Wis. 419; Geisinger *v.* Beyl, 80 Wis. 443; Southern Pac. R. Co. *v.* Goodrich, 57 Fed. Rep. 879.

Where Title is Equitable. — Possession need not be alleged where the title is shown to be an equitable one. Freeman *v.* Brown, 96 Ala. 301; Echols *v.* Hubbard, 90 Ala. 309; Astiazaran *v.* Santa Rita Land, etc., Co., (Ariz. 1889) 20 Pac. Rep. 189; Ely *v.* New Mexico, etc., R. Co., (Ariz. 1888) 19 Pac. Rep. 6; Organ *v.* Memphis, etc., R. Co., 51 Ark. 235; Mathews *v.* Marks, 44 Ark. 436; Bryan *v.* Winburn, 43 Ark. 28; Lawrence *v.* Zimpleman, 37 Ark. 643; Stock-Growers' Bank *v.* Newton, 13 Colo. 245; Graham *v.* Florida Land, etc., Co., 33 Fla. 356; Sloan *v.* Sloan, 25 Fla. 53; Mason *v.* Black, 87 Mo. 329. See *contra* Frost *v.* Spitley, 121 U. S. 552.

Where cloud is created by a tax deed charged to be irregular or void, it may be removed, notwithstanding failure to show that plaintiff is in possession. Harding *v.* Guice, 80 Fed. Rep. 162 (*citing* Christian *v.* Vance, 41 W. Va. 754).

Where there is shown to be no adequate remedy at law, equity will grant relief, notwithstanding the failure to allege possession. Belcher *v.* Scruggs, 125 Ala. 336; Astiazaran *v.* Santa Rita Land, etc., Co., (Ariz. 1889) 20 Pac. Rep. 189; Ely *v.* New Mexico, etc., R. Co., (Ariz. 1888) 19 Pac. Rep. 6; Chaplin *v.* Holmes, 27 Ark. 414; Redmond *v.* Packenham, 66 Ill. 434; Shays *v.* Norton, 48 Ill. 100; Holden *v.* Holden, 24 Ill. App. 106; Grove *v.* Jennings, 46 Kan. 366; Clouston *v.* Shearer, 99 Mass. 209; Hamilton *v.* Batlin, 8 Minn. 403; Donnelly *v.* Simonton, 7 Minn. 167; Day Land, etc., Co. *v.* State, 68 Tex. 526; Kruczinski *v.* Neuendorf, 99 Wis. 264; Davenport *v.* Stephens, 95 Wis. 436; Smith *v.* Zimmerman, 85 Wis. 542; Smith *v.* Chicago, etc., R. Co., 83 Wis. 271; Smith *v.* Sherry, 54 Wis. 114. Or that the land was vacant. Grove *v.* Jennings, 46 Kan. 366. Or unoccupied or unimproved. Shays *v.* Norton, 48 Ill. 100.

Description of Property. — The property must be described with certainty. Loeb *v.* Wolff, 116 Ala. 273; Miller *v.* Luco, 80 Cal. 257; Conn. Laws (1893), c. 66, § 2; Satterwhite *v.* Sherley, 127 Ind. 59; Ratliff *v.* Stretch, 117 Ind. 526; Rausch *v.* United Brethren, etc., 107 Ind. 1; Johnson *v.* Taylor, 106 Ind. 89; Sharpe *v.* Dillman, 77 Ind. 280; Me. Rev. Stat. (1883), c. 104, § 47; Stat. (Supp. 1895), c. 104; Mass. Stat. (1893), c. 340; Mo. Rev. Stat. (1899), § 647; Rees *v.* McDaniel, 115 Mo. 145; Bishop *v.* Waldron, 56 N. J. Eq. 484; Southmayd *v.* Elizabeth, 29 N. J. Eq. 203; Howard *v.* Levering, 4 Ohio Cir. Dec.

236; Broderick *v.* Cary, 98 Wis. 419; Union Mill, etc., Co. *v.* Warren, 82 Fed. Rep. 519.

Sufficient Description. — In Redd *v.* Murry, 95 Cal. 48, the complaint described the land as follows: "Situate in the county of *Tulare*, state of *California*, described as follows, to wit: On the north, *two hundred and forty* feet on *Mill* Street; on the east, *one hundred and ten* feet on a *thirty*-foot alley; on the south, *two hundred and forty* feet on an alley; on the west, *one hundred and ten* feet by a *thirty*-foot alley; and being all of lots Nos. *one*, *two*, *three*, and *four*, all of block No. *eight*, as per plat of *Johnson & Murry's* addition of the town of *Porterville*; said land being described, with reference to plats of the town of *Porterville* now on file in the recorder's office of said *Tulare* County, as commencing at a point on the south boundary of *Mill* Street *thirty* feet east of the northeast corner of lot *five*, in block *twenty*, of the old town of *Porterville*; thence running easterly along said boundary line *two hundred and forty* feet; thence southerly at right angles *one hundred and ten* feet; thence westerly at right angles *two hundred and forty* feet; thence northerly to the point of beginning, lying and being in the southwest quarter of section *twenty-five*, township *twenty-one* south, range *twenty-seven* east, M. D. M." This description was held sufficient. The court said: "The two descriptions of the land therein contained are not inconsistent with each other, and, together, are sufficient to identify the land by reference to the recorded plats of the town of Porterville, if there are such plats agreeing with each other and conforming to such description in the delineation of Mill Street, block 20, and the lots in question."

A description is not defective which calls for a lot of land one hundred varas square, bounded on three sides by well-known streets upon the plat of a city laid out, surveyed and platted, and on the other by the unsurveyed lands. Garwood *v.* Hastings, 38 Cal. 216.

Insufficient Description. — In Ward *v.* Janney, 104 Ala. 122, a description as follows was held insufficient, to wit: "The following real estate situated near the city of *Montgomery*, *Alabama*, namely, *five* acres of land being a part of lot number *five* according to survey made by *A. J. Pickett* of the land of *Mrs. Westcott.*" There were also facts to show that the five acres were leased by complainant's grantors to one Ward "for a truck farm," and was being occupied by Ward at the time of bill filed.

In Kadderly *v.* Frazier, (Oregon 1901) 63 Pac. Rep. 487, the complaint referred to "*one hundred and ten* acres of land, situated in section *12*, T. *1* S., R. *3* E. of the *Williamette* meridian, the same being a part of the *L. B. Morgan D. L. C.*," and stated that the sheriff "levied upon the real property of the plaintiff first described herein, to wit, *seventy* acres thereof," etc. It was held that this description was insufficient.

Name of Adverse Claimant. — The name of the person who claims or is claimed or reputed to have title or interest in or incumbrance on the land must be stated. Loeb *v.* Wolff, 116 Ala. 273; Bishop *v.* Waldron, 56 N. J. Eq. 484; Southmayd *v.* Elizabeth, 29 N. Y. Eq. 203.

That defendant is asserting claim adverse to plaintiff must be alleged. Adler *v.* Sullivan, 115 Ala. 582; Wilson *v.* Carter, 117 Cal. 53; Rough *v.* Simmons, 65 Cal. 227; Stoddart *v.* Burge, 53 Cal. 394; Satterwhite *v.* Sherley, 127 Ind. 59; Bisel *v.* Tucker, 121 Ind. 249; Rausch *v.* United Brethren, etc., 107 Ind. 1; Johnson *v.* Taylor, 106 Ind. 89; Conger *v.* Miller, 104 Ind. 592; Locke *v.* Catlett, 96 Ind. 291; Entreken *v.* Howard, 16 Kan. 551; Whipple *v.* Earick, 93 Ky. 121; Campbell *v.* Disney, 93 Ky. 41; Cleland *v.* Casgrain, 92 Mich. 139; Torrent *v.* Muskegon Booming Co., 22 Mich. 354; Stockton *v.* Williams, Walk. (Mich.) 120; Zumwalt *v.* Madden, 23 Oregon 185; Broderick *v.* Cary, 98 Wis. 419; Gamble *v.* Loop, 14 Wis. 465; Ely *v.* New Mexico, etc., R. Co., 129 U. S. 291; Kennedy *v.* Elliott, 85 Fed. Rep. 832; Goldsmith *v.* Gilliland, 10 Sawy. (U. S.) 606. However, where the facts pleaded show that the claim of defendant is adverse to the title of the plaintiff and inconsistent therewith, the complaint need not aver in terms that defendant's claim of title is adverse to the title of plaintiff. Otis *v.* Gregory, 111 Ind. 504; Kitts *v.* Willson, 106 Ind. 147; Broderick *v.* Cary, 98 Wis. 419.

Nature of Cloud — *Under Chancery Practice.* — Where a suit is brought in equity to remove a cloud, the bill must state facts from which the conclusion that the claim of defendant is a cloud upon plaintiff's title may be drawn, and in addition to stating the writing

or matter which constitutes the alleged cloud the bill must state the facts which give the instrument apparent validity as well as those facts which tend to show its actual invalidity. Smith *v.* Gil mer, 93 Ala. 224; Curry *v.* Peebles, 83 Ala. 225; Lawrence *v.* Zimpleman, 37 Ark. 643; Chaplin *v.* Holmes, 27 Ark. 414; Castro *v.* Barry, 79 Cal. 443; Hibernia Sav., etc., Soc. *v.* Ordway, 38 Cal. 679; Welles *v.* Rhodes, 59 Conn. 498; Welden *v.* Stickney, 1 App. Cas. (D. C.) 343; Douglass *v.* Nuzum, 16 Kan. 515; Torrent *v.* Muskegon Booming Co., 22 Mich. 354; Cleveland *v.* Stone, 51 Minn. 274; Maloney *v.* Finnegan, 38 Minn. 70; Griffin *v.* Harrison, 52 Miss. 824; Banks *v.* Evans, 10 Smed. & M. (Miss.) 35; Mason *v.* Black, 87 Mo. 329; Clark *v.* Covenant Mut. L. Ins. Co., 52 Mo. 272; Rodgers *v.* Appleton City First Nat. Bank, 82 Mo. App. 377; Scorpion Silver Min. Co. *v.* Marsano, 10 Nev. 370; Southmayd *v.* Elizabeth, 29 N. J. Eq. 203; Nickerson *v.* Canton Marble Co., 35 N. Y. App. Div. 111; Strusburgh *v.* New York, 87 N. Y. 452; Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474; Dederer *v.* Voorhies, 81 N. Y. 153; Houghtaling *v.* Walling, 48 Hun (N. Y.) 104; Sanders *v.* Yonkers, 63 N. Y. 489; Fonda *v.* Sage, 48 N. Y. 173; Crooke *v.* Andrews, 40 N. Y. 547; Farnham *v.* Campbell, 34 N. Y. 480; Ward *v.* Dewey, 16 N. Y. 519; Browning *v.* Lavender, 104 N. Car. 69; Murray *v.* Hazell, 99 N. Car. 168; Busbee *v.* Macy, 85 N. Car. 329; Day *v.* Schnider, 28 Oregon 457; O'Hara *v.* Barker, 27 Oregon 156; Teal *v.* Collins, 9 Oregon 89; Grant County *v.* Colonial, etc., Mortg. Co., 3 S. Dak. 390; Watson *v.* Glover, 21 Wash. 677; Broderick *v.* Cary, 98 Wis. 419; Davenport *v.* Stephens, 95 Wis. 456; Pier *v.* Fond du Lac, 38 Wis. 470; Gamble *v.* Loop, 14 Wis. 465; Goldsmith *v.* Gilliland, 10 Sawy. (U. S.) 606. And a complaint which alleges that the claim of the defendant is a cloud upon title is not enough without a statement of the facts upon which it is based. Welles *v.* Rhodes, 59 Conn. 498. If all of the facts are alleged which constitute a cloud upon the title, that will be regarded as sufficient, although the term "cloud" is not used in the complaint. Williams *v.* Ayrault, 31 Barb. (N. Y.) 364.

Under Statute.— Where the statutory remedy to quiet title is pursued, the general rule is that the plaintiff need not specifically set forth the adverse claim of defendant. Otis *v.* Gregory, 111 Ind. 504; McPheeters *v.* Wright, 110 Ind. 519; Conger *v.* Miller, 104 Ind. 592; Stribling *v.* Brougher, 79 Ind. 328; Jeffersonville, etc., R. Co. *v.* Oyler, 60 Ind. 383; Marot *v.* Germania Bldg., etc., Assoc. Number 2, 54 Ind. 37; Scorpion Silver Min. Co. *v.* Marsano, 10 Nev. 370 (*overruling* Blasdel *v.* Williams, 9 Nev. 161); Bishop *v.* Waldron, 56 N. J. Eq. 484; Monighoff *v.* Sayre, 41 N. J. Eq. 113; Ludington *v.* Elizabeth, 32 N. J. Eq. 159; King *v.* Townshend, 78 Hun (N. Y.) 380 (*explaining* Brown *v.* Teel, 59 Hun (N. Y.) 91; Austin *v.* Goodrich, 49 N. Y. 266); Smith *v.* Taylor, 34 Tex. 589. Or show the nature of the estate or interest claimed by him. Loeb *v.* Wolff, 116 Ala. 273; Adler *v.* Sullivan, 115 Ala. 582; Stratton *v.* California Land, etc., Co., 86 Cal. 353; Castro *v.* Barry, 79 Cal. 443; Hyde *v.* Redding, 74 Cal. 493; People *v.* Center, 66 Cal. 551; Amter *v.* Conlon, 22 Colo. 150, 3 Colo. App. 185; Otis *v.* De Boer, 116 Ind. 531; Otis *v.* Gregory, 111 Ind. 504; Lafayette Second Nat. Bank *v.* Corey, 94 Ind. 457; Boyd *v.* Olvey, 82 Ind. 294; Whipple *v.* Earick, 93 Ky. 121; Bovey-De Laittre Lumber Co. *v.* Dow, 68 Minn. 273; Goldsmith *v.* Gilliland, 10 Sawy. (U. S.) 606; Stark *v.* Starrs, 6 Wall. (U. S.) 402. And its invalidity. Monighoff *v.* Sayre, 41 N. J. Eq. 113. It rests with the defendant to set forth his claims in his answer. Adams *v.* Crawford, 116 Cal. 495; Landregan *v.* Peppin, 94 Cal. 465; Stratton *v.* California Land, etc., Co., 86 Cal. 353; Wall *v.* Magnes, 17 Colo. 476; Amter *v.* Conlon, 3 Colo. App. 185, 22 Colo. 150; Otis *v.* De Boer, 116 Ind. 531; Boyd *v.* Olvey, 82 Ind. 294; Bishop *v.* Waldron, 56 N. J. Eq. 484; Southmayd *v.* Elizabeth, 29 N. J. Eq. 203; O'Hara *v.* Parker, 27 Oregon 156; Zumwalt *v.* Madden, 23 Oregon 185; Clark *v.* Darlington, 7 S. Dak. 148; Ely *v.* New Mexico, etc., R. Co., 129 U. S. 291; Goldsmith *v.* Gilliland, 10 Sawy. (U. S.) 606. It is sufficient for the plaintiff to aver generally that defendant claims some estate, interest or title adverse to or hostile to that asserted by the plaintiff. Astiazaran *v.* Santa Rita Land, etc., Co., (Ariz. 1889) 20 Pac. Rep. 189; Ely *v.* New Mexico, etc., R. Co., (Ariz. 1888) 19 Pac. Rep. 6; Stratton *v.* California Land, etc., Co., 86 Cal. 353; Weston *v.* Estey, 22 Colo. 334; Amter *v.* Conlon, 3 Colo. App. 185, 22 Colo.

150; Smith *v.* Schlink, (Colo. App. 1900) 62 Pac. Rep. 1044; Wall *v.* Magnes, 17 Colo. 476; Miles *v.* Strong, 68 Conn. 273; Tolleston Club *v.* Clough, 146 Ind. 93; Wilson *v.* Wilson, 124 Ind. 472; Bisel *v.* Tucker, 121 Ind. 249; Otis *v.* De Boer, 116 Ind. 531; McPheeters *v.* Wright, 110 Ind. 519; Rausch *v.* United Brethren, etc., 107 Ind. 1; Johnson *v.* Taylor, 106 Ind. 89; Kitts *v.* Willson, 106 Ind. 147; Carver *v.* Carver, 97 Ind. 497; Lafayette Second Nat. Bank *v.* Corey, 94 Ind. 457; Stumph *v.* Reger, 92 Ind. 286; Nutter *v.* Fouch, 86 Ind. 451; Jeffersonville, etc., R. Co. *v.* Oyler, 60 Ind. 383; Marot *v.* Germania Bldg., etc., Assoc. Number 2, 54 Ind. 37; Whipple *v.* Earick, 93 Ky. 121; Campbell *v.* Disney, 93 Ky. 41; Walton *v.* Perkins, 28 Minn. 413; Hamilton *v.* Batlin, 8 Minn. 403; Steele *v.* Fish, 2 Minn. 153; Cook *v.* Friley, 61 Miss. 1; Southmayd *v.* Elizabeth, 29 N. J. Eq. 203; Bailey *v.* Briggs, 56 N. Y. 407; Phillips *v.* Rome, etc., R. Co., (Supreme Ct. Gen. T.) 9 N. Y. Supp. 799; Darlington *v.* Compton, 11 Ohio Cir. Dec. 97; O'Hara *v.* Parker, 27 Oregon 156; Zumwalt *v.* Madden, 23 Oregon 185; Clark *v.* Darlington, 7 S. Dak. 148; Glasmann *v.* O'Donnell, 6 Utah 446; Watson *v.* Glover, 21 Wash. 677; Kennedy *v.* Elliott, 85 Fed. Rep. 832; Union Mill, etc., Co. *v.* Warren, 82 Fed. Rep. 519; Parley's Park Silver Min. Co. *v.* Kerr, 130 U. S. 256; Reynolds *v.* Crawfordsville First Nat. Bank, 112 U. S. 405; Goldsmith *v.* Gilliland, 10 Sawy. (U. S.) 606. Which is unfounded and a cloud upon plaintiff's title. Wall *v.* Magnes, 17 Colo. 476; Tolleston Club *v.* Clough, 146 Ind. 93; Wilson *v.* Wilson, 124 Ind. 472; Rausch *v.* United Brethren, etc., 107 Ind. 1; Johnson *v.* Taylor, 106 Ind. 89; Conger *v.* Miller, 104 Ind. 592; Lafayette Second Nat. Bank *v.* Corey, 94 Ind. 457; Watson *v.* Glover, 21 Wash. 677.

A contrary rule, however, prevails in some states, and in those states it is held that a general allegation is not sufficient. Amter *v.* Conlon, 22 Colo. 150, 3 Colo. App. 185; Douglass *v.* Nuzum, 16 Kan. 515; Jenks *v.* Hathaway, 48 Mich. 536; McDonald *v.* Early, 15 Neb. 63; Lamb *v.* Boyd, 2 Ohio Cir. Dec. 672; Teal *v.* Collins, 9 Oregon 89; Page *v.* Kennan, 38 Wis. 320; Wals *v.* Grosvenor, 31 Wis. 681.

Sufficient Allegations. — An allegation as follows, "That the defendant claims some interest therein, adverse to the plaintiffs, which claim is without right and unfounded, and a cloud upon plaintiffs' title," is sufficient. Tolleston Club *v.* Clough, 146 Ind. 93.

A complaint which does not in terms allege that the claim set up by the defendant is adverse to the plaintiff, but alleges that the plaintiff owns the land in fee and that the defendant is making a claim of title thereto, which claim is unfounded, is sufficient. Gillett *v.* Carshaw, 50 Ind. 381; Dumont *v.* Dufore, 27 Ind. 263.

In *New Jersey*, the complainant is required merely to allege that an outstanding hostile right is claimed or reputed to exist: he is not even bound to show that the person in whom this right inheres asserts it. Southmayd *v.* Elizabeth, 29 N. J. Eq. 203; Monighoff *v.* Sayre, 41 N. J. Eq. 113. "That the defendant unjustly claims an estate in these premises in fee or for life, or for a term of years, not less than *ten* years, or in reversion or remainder, by virtue of a lease or conveyance made by said *Carthage, Watertown & Sackett's Harbor Railroad Company*, which said lease or conveyance, and all rights thereunder, the defendant, the *R., W. & O. R. R. Co.*, now claim to own," is sufficient. Phillips *v.* Rome, etc., R. Co., (Supreme Ct. Gen. T.) 9 N. Y. Supp. 799.

In King *v.* Townshend, 78 Hun (N. Y.) 380, the third paragraph of the complaint was as follows: "That the defendant, *John Townshend*, unjustly claims an estate, or interest therein, adverse to that of plaintiff, to wit, the adverse claim that he is seised of said premises in fee." This paragraph was held sufficient.

Insufficient Allegation. — "Plaintiff further says that each of said defendants claims some right or title to, or some interest in, said lands," is insufficient to make the complaint one for the quieting of title, because it does not show that the defendants' claim is adverse to the title asserted by the plaintiff or is unfounded and a cloud upon the plaintiff's title. Lafayette Second Nat. Bank *v.* Corey, 94 Ind. 457.

In Austin *v.* Goodrich, 49 N. Y. 266, it was alleged that the defendant "unjustly claims title to said premises." A demurrer to the complaint was held good upon the ground that the plaintiff failed to allege that the defendant claimed an estate "in fee, or for life, or for a term of years not less than ten."

In Gamble *v.* Loop, 14 Wis. 465, it was held that an averment that defendants are "doing all they can to dispossess the plaintiff of his interest in and possession of said land" was insufficient, because they might be doing that wrongfully without setting up any claim in themselves.

Inadequacy of Remedy at Law — *In Chancery.* — That plaintiff has no adequate remedy at law must be stated in the bill. Fejervary *v.* Langer, 9 Iowa 159; Heywood *v.* Buffalo, 14 N. Y. 534; Southern Pacific R. Co. *v.* Goodrich, 57 Fed. Rep. 879.

Under Statute. — However, where the action is brought under a statute, an averment that the plaintiff has no adequate remedy at law is not necessary. Puterbaugh *v.* Puterbaugh, 131 Ind. 288; Bishop *v.* Waldron, 56 N. J. Eq. 484.

Offer to Do Equity. — Where some invalid instrument of title, as a sheriff's deed, tax deed or mortgage, is sought to be canceled as a cloud on title, plaintiff must offer in his bill, or complaint, to reimburse defendant for any just expenses that may have been incurred, as a condition of the relief sought. Grider *v.* American Freehold Land Mortg. Co., 99 Ala. 281; New England Mortg. Security Co. *v.* Powell, 97 Ala. 483; American Freehold Land Mortg. Co. *v.* Sewell, 92 Ala. 163; Gage *v.* Du Puy, 134 Ill. 132; Ames *v.* Sankey, 128 Ill. 523; Barnett *v.* Cline, 60 Ill. 205; Sankey *v.* Seipp, 27 Ill. App. 299; Hays *v.* Carr, 83 Ind. 275; Weston *v.* Meyers, 45 Neb. 95; Loney *v.* Courtnay, 24 Neb. 580.

No Suit Pending. — Under a statute which provides that a bill to settle title to lands may be brought where no suit is pending, the averment of this fact is essential to the maintenance of the bill. Parker *v.* Boutwell, 119 Ala. 297; Loeb *v.* Wolff, 116 Ala. 273; Adler *v.* Sullivan, 115 Ala. 582.

Prayer for Relief — *Generally.* — Prayer should be for a decree quieting plaintiff's title, and to remove the cloud. Kennedy *v.* Elliott, 85 Fed. Rep. 832.

For statutory requisites as to contents of prayer for relief see list of statutes cited *supra*, note 1, p. 155.

That plaintiff's claim be established against any claim of the defendant, and that defendant be forever barred against having or claiming any right or title in the land adverse to the plaintiff, is proper. Broderick *v.* Cary, 98 Wis. 419.

Prayer to recover possession may be united with a prayer to remove a cloud, where the plaintiff is out of possession. Carver *v.* Carver, 97 Ind. 497; Wyland *v.* Mendel, 78 Iowa 739; Lees *v.* Wetmore, 58 Iowa 170.

That Defendant Specify His Title. — Under a statute which provides that a plaintiff in possession and claiming ownership must, in his bill to quiet title, call upon the defendant to specify his title, claim, interest or incumbrance, etc., a demand in the prayer that the defendants and each of them "be required to set forth and specify his, her or its title or incumbrance on said land or any part thereof, and what part and how and by what instrument the same is created or derived," is proper, as the prayer is a part of the bill. Slosson *v.* McNulty, (Ala. 1900) 29 So. Rep. 183.

Prayer for general relief may be inserted in addition to the prayer for special relief claimed. Buena Vista County *v.* Iowa Falls, etc., R. Co., 49 Iowa 657. And a prayer for general relief will entitle the plaintiff to such relief as the averments of the petition and proof will justify. Paton *v.* Lancaster, 38 Iowa 494; Polk *v.* Rose, 25 Md. 153. Where the prayer was for cancellation of the deed held by defendant as a cloud upon complainant's title, and for general relief, it was held that a decree could not be rendered for the delivery of the possession of the land. Vanderburg *v.* Williamson, 52 Miss. 233.

Precedents. — In Ely *v.* New Mexico, etc., R. Co., 129 U. S. 291, a complaint alleging that the "plaintiff is the owner in fee of all that piece or parcel of land granted by the *Mexican* authorities to *Leon Herreros* on *May 15, 1825*," called the Rancho San José de Sonoita, situated in the Sonoita Valley in the county aforesaid, and more particularly described and bounded in the complaint, according to the calls of a survey made by the government of Spain in June, 1821; and that the "defendants, and each of them, claim an estate or interest in and to the above described land and premises adverse to this plaintiff; that the said claim of the said defendants and each of them is without any right whatsoever; and the said defendants have not, nor have any or either of them, any estate, right, title or in-

terest whatever in said lands and premises or any part thereof. Wherefore the plaintiff prays:

1st. That the defendants, and each of them, be required to set forth the nature of his claim, and that all adverse claims of the defendants, and each of them, may be determined by decree of this court.

2d. That by said decree it be declared and adjudged that the defendants have no estate or interest whatever in or to said land or premises, or in or to any part thereof, and that the title of the plaintiff is good and valid.

3d. That the defendants, and each of them, be forever enjoined and debarred from asserting any claim whatever in or to said land or premises, or to any part thereof, adverse to the plaintiff, and for such other and further relief as to this honorable court shall seem meet and agreeable to equity, and for his costs of suit," was held good on demurrer.

In Rough *v.* Simmons, 65 Cal. 227, it was held that a complaint which alleged substantially that plaintiff was the owner and in possession of the easterly 11 42-100 acres of the Colonel Limberger Placer Mine, and that defendant claimed an estate or interest therein adverse to the plaintiff, which claim was without right, and that defendant had no estate, right, title or interest in the said 11 42-100 acres, etc., stated a cause of action.

A complaint which alleges in substance that plaintiffs are the owners of certain lands; that defendants are in possession of eighty acres of said premises, but assert a claim to the whole thereof, and claim an estate or interest in said property adverse to the plaintiff, which interest or estate the plaintiffs allege to be without right or title, and without color of right or title as against the plaintiff, states a cause of action. Statham *v.* Dusy, (Cal. 1886) 11 Pac. Rep. 606.

In Brown *v.* Ogg, 85 Ind. 234, the first paragraph of the complaint stated substantially that plaintiff was the owner in fee of said real estate and in possession of the same; that the defendant and the said Mason claimed title to or interest in said real estate, but that he was ignorant as to the precise nature of said claim, and could not therefore more particularly describe same; that said claim cast a cloud upon his title and diminished the market value of his land, which was followed by a prayer that the title be quieted. The court held that these facts entitled the plaintiff to the relief asked.

In Pierce *v.* Thompson, 26 Kan. 714, is set out the following petition: "The plaintiff alleges that he is in the possession of the following-described real estate, situate in *Franklin* county, *Kansas*, to wit, (*Here the property is described*); that the defendants, *Helen T. Pierce* and *Sarah A. Pennock*, claim an estate or interest therein adverse to this plaintiff, and are tenants-in-common of said premises, and derive their title from the same source; that this action is brought for the purpose of determining such adverse estate or interest. Wherefore [plaintiff prays] that said adverse estate or interest, if any, may be determined by the court here, and if none, that this court may so adjudge, and for his costs of suit." It was held that it was doubtful whether or not this petition stated any cause of action, apparently for the reason that it did not allege title and actual possession. The court said: "It will be noticed that the plaintiff in his petition did not allege that he had any title to the property in controversy. It will also be noticed that he did not allege that he had the actual possession thereof; and it will also be noticed that he did not even allege that he was in the peaceable possession thereof. All that he did allege respecting title or possession was, that he was 'in possession of the property.'"

A petition which stated that plaintiffs were the owners and in the possession of a certain described section of land in Floyd county; that defendants were interfering with them in the quiet enjoyment of the use and occupation of the land by threatening to institute vexatious suits of trespass and ejectment for the possession thereof, and by threatening to commit trespasses on the land under a claim of right, and prayed that the title be quieted in the plaintiffs and that the defendants be enjoined from interfering with plaintiffs in the quiet enjoyment of the land, was held on demurrer to state a cause of action. Boyd *v.* Clarke, (Ky. 1900) 59 S. W. Rep. 511.

In Fritz *v.* Grosnicklaus, 20 Neb. 413, the following petition is set out:

"1st. The plaintiff for cause of action states the facts to be that on the

13th of *May*, 1881, he purchased, and thereby became the owner of, the north-east quarter of section *thirty-two* (*32*), township *twenty-nine* (*29*), range *eleven* (*11*) west *sixth* principal meridian, in *Holt* county, *Nebraska*.

2d. That, at the time of said purchase, plaintiff and one *David L. Ludwig* were contemplating a copartnership to carry on a general milling and other kindred business in *Holt* county, *Nebraska*, the members of which were the said plaintiff and said *David Ludwig*, and no others, in the said contemplated company. Partnership was to be *Grosnicklaus & Co.*, but said partnership at the time of said purchase had not been formed.

3d. That plaintiff, supposing at the time of said purchase that said contemplated partnership would be formed, and, to save the expense of recording said property, had said real estate deeded to *Grosnicklaus & Co.*, to inure to the use of said partnership when it should be formed as was then contemplated.

4th. That the plaintiff paid the entire purchase price of said lands from his own individual funds.

5th. That said contemplated copartnership between plaintiff and said *David Ludwig* was not, at the time of said purchase, nor at any time prior or subsequent thereto, actually formed, and no such copartnership has ever in fact existed.

6th. That the defendants now claim title, the nature and extent of which is unknown to plaintiff, in and to said premises by virtue of a partnership formed between the said plaintiff and the said defendants herein and one *Anna Grosnicklaus*; but said partnership was formed long after the purchasing of said lands by plaintiff, and that neither of said defendants have any title or interest in said land or any part thereof.

7th. The plaintiff further says that the claim of said defendant to title of said land casts a cloud upon the title of this plaintiff to said land.

8th. The plaintiff further says that he is the absolute owner of said land in fee simple, and defendants have no right or title to the same. First. Plaintiff therefore prays that each of said defendants may be summoned to appear and show cause why the title of plaintiff should not be quieted in and to said lands. Second. That on the final hearing of this cause this plaintiff be decreed to be the absolute and sole owner of said premises, and that upon the final hearing of said cause said defendants and each of them be perpetually enjoined from having or claiming any interest or title in and to said premises or any portion thereof, and that plaintiff have such other and further relief as may be just and equitable."

A demurrer to this petition on the ground that it did not state facts sufficient to constitute a cause of action, and that it did not appear from the facts stated that there was any cloud on plaintiff's title, was overruled. The court said: "It must be conceded that the petition is not skillfully drawn, and is not so full in its averments as might be desired by a careful pleader; but we think that by the application of the liberal rules which prevail, under the code, for the construction of pleadings, the petition is sufficient."

In Union Mill, etc., Co. *v.* Warren, 82 Fed. Rep. 519, the amended bill alleged that complainant is "the owner in fee, in the possession, and entitled to the possession, * * * of *320* acres of land," particularly describing it, "together with all the waters of *Six-Mile Canon* creek, flowing or to flow to, over, or through said land;" that the defendants claim an estate or interest therein adverse to complainant; that the claim of the said defendants, and each of them, is without any right whatever; that the said defendants, and each of them, has no estate, right, title, or interest whatever in said land or premises, or to said waters of said *Six-Mile Canon* creek, or any part thereof; that the claim of the defendants operates as and is a cloud upon the title of complainant to said land and premises, and to the waters of said *Six-Mile Canon* creek, and causes complainant irreparable injury, and defendants threaten to continue, and do continue, to set up and claim said title to said land and premises and to said waters, adverse to complainant." This bill was held sufficient on demurrer.

In Parley's Park Silver Min. Co. *v.* Kerr, 130 U. S. 256, the complaint set forth the cause of action in the very terms of the statute of the territory of Utah, alleging in effect that the plaintiff is owner, subject only to the paramount title of the United States, and in possession of the lands in question; that the defendant claims an adverse

Form No. 16817.[1]

(*Title of court as in Form No. 5910.*)

John Doe, plaintiff,
against
Richard Roe, *Samuel Short* and *William West*, defendants.
} Complaint to Quiet Title.

John Doe, the plaintiff in this action, complains of *Richard Roe*, *Samuel Short* and *William West*, the defendants, and for cause of action alleges,

That the plaintiff above named is now and for a long time hitherto has been the owner and in the actual possession of that certain piece or parcel of land situate lying and being in said county of of *San Mateo*, bounded and described as follows, viz, (*describing property*).

And plaintiff further avers that the said defendants claim an interest or interests therein adverse to the plaintiff, and that the claims of the said defendants are without any right whatever, and that the said defendants have not, nor have either of them, any estate, right, title or interest whatever in said land or premises, or any part thereof.

Wherefore plaintiff prays that said defendants may be required to set forth the nature of their several claims, and that all adverse claims of the said defendants, or either of them, may be determined by a decree of this court; and that by said decree it be declared and adjudged that said plaintiff is the owner of said premises and that the defendants or either of them have no estate or interest whatever in or to the said land and premises, and also that the said defendants, and each and every one of them, be forever debarred from asserting any claim whatever in or to said land and premises adverse to the plaintiff, and for such other and further relief as to equity shall seem meet.

And the plaintiff will ever pray, etc.

(*Signature of attorney, and verification*[2] *as in Form No. 5910.*)

interest or estate therein; that the said claim is without legal or equitable foundation and void; and that it is a cloud on plaintiff's title, embarrasses him in the use and disposition of the property, and depreciates its value. Therefore, he prays (1) That the defendant may be required to set forth the nature of his claim, and that all adverse claims of the defendant may be determined by a decree of the court. (2) That by said decree it be adjudged that the defendant has no interest or estate whatever in said land, and that the title of the plaintiff is valid and good. (3) That the defendant be enjoined against asserting any adverse title to said land or premises. This complaint was held "sufficient to require the nature and character of the adverse claim on the part of the defendant to be set up, inquired into, and judicially determined, and the question of title finally settled."

Under a statute as follows: "An action may be brought by a person in possession, by himself or tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such estate or interest," the following is an approved form of petition: "Plaintiff is in actual possession of the following-described real estate situated in said county of —— (*describe the real estate*). The defendant claims an estate or interest therein adverse to plaintiff's right." This is followed by prayer for relief. Durell *v.* Abbott, 6 Wyo. 265.

1. *California.* — Code Civ. Proc. (1897), § 738 *et seq.*

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 1, p. 156.

2. For a form of verification in a particular jurisdiction see the title VERIFICATIONS.

Form No. 16818.[1]

(*Venue and title of court and cause as in Form No. 5915.*)

The plaintiff, *John Doe*, complains of the defendant, *Richard Roe*, and says that plaintiff is the owner in fee simple of the following described tract or parcel of land, to wit: the southeast quarter of section *31*, township *20* north, range *8* east, in the county of *Fountain* and state of *Indiana*; that the defendant is now in possession of said premises, and that for the last *twelve* years immediately preceding the filing of this complaint has been in the continuous possession thereof, claiming title thereto adversely to this plaintiff; that defendant's claim of title is unjust and unfounded, and a cloud upon plaintiff's title to the aforesaid premises.

Wherefore plaintiff prays that the defendant's claim may be declared null and void; that plaintiff's title may be quieted, and for all other just and equitable relief.

(*Signature and verification as in Form No. 5915.*)

Form No. 16819.[2]

(Precedent in Durell *v.* Abbott, 6 Wyo. 269.)[3]

[(*Commencing as in Form No. 5938.*)][4]

1. That the plaintiffs are now, and for a long time have been, and are entitled to be, in the possession of certain real property, situated, lying, and being in the county of *Laramie* and state of *Wyoming*, known and described as follows, to wit: Lot numbered *one* in section numbered *twenty-three*, in township numbered *fourteen* north, of range numbered *sixty-seven* west of the *sixth* principal meridian.

2. That the said plaintiffs claim title in fee to the said premises, and that the defendant aforesaid claims an estate or interest therein adverse to the said plaintiffs.

3. That the claim for said defendant is without any right whatever, and that the said defendant has not any estate, right, title, or interest whatsoever in said land or premises, or any part thereof.

[Wherefore plaintiff prays that defendant's claim may be declared null and void; that plaintiff's title may be quieted, and for all other proper relief.

(*Signature and verification as in Form No. 5938.*)][5]

b. Where Defendant Claiming Title to Land has Entered and Fenced It Off.

1. *Indiana.* — Horner's Stat. (1896), § 1070.

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 1, p. 156.

This is substantially the third paragraph of the complaint in Indiana, etc., R. Co. *v.* Brittingham, 98 Ind. 294. In that case a demurrer to that paragraph was overruled and judgment rendered for plaintiff.

2. *Wyoming.* — Rev. Stat. (1887), § 2985.

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 1, p. 156.

3. A demurrer to the petition in this case, on the ground that the allegation that plaintiff claims title in fee is not sufficient, but that the nature of the title should be set up, was overruled.

4. The matter to be supplied within [ ] will not be found in the reported case.

5. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

Form No. 16820.[1]

(Precedent in Jeffersonville, etc., R. Co. *v.* Oyler, 60 Ind. 384.)[2]

[(*Venue and title of court and cause as in Form No. 5915.*)][3]

Samuel P. Oyler, plaintiff, complains of the *Jeffersonville, Madison and Indianapolis Railroad Company*, defendant, and says, that he, plaintiff, is the owner in fee-simple of lots number *sixteen*, *twenty*, *twenty-one* and *twenty-three*, in *Hamilton* and *Oyler's* addition to the city of *Franklin*, in *Johnson* county, state of *Indiana*; that the track of the railroad of the defendant crosses the western end of the lots aforesaid, the western line of said lots, as located and platted, being the centre of the railroad track aforesaid; that an amount of said lots, not exceeding *fifteen* feet of the western end thereof, is amply sufficient for the proper maintenance of the track of said railroad, and for the safe and secure passage of the trains thereon; that, for more than *twenty* years last past, until the *21st* day of *July*, 1875, no greater amount than *fifteen* feet of the west end of said lots has ever been used or appropriated for the right of way across the same of said railroad, or for railroad purposes; that the defendant is setting up a pretended title and claim to *fifty* feet in width of the west end of said lots, and upon the *21st* day of *July*, 1875, without the leave or license of this plaintiff, did, by her agents, servants and employees, enter upon said lots, the property of the plaintiff, and erect in and upon said lots, at a distance of *fifty* feet from the centre of her said railroad track, a post and plank fence, thereby obstructing the free use of said lots by this plaintiff; and the plaintiff says, that the defendant has no title or right to or upon said lots, at the point where they erected said fence; that the acts of defendant, as aforesaid, are a cloud upon the title of the plaintiff in and to said lots. Wherefore he prays judgment of this court for the quieting of his title in said lots, for *two hundred* dollars in damages, and for all other proper relief.

[(*Signature and verification as in Form No. 5915.*)][3]

c. Where Defendant Claims Land Under Tax Deed.[4]

1. *Indiana.* — Horner's Stat. (1896), § 1070.

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 1, p. 156.

2. On demurrer, the complaint in this case was held sufficient.

3. The matter to be supplied within [ ] will not be found in the reported case.

4. **Cloud Resulting from Tax Sale.** — An action may be maintained to remove a cloud resulting from proceedings had for the collection of taxes. Phelps *v.* Harding, 87 Ill. 442; Reed *v.* Reber, 62 Ill. 240; Gage *v.* Chapman, 56 Ill. 311; Reed *v.* Tyler, 56 Ill. 288; Gage *v.* Rohrbach, 56 Ill. 262; Sankey *v.* Seipp, 27 Ill. App. 299; Crooke *v.* Andrews, 40 N. Y. 547.

Requisites of Bill, Complaint or Petition, Generally. — See *supra*, note 1, p. 156.

Apparent Validity of Tax Title. — The general rule in a suit to remove a cloud from title is that the complaint must set out the facts which show the apparent validity of the outstanding title; but where the statute declares a tax deed to be prima facie evidence of title, the mere naming of the instrument and alleging that it is regular upon its face is sufficient to show its apparent validity. Hibernia Sav., etc., Soc. *v.* Ordway, 38 Cal. 679; Day *v.* Schnider, 28 Oregon 457.

Invalidity of tax title must be alleged. Gage *v.* McLaughlin, 101 Ill. 155; Gage *v.* Reid, 104 Ill. 509. And the facts showing the invalidity of the deed must be stated. Gage *v.* Reid, 104 Ill. 509.

Where the sole allegation with respect to defendant is that on July 11, 1874, there was recorded in the recorder's office of Cook county a deed, dated September 8, 1869, executed by the sheriff of said county to Asahel Gage, pertaining to one of the lots; that there was recorded in said office on July 19, 1879, a deed from the county clerk of said county to Asahel Gage, pertaining to said lots; "that said *two* deeds purport to be tax deeds, and said *Asahel Gage* claims to have some interest in said lots by virtue of said deeds," it is insufficient. Gage *v.* McLaughlin, 101 Ill. 155. But that facts upon which the invalidity of the tax sale and certificate is claimed are unnecessary see Frum *v.* Weaver, 13 S. Dak 457; Clark *v.* Darlington, 7 S. Dak. 148 (*citing* as authority Ely *v.* New Mexico, etc., R. Co., 129 U. S. 291; Amter *v.* Conlon, 3 Colo. App. 185; Jeffersonville, etc., R. Co. *v.* Oyler, 60 Ind. 383; Scorpion Silver Min. Co. *v.* Marsano, 10 Nev. 370; but stating that McDonald *v.* Early, 15 Neb. 63, seems to hold differently).

Tax deed under which defendant claims should be set out in the bill. Gage *v.* Reid, 104 Ill. 509.

Offer to Pay Taxes. — The bill or petition should contain an offer to pay the taxes due at the time of the tax sale or subsequently. Gage *v.* Du Puy, 134 Ill. 132; Ames *v.* Sankey, 128 Ill. 523; Sankey *v.* Seipp, 27 Ill. App. 299; Weston *v.* Meyers, 45 Neb. 95. But no offer is necessary where the bill alleges that no taxes were due for which the land could be sold. Gage *v.* Kaufman, 133 U. S. 471. And in *South Dakota* an allegation of tender of taxes to which the land was subject was held unnecessary in Campbell *v.* Equitable L. & T. Co., (S. Dak. 1901) 85 N. W. Rep. 1015; Frum *v.* Weaver, 13 S. Dak. 457; Clark *v.* Darlington, 7 S. Dak. 148.

An offer to "pay whatever moneys, taxes and interest equity and the court may require" is sufficient. Ames *v.* Sankey, 128 Ill. 523; Sankey *v.* Seipp, 27 Ill. App. 299.

Precedents. — In Keens *v.* Gaslin, 24 Neb. 310, there is set out an amended petition, containing three counts, the first of which is as follows:

"That the said *John S. Lemon* was, on the *1st* day of *January*, 1877, owner in fee simple of the following described premises situated in the county of *Buffalo*, state of *Nebraska*, to-wit: The *west 1-2 south-west 1-4* of section *20*, township *10* north, of range *15* west; that said plaintiff, *William Gaslin, Jr.*, since the commencement of this case, obtained title in fee simple to said premises by deed, duly executed, acknowledged, and delivered, and by leave of court was duly made plaintiff in this case, and is now the owner in fee simple of said land, and the real party in interest in this case, and has been since his substitution for said *Lemon*. In the year 1877, at the time provided by law, the board of county commissioners in said *Buffalo* county, among other taxes for that year and without authority of law, levied a tax known as 'sinking fund,' levied as a sinking fund for the payment of part of the principal and interest on all outstanding and floating debts of the county excepting the bonded debts of said county; contrary to law said pretended sinking fund tax was duly carried upon the tax list for that year, and on the *6th* day of *November*, A. D. *1878*, said pretended tax stood unlawfully charged against the property above described in the sum of $*1*, and on the said *6th* day of *November*, A. D. *1878*, the treasurer of said *Buffalo* county, without authority of law, sold said premises for said illegal tax, together with other taxes legally chargeable against the same, amounting in all to the sum of $*10.42* to *Francis G. Keens*, defendant. Subsequent taxes have been paid on said premises by said *Francis G. Keens*, as follows:

1878.	$*6 36*
1879.....	*4 00*
1880.....	*5 00*

Interest on $*9.42* of 1877 tax, and on subsequent taxes to the commencement of this action, is the sum of $*7.38*, making in all paid by said *Keens*, with interest at the rate of *12* per cent., of the sum of $*32.16*. On the *15th* day of *November*, A. D. *1881*, the plaintiff tendered to said *Francis G. Keens* the amount paid by him in purchasing said lands and subsequent taxes, with *12* per cent. interest thereon, which he refused, and the plaintiff now offers to pay the taxes justly (due) against said land, with interest at *12* per cent. per annum. Afterwards, and on the *22d* day of *November*, *1880*, the treasurer of said county issued to *Francis G.*

Keens a tax deed for said land under said pretended sale, and on the *22d* day of *November*, A. D. 18*80*, said tax deed was duly filed for record in the office of the county clerk for *Buffalo* county, and was duly recorded in book '*K*' of deeds of said county, on page *93*, and still remains unsatisfied of record, and is a cloud upon the plaintiff's title.

On the *1st* day of *July*, 18*81*, the said *Francis G. Keens* and *Ella J. Keens*, his wife, conveyed by warranty deed said lands to *William J. Neeley*, which deed was thereafter duly filed for record in the county clerk's office for *Buffalo* county aforesaid, and still remains unsatisfied of record, and a cloud upon the plaintiff's title.

On the *1st* day of *July*, A. D. 18*81*, this said *William J. Neeley* and *Rebecca S. Neeley*, his wife, gave their mortgage deed of that date to said *Francis G. Keens* upon said land, which deed was thereafter duly filed for record and recorded in the county clerk's office for *Buffalo* county, and still remains of record unsatisfied, and a cloud upon the plaintiff's title.

That on *April 20*, A. D. 18*83*, the said *John S. Lemon* sold and conveyed, by deed duly executed, delivered, and recorded in said *Buffalo* county record of deeds, the said premises described in said petition to late *Samuel L. Savidge*; that said *Samuel L. Savidge* deceased in said *Buffalo* county, *November 30*, 18*83*, whose interest and interests of whose estate and heirs were duly and legally sold to said *Gaslin*, on or about the *3d* day of *May*, 18*84*, by administrators of said estate of said *Savidge*, to pay debt of said estate, and a deed of conveyance of said land executed and delivered to said *Gaslin* by administrator of said estate, which deed and all proceedings therein had were in due and legal form, and the said *Gaslin* is now the owner and has been since the *3d* day of *May*, 18*84*, in fee simple, of said land, and the real and only party plaintiff in interest in this case. The plaintiff further shows to the court that said tax sale and assessment is irregular and illegal, for the reason that the whole *80* acres of land in this case described was offered and sold for the tax of year complained of, instead of offering and selling sufficient thereof to pay said tax, when in truth and fact a small fraction and quantity would have sold for sufficient to pay said tax and all taxes thereon.

Plaintiff further says that the said tax deed copy hereto annexed, noted 'Exhibit *A*,' is void on its face, and of no validity or legal form whatever, for the reason that it is not stated therein said land was sold at the court-house or place of holding court, or at treasurer's office, where by law the taxes are payable; the execution of said deed is not attested by the county clerk with county seal, nor is attested by the official seal of county treasurer, nor by any seal whatever. Said deed fails to show to whom the said land was sold, fails to show any consideration.

(*Second and third counts were here set out, which were held to be clearly inconsistent with the first.*)

Plaintiff therefore asks judgment, and first prays that said tax deed be set aside and declared null and void.

2d. That said warranty deed from said *Francis G. Keens* and *Ella J. Keens*, his wife, to said *William J. Neeley* be canceled and set aside.

3d. That said mortgage deed from said *William J.* and *Rebecca S. Neeley* to said *Keens* be set aside, canceled, and held for naught.

4th. * * * and for such other and further relief as law and equity entitles said plaintiff to."

Demurrers to this petition were overruled. The court held that from the prayer it was evident that the principal relief sought was to remove the cloud from the title of the plaintiff's land.

In Sanders *v.* Parshall, 67 Hun (N. Y.) 105, the complaint, omitting the description of the land referred to, was as follows:

"The complaint of the plaintiff respectfully shows to the court:

1. That the plaintiff is the owner in fee absolute of all that certain lot of land, situate, lying and being in the town and county of *Westchester* and state of *New York*, laid down on a certain map on file in the office of the register of the county of *Westchester*, entitled 'Map of *Olinville*,' and known and distinguished thereon by the number *forty-two* (*42*), and bounded as follows: * * *

2. That the defendant unlawfully claims possession of said lot of land and right of possession by and through a lease thereof or right to a lease thereof for the term of *1,000* years, made, or right to have made to him by the treasurer of *Westchester* county, pursuant to a sale thereof by the treasurer

Form No. 16821.[1]

(Precedent in Campbell *v.* Equitable L. & T. Co., (S. Dak. 1901) 85 N. W. Rep. 1016.)[2]

of *Westchester* county, made on the *23d* day of *February*, 1870, to the defendant for alleged unpaid taxes thereon for the year 1868; the said alleged taxes were invalid, and said sale was without authority of law and void, although apparently valid.

Wherefore, the plaintiff demands judgment that he be adjudged entitled to the immediate possession of said premises, and that the defendant be adjudged to surrender the possession thereof to the plaintiff, and the lease or certificate for a lease issued to him by the county treasurer of *Westchester* county, pursuant to said tax sale of said premises, for cancellation, and that the plaintiff have such other and further relief as to the court may seem just, with costs of this action."

The court held that as a complaint in ejectment it was insufficient, but that it stated a cause of action to remove a cloud from the plaintiff's title. This case was affirmed in 142 N. Y. 679.

In Crooke *v.* Andrews, 40 N. Y. 547, it is alleged in substance that the plaintiff is the owner in fee, of certain lands in the city of Brooklyn, particularly described; that the defendant claims an estate or interest therein, by reason of sales thereof, made by the authorities of Brooklyn, for taxes during the years 1855, 1856, 1857, 1858, 1859, 1860, and 1861, and has received certificates of such sales of the premises; has put his claim thereto upon record, and has given notices in writing, to the plaintiff and others, that he claims title to the premises, by force of such tax sales; and that thereby such sales have become presumptively a lien thereon, and such certificate and claim is a cloud upon the title of the plaintiff to his said lands, diminishing their value and interfering with the sale thereof.

That in fact no such lien exists, for the reason that such taxes were assessed to persons particularly mentioned in the complaint, who had no title or interest in the premises, and at no time were assessed in the name of or against any person who was the owner or occupant, or who had any interest therein.

The prayer of the complaint was that the several sales might be declared void and the defendant be decreed to discharge the same, etc.

The sales mentioned in the complaint were by virtue of a statute providing that on a sale for taxes the collector is required to deliver to the purchaser a certificate of the sale, which shall be recorded, and shall thereupon constitute a lien, and if the land is not redeemed a deed shall be executed to the purchaser. On demurrer, the complaint was held to state facts sufficient to constitute a cause of action, although it did not state that a deed was about to be executed and did not set out the words of the certificate.

In Frum *v.* Weaver, 13 S. Dak. 457, the first paragraph of the complaint was as follows:

"That plaintiff is, and ever since the *6th* day of *January*, 1898, has been, the legal holder and owner of the southeast quarter of section *thirty-one*, in township *one hundred and thirteen* north, of range *seventy-two* west of the *5th* P. M., in *Hyde* county, *South Dakota*, in fee simple, and is entitled to the immediate possession, but the defendants have been during the time since said *January 6th* holding and occupying said premises as a homestead, and claim some right, title, and interest therein by virtue of a certain so-called 'treasurer's sale deed,' executed by *C. P. Swanson*, as county treasurer, bearing date *March 25*, 1891, without plaintiff's consent, and against plaintiff's will."

On demurrer, it was held to constitute in itself a good case of action.

A complaint to quiet title which alleged: First, that plaintiff "is the absolute and unqualified owner in fee simple" of the land described; and, second, that the defendant "wrongfully and without right claims an interest in said land by virtue of an alleged purchase thereof at tax sale; that said claim is unjust and wrongful, and without any foundation in fact or law; that said claim is made adversely to said ownership and title of said plaintiff," was held sufficient on demurrer in Clark *v.* Darlington, 7 S. Dak. 148.

1. *South Dakota.* — Dak. Comp. Laws (1887), § 5449.

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 4, p. 170.

2. The second and third paragraphs

[(*Commencement as in Form No. 5933.*)][1]

That the plaintiff at all the times mentioned herein is and was the owner in fee simple of the following described premises, situated in *Central Point* township, *Day* county, *South Dakota*, to wit: The south-west quarter of section *eight* (*8*) in township *one hundred and twenty-one* (*121*) north, range *fifty-four* (*54*) west of the *fifth* P. M. That the defendant claims an estate or interest in said premises adverse to the plaintiff by virtue of a pretended tax deed executed by the treasurer of *Day* county, *South Dakota*, to the defendant, dated *June 15*, 1897, and which was recorded in the office of the register of deeds of said *Day* county on *June 22*, 1897, in Book *L.* of Deeds, at page *61*, but that such claim is without merit or foundation in law.

[Wherefore plaintiff prays that his title may be quieted and for all other proper relief.

(*Signature and verification as in Form No. 5933.*)][2]

d. Where Defendant Claims Land Under Secretary of Interior and Plaintiff Under Homestead Act.

Form No. 16822.[3]

(Precedent in Missouri, etc., R. Co. *v.* Noyes, 25 Kan. 340.)[4]

[(*Venue and title of court and cause as in Form No. 5917.*)][1]

(1) And now comes plaintiff, by his attorney *S. N. Wood*, and says that the defendant is a corporation, incorporated under the incorporation laws of the state of *Kansas*.

(2) That plaintiff is a citizen of the United States, over the age of twenty-one, and the head of a family, and has been for eight years last past.

(3) That in *February*, 1867, plaintiff entered, under the laws of the United States, to-wit, the acts of congress approved May 20, 1862, and March 21, 1864, entitled "An act to secure homesteads to actual settlers on the public domain," at the land-office at *Junction City*, *Kansas*, the east half of the south-east quarter of section *eighteen*, (*18*,) township *eighteen*, (*18*,) of range *eight* (*8*) east, in *Chase* county, and paid $*10* and the office fees; and that at the time he was residing upon said land with his family, and has continued to reside upon said land and cultivate it ever since.

(4) That on the *twenty-fourth* day of *March*, 1873, being over five years and under seven years after he had entered said land, he submitted his final proof and paid the last fees, and obtained his final certificate, No. *575*, and passed upon application No. *1806*; and that plaintiff complied with the law in every particular.

of the complaint in this case are here set out. They were held, on demurrer, to state a complete cause of action.

1. The matter to be supplied within [] will not be found in the reported case.

2. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

3. *Kansas*. — Gen. Stat. (1897), c. 96, § 1.

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 1, p. 156.

4. No objection was made to the sufficiency of this petition. Judgment for plaintiff was affirmed.

(5) That since the *twenty-fourth* day of *March*, 1873, the honorable secretary of the interior, without any authority of law, selected said land for the use and benefit of the *Missouri, Kansas & Texas Railway Company*, without the authority of law for the same.

Wherefore plaintiff prays that he may be quieted in his title to said land, and that the defendant herein be forever barred as to all right, title, or interest in said land, with costs of suit.

[(*Signature and verification as in Form No. 5917.*)][1]

e. Where Defendant Claims Title to Land on Ground that Plaintiff's Title was Under a Deed Made by One of Unsound Mind.

Form No. 16823.[2]

(Precedent in Rose *v.* Nees, 61 Ind. 484.)[3]

[(*Venue and title of court and cause as in Form No. 5915.*)][1]

Allen T. Rose, plaintiff, complains of the defendants, and says, that, on the *17th* day of *December*, 1867, one *Jacob Nees* was the owner of the north-west quarter of the north-east quarter, and north half of the south-west quarter of the north-east quarter, of section *twenty-six* (*26*), town *twelve* (*12*), range *five* (*5*) west; that, at that time, the said *Jacob* was the husband of *Nancy* and father of the other defendants, and on that day he and his said wife sold and conveyed to one *George W. Watts* the said land for the sum of $*700*, the grantors reserving the possession of said land for life, by keeping the said farm in as good repair as it was at that time. A copy of the said deed is filed herewith and made part hereof.

That said *Watts* paid said consideration money to said *Jacob*, as follows: About $*300* was paid to parties who held liens on said lands, and the balance to the children of said *Jacob*, by his request.

That said *Jacob* died in 1869, and said *Nancy* retained possession of said land until the Fall of 1870.

That, after said purchase and conveyance and death of the said *Jacob*, said *Nancy* failed to keep the same in as good repair as when said conveyance was executed, but suffered the house and stables, barn and other buildings to fall into decay, and the fence to rot down, and burned up the rails and pickets of the fences, and suffered the grounds to grow up with underbrush, and to become unfit for cultivation, so that the same was thereby lessened in value to the amount of $*250*.

That said *Nancy* having failed to keep the same in repair as aforesaid, the said *Watts* entered said premises and demanded possession thereof from said *Nancy*, for the reason that she had failed to keep said farm in repair as aforesaid; that said *Nancy* refused to surrender the possession, but, by agreement, referred the question to the arbitrament of *Michael Baumunk* and *John Bowman*, who, after considering

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *Indiana.* — Horner's Stat. (1896), § 1070.

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 1, p. 156.

3. On demurrer, the complaint was held to state a case under the statute.

the matter, decided that she should surrender the possession to said *Watts*, and he was to allow her to take the crop of wheat, and give her $*25* per year while she lived.

That, pursuant thereto, she surrendered said property to said *Watts*, who faithfully complied with his part of the award.

He further says, that afterward said *Watts* sold and conveyed to him said real estate for the sum of $*2,100*, which he paid at the time; that he was a purchaser in good faith, believing said *Watts* had the sole title thereto, and that he had no notice or knowledge of any claim of defendants until said sale, conveyance and payment were all fully consummated.

He further states, that, since that time, said *Nancy* has taken possession of said land, and the other defendants, her children, are wrongfully claiming title thereto, on the pretended grounds that said *Jacob* was not of sound mind when the said deed to *Watts* was executed which clouds plaintiff's title. Wherefore he prays, that his title thereto be quieted, and for possession of the premises, and damages to the amount of $*200* for detention, and for general relief.

Rose & Mack, for Pl'ff.

[(*Verification.*)][1]

f. Where Defendant Denies Sale of Land to Plaintiff, Who is in Possession as Owner.

Form No. 16824.[2]

(Precedent in Hyneman *v.* Roberts, 118 Ind. 138.)[3]

[(*Venue and title of court and cause as in Form No. 5915.*)][1]

William A. Roberts, plaintiff, complains of *Aaron Hyneman*, defendant, and says that heretofore, in *September*, 1*883*, said plaintiff purchased of said defendant the following real estate in said county and state, to wit, lots *103* and *104* of the eastern enlargement of the town of *Hazelton*, and paid said defendant therefor all the purchase-money except *one hundred and fifty* dollars, but took therefor no conveyance or other writing from said defendant, and immediately upon said purchase [under and by virtue of the contract] entered into possession of said real estate, and has ever since kept actual and open possession, claiming to own the same; and plaintiff says that the said defendant, at divers times within the year last past, has denied, and still denies, the said sale, and asserts to the public that said plaintiff is not the owner and has not purchased said real estate, but that said defendant is the owner, and thereby places a cloud upon

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *Indiana.* — Horner's Stat. (1896), § 1070.

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 1, p. 156.

3. After judgment for plaintiff on the complaint in this case, the defendant moved in arrest of judgment, on the ground that the complaint did not allege specifically that the plaintiff entered into possession of the real estate under and by virtue of the contract. The court held that this might fairly be inferred after judgment. The form set out in the text has been remedied to cure the defect pointed out by the court.

the plaintiff's title, and puts the same in dispute; and plaintiff says that said sum of *one hundred and fifty* dollars of the purchase-money as aforesaid is still due from plaintiff to defendant. Plaintiff therefore prays that he have judgment that he is the owner of said real estate, subject to the lien for the unpaid purchase-money, and that his title thereto be in all things quieted, and for all proper relief.

[(*Signature and verification as in Form No. 5915.*)][1]

g. Where Defendant, as Heir of Vendor, Under Whom Plaintiff Holds Land by Contract of Purchase, Claims Some Interest Therein.

Form No. 16825.[2]

(Precedent in Great Bend Land, etc., Co. *v.* Cole, 52 Kan. 791.)[3]

The State of *Kansas*, } In the *district* court of said county.
Barton County. }

T. C. Cole, plaintiff,
v.
Lenora Walters, *Sr.*, *Charles Walters*, *Robert Walters*, and *Lenora Walters*, *Jr.*, heirs of *Elias Walters*, deceased, defendants.

Said plaintiff alleges that he is in the quiet and peaceable possession of the following-described real estate (*describing it*), in *Barton* county, *Kansas*, and has been for more than *two* years last past; and that he has the equitable title to said land under and by virtue of a contract of purchase from *Elias Walters*, the then owner of the above-described tract of land, who has since died, and that the above-named defendants are his heirs, and that they, the said defendants, set up and claim an estate and interest in and to said premises adverse to the estate and interest of the said plaintiff as aforesaid averred; that the plaintiff has complied with all the terms and conditions of said contract of purchase on his part, and is entitled to a decree in his favor of the legal title to said land. The plaintiff therefore prays that the said *Lenora Walters*, *Sr.*, *Charles Walters*, *Robert Walters* and *Lenora Walters*, *Jr.*, be compelled to show their title, and that it may be determined null and void as to and against said title of the said plaintiff.

[(*Signature and verification as in Form No. 5917.*)][1]

h. Where Lands are Affected by Possible Restrictions, Stipulations or Agreements of More than Twenty Years' Standing.

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *Kansas.* — Gen. Stat. (1897), c. 96, § 1.

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 1, p. 156.

3. No objection was made to the form of the petition in this case. It was held to contain allegations in the nature of an action to quiet title, and also for specific performance, and that the trial court had power to enter judgment quieting title to the premises in favor of the plaintiff and against the defendant, and perhaps for a decree of specific performance.

Form No. 16826.[1]

(Precedent in Crocker *v.* Cotting, (Mass. 1889) 53 N. E. Rep. 158.)[2]

To the Honorable the Justices of the *Supreme Judicial* Court for the county of *Suffolk*:

Respectfully represent *Annie B. Crocker*, of *Boston*, in the county of *Suffolk*, *Edith Page* and *Calvin G. Page*, both of *Newton*, in the county of *Middlesex*, and *Hollis B. Page*, of *Belmont*, in the county of *Middlesex*: That they hold as tenants in common *one* undivided *third* part or share of the following described real estate, situated in *Boston*, in the county of *Suffolk*, which they wish to hold in severalty, to wit: A certain piece or parcel of land, bounded westerly by *Carver* street, there measuring about *five* feet; northerly by lands owned by your petitioners, and in part by land formerly of *Dwight Boyden*, more recently owned by *George S. Winslow*, late of *Boston*, deceased, there measuring about *sixty-two* feet *three* inches; easterly by land now or lately owned by the trustees of the will of *Samuel K. Williams*, late of *Boston*, deceased, there measuring about *five* feet; and southerly by other land of your petitioners, there measuring about *sixty-one* feet *eight* inches. That the names and residences of all the other tenants in common, and their respective shares and proportions thereof, are as follows: *Charles U. Cotting* and *Francis C. Welch*, both of said *Boston*, as they are trustees of the will of *Samuel K. Williams*, late of *Boston*, deceased, own *one-third* part undivided, and *Jonathan A. Lane*, of said *Boston*, *John C. Lane*, of *Norwood*, in the county of *Norfolk*, and *George S. Winslow*, of said *Boston*, as they are trustees of the will of *George S. Winslow*, late of *Boston*, deceased, own *one-third* part undivided. That the title of the petitioners to said parcel of land appears of record to be affected by certain possible restrictions, stipulations, or agreements made or imposed more than *thirty* years prior to the filing of this petition, namely, the rights affecting said parcel which were granted to *Samuel K. Williams* and his heirs and assigns by *David S. Townsend* and others, in and by their deed dated *July 12*, 1842, recorded in *Suffolk* Registry of Deeds, Libro *490*, folio *26*; also the rights affecting said parcel which were granted to *Dwight Boyden* and his heirs and assigns by *David S. Townsend* and others in and by their deed dated *February 10*, 1843, recorded in said *Suffolk* Registry, Libro *497*, folio *38*; also the rights affecting said parcel which were granted to *Levi Bates* and his heirs and assigns by *David S. Townsend* and others in and by their deed dated *January 28*, 1843, recorded in said *Suffolk* Registry, Libro *497*, folio *216*; also the rights affecting said parcel which were granted to *George M. Dexter* and his heirs and assigns by said *David S. Townsend* and others, in and by their deed dated *May 10*, 1843, and recorded in said *Suffolk* Registry, Libro *502*, folio *90*. * * * Each of the foregoing deeds purports to be a conveyance by the grantors

1. *Massachusetts.*— Stat. (1889), c. 442, as *affected* by Stat. (1890), c. 427.

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 1, p. 156.

2. A demurrer to the petition in this case, for the purpose of testing the constitutionality of the statute under which it was framed, was overruled.

to the grantee of a lot of land abutting on said parcel herein first described, which is the *five*-foot passageway leading to *Carver* street in said deeds referred to; and each of said deeds contains a grant, in terms substantially the same in each conveyance, of the right of passing and repassing in, upon and over, and of draining under, said passageway, as by the records of said deeds appears. The respondents *Cotting* and *Welch*, trustees, now own, as successors in title to said *Williams*, the lot of land which was conveyed to said *Williams* by the deed to him above referred to, together with the rights in said passageway granted therein and thereby. The respondents *Lane*, *Lane*, and *Winslow* now own, as successors in title to said *Boyden*, the lot of land which was conveyed to said *Boyden* by the deed to him referred to above, together with the rights in said passageway therein and thereby granted. The petitioners are the owners of all the land abutting upon said parcel, being the passageway aforesaid, excepting the lots of respondents as aforesaid, with all the rights, titles, and interests conveyed as aforesaid to said *Bates* and *Dexter*; and no persons except petitioners and respondents appear of record to have any estates, rights, titles, or interests in the same. The petitioners are informed that the respondents claim, under and by virtue of the aforesaid deeds, that no person who shall at any time, by partition or otherwise, obtain a title in severalty to said parcel, or any portion thereof, will have the right to build upon or over or under said parcel, without leave of respondents or their successors in title under the deeds aforesaid, and that they (said respondents) thereby have, as appurtenant to their respective abutting lots, the right to have said parcel maintained open to the sky and unobstructed throughout its length and breadth, and also claim that other restrictions upon the use of the fee and soil of said parcel were granted and imposed by the deeds before referred to, and which restrictions they claim the right to enforce. The petitioners, admitting that respondents are entitled to rights of way and drainage in said parcel under the deeds aforesaid to the predecessors in title of the respondents, deny the aforesaid further and additional claims of the respondents, and deny that any rights were granted to the predecessors in title of the respondents, or are now owned by the respondents, or appurtenant to their respective lots, which abut upon said parcel, other than such rights of passage and drainage. And the petitioners further represent and claim that the rights in said passageway are such that it would be reasonably lawful and proper for any owner thereof in severalty to build or cover over the same, "provided no portion of said buildings or coverings over the same were placed within *ten* feet in vertical height of the grade level of said passageway," and that it was so found and ordered in a decree heretofore, on *February 24*, 1896, entered in a suit in equity brought in this court by the petitioners against the respondents, in which suit the respondents entered their respective cross bills, said cause being No. *5,022* equity, but that the respondents claim that said decree in the respect mentioned is not binding upon them, because the matter so referred was not properly an issue in said cause. The petitioners further represent that proceedings for

the partition of said passageway between the parties hereto are now pending, and that it is of great importance to the parties respectively finally to have determined the nature and extent of the respective rights in said passageway, and particularly whether or not the rights of passage over the same are such as to require its remaining open and unobstructed to the sky, or whether, on the other hand, it may be covered and built over at a reasonable height, and, if so, at what height.

Wherefore the petitioners bring this petition, under the provisions of chapter 442 of the Acts of 1889, and acts in amendment thereof and in addition thereto, and pray that this honorable court will determine and define the nature and extent of the rights, easements, and restrictions aforesaid.

[*Annie B. Crocker.*
Edith Page.
Calvin G. Page.
Hollis B. Page.][1]

1. Where Land is Wild and Uncultivated.

Form No. 16827.[2]

(Precedent in Huff *v.* Laclede Land, etc., Co., 157 Mo. 67.)[3]

[(*Title of court and cause as in Form No. 5921.*)][4]

Plaintiff states and avers that the defendant, the *Laclede Land and Improvement Company*, is a corporation, organized and existing under the laws of the state of *Missouri*. That defendant, *Robert L. Lindsay*, is the trustee in a deed of trust, in which deed of trust the other defendant, *Bank of America of New York*, is the beneficiary. Plaintiff for his cause of action against the defendants, states and avers, that he is the owner in fee simple and claims that title to the following real estate, lying, being and situate in the county of *Reynolds*, in the state of *Missouri*, to wit: The southeast quarter of section *thirty-four*, in township *thirty-two* north, of range *one* west, containing *one hundred and sixty* acres, more or less. Plaintiff further states and avers that the real estate aforesaid is not in the possession of any person or persons whatsover, but is wild and uncultivated timber land. That the defendants claim some title, estate or interest in and to said premises, the nature and character of which claim is unknown to plaintiff, and cannot be described herein, except that said claim is adverse and prejudicial to this plaintiff. Wherefore, the premises considered, the plaintiff prays the court to try, ascertain and determine the estate, title and interest of the plaintiff and the defendants herein, respectively, in and to the real estate aforesaid, and to

1. The matter enclosed by [ ] will not be found in the reported case.

2. *Missouri.*—Rev. Stat. (1899), § 650. See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 1, p. 156.

3. The petition in this case was held sufficient on demurrer. The court said: "It is difficult to see how the plaintiff * * * could have shaped his petition in closer conformity to the terms and meaning of the statute than he has done."

4. The matter to be supplied within [ ] will not be found in the reported case.

define and adjudge by its judgment or decree the title, estate and interest of the parties plaintiff and defendant herein, severally, in and to the aforementioned premises, according to the statute in such cases made and provided, and for the costs in this behalf expended.

[*Jeremiah Mason*, Attorney for Plaintiff.][1]

j. Where Plaintiff Claiming Equitable Interest to Land Under Deed which did Not Convey Legal Title as Intended, Because Made by Grantor After Death of Grantee, Seeks to Gain Legal Title.

Form No. 16828.[2]

(Precedent in Howell *v.* Jump, 140 Mo. 446.)[3]

[(*Title of court and cause as in Form No. 5921.*)][4]

The plaintiffs state that heretofore, to wit, in 1854, one *James Dollison*, now deceased, was the owner of the following real estate, situate in *Greene* county, *Missouri*, to wit: (*Here follows a description of the land*). That said *Joseph Cates* died in the latter part of 1854, and at and prior to his death said *Cates* was in possession of the property aforesaid, claiming it as his own; that during the year 1854 said *James Dollison* had made a contract in writing with said *Joseph Cates* to sell and convey to the latter the said premises, and had placed the said *Cates* in possession of said premises under said contract, and so said *Cates* remained until after his death in possession thereof, and after his death, to wit, on *January 5*, 1855, said *Dollison* executed and acknowledged a deed which acknowledged full payment of purchase money of said tract, and which purported to convey the above described land to *Joseph Cates*, which said deed was on said date recorded in the office of the recorder of deeds of *Greene* county, *Missouri*; that neither of these plaintiffs knew said *Cates* was dead at the time said *Dollison* executed said conveyance to him until the summer of 1895, nor ever heard of said facts, or had any intimation thereof, until that time; that afterward said premises were administered on as being assets and real estate belonging to the estate of said *Joseph Cates*, deceased, by the administrator of said estate, under the orders of the *probate* court of *Greene* county, *Missouri*; that *two and a half* acres thereof were set apart by commissioners appointed by said court to one *Edna Cates*, widow of said *Joseph Cates*, deceased, as her dower interest in the premises aforesaid; that all the lands aforesaid were duly sold (subject to the dower of said widow) under orders of the *probate* court of *Greene* county, *Missouri*, in due course of administration by the administrator of the estate of said *Joseph Cates*, to pay

1. The matter enclosed by [ ] will not be found in the reported case.

2. *Missouri.* — Rev. Stat. (1899), § 650.

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 1, p. 156.

3. No objection was made to the sufficiency of the petition in this case. The trial resulted in a finding and judgment for the plaintiff in accordance with the prayer of the petition. This judgment was affirmed.

4. The matter to be supplied within [ ] will not be found in the reported case.

the debts of said estate; that said sale occurred on or about *April 25th*, 1872, and plaintiff *Howell* purchased at said sale all the tract first aforesaid, including the part set apart to said *Edna Cates*, as widow, but subject to her dower, which sale was duly approved by said *probate* court, and a deed made to said *H. E. Howell*, by said administrator, conveying to said *Howell* all the right, title, interest and estate, at law or in equity, of the said *Joseph Cates*, deceased, of, in and to the premises aforesaid, which deed was duly filed for record *June 8th*, 1872; that the said *Edna Cates* has been in possession of the portion of said premises allotted to her, as dower, until the year 1892, or thereabouts, when she departed this life; that otherwise and except said dower right, plaintiff *Howell* has been in possession of all the premises aforesaid, since his aforesaid deed, dated *April*, 1872, was delivered, claiming to own the same and every part thereof against all other persons whomsoever, except his own grantees of different parts of said tract; that the defendant, *J. W. Jump*, has wrongfully taken possession of the following part of said tract, which is included in the part of the premises first aforesaid, which was allotted said *Edna Cates* for her dower, to wit, (*describing a small part of the tract first described*), and is now with defendant, *S. C. Haseltine*, in possession of same, claiming to own it under certain deeds from the heirs of said *Joseph Cates*, deceased, and said *S. C. Haseltine* claims to own the same under conveyances from the heirs of *James Dollison*, deceased; that both said *Cates'* and said *Dollison's* heirs at the time they executed said conveyances, had full knowledge of the rights, title, interest and estate of said *Howell*, of, in and to said premises, as did likewise the defendants, *Jump* and *Haseltine*; that by reason of the said *Joseph Cates*, deceased, being dead at the time said *James Dollison* made the aforesaid conveyance of the said premises to him, said *Joseph Cates*, pursuant to the bond and contract to that effect theretofore executed and delivered (along with possession of the premises) by said *Dollison* to said *Cates*, the legal title did not pass to said *Cates* by said conveyance, and so did not pass by the aforesaid administrator's deed to the plaintiff, *Howell*, but said *Cates* did own, have and hold the full equitable right and interest in and to said premises by virtue of his purchase from said *Dollison*, and in fact the complete estate, except the naked legal title; that the heirs of said *Joseph Cates* and of said *Dollison*, as well as the defendants *Jump* and *Haseltine*, at all times well knew that said *Joseph Cates* paid *Dollison* the full purchase price for said lands; that plaintiff *Howell* has conveyed to plaintiffs *Goode* and *Vaughan*, an undivided *one-half* interest in the premises first aforesaid, covering and including the above described tract, claimed and occupied by said *Jump*; that plaintiffs are without adequate remedy at law, so pray that all right, title, interest and estate of said *Jump* and the said *Haseltine*, either at law or in equity of, in and to the tract last aforesaid, be divested out of said defendants and vested in these plaintiffs; and for all other proper relief, including possession of said premises.

[(*Signature as in Form No. 5921.*)][1]

1. The matter to be supplied within [ ] will not be found in the reported case.

k. Where Plaintiff in Adverse Possession of Land Seeks to have Record Cloud Removed, Such Cloud being a Deed Under Which No Possession has been Taken.

Form No. 16829.[1]

(Precedent in Tourtelotte *v.* Pearce, 27 Neb. 58.)[2]

[(*Commencing as in Form No. 5923.*)][3]

1. That he is the owner in fee simple and in the possession of the following described lots or parcels of land, situate in the county of *Otoe*, in said state of *Nebraska*, known as lots numbers *one* and *two* in block number *thirty-one*, in *Greggsport*, an addition to *Nebraska City*, according to the recorded plat of said addition; that he has been thus in the undisturbed, peaceable, and [exclusive] adverse possession thereof, and of the whole thereof, for the period of *seventeen* years last past, and especially adverse to the claims of the said defendants above named, and of each of them.

2. That the said defendant, *Milton Fornia*, claims to have some title to said described premises by virtue of a certain deed or deeds from one *Thomas B. Stevenson* to him, but that neither the said *Stevenson*, nor any of his grantors, nor the said defendant *Fornia*, ever had possession of the said premises, or any part thereof; that the said defendant, *A. H. Pearce*, also claims some title thereto, by virtue of certain deeds to him executed from other parties, but that neither he nor his grantors ever had the possession thereof; that the said defendant, *Jacob Sichl*, has, or claims some title or interest therein, by virtue of certain deeds from one *Sarah E. Schoenheit* to *Richard A. White*, and from the said *White* to the said defendant *Jacob Sichl*, but that no possession has ever been had thereunder by the said *Sichl*, or either of his grantors; that said deeds are recorded in the office of the clerk of said county of *Otoe*, and that the same constitute clouds upon the title of this said plaintiff in and to the said premises and injure the market value thereof; that neither of the said defendants will institute an action to determine the legal title to the said premises, and that this plaintiff is without remedy in the premises; that the plaintiff has made lasting and valuable improvements thereon.

Wherefore this said plaintiff prays for a decree of this honorable court in his favor, and against the said defendants, quieting his title in and to said described lots, against the claims and demands of the said defendants and each of them; that the cloud caused by that record of the several deeds to the several defendants, in the office of the clerk of said county, may be removed, and the same and each of them decreed to be no cloud upon the title of the said plaintiff in

1. *Nebraska.* — Comp. Stat. (1899), § 4150.

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 1, p. 156.

2. The petition in this case was held defective because, while it alleged that plaintiff had been in adverse possession of the property, it did not allege that such adverse possession was exclusive; but since the objection was taken after judgment it was considered waived. The defect has, however, been remedied in the form set out in the text.

3. The matter to be supplied within [ ] will not be found in the reported case.

and to said premises; that the said defendants and each of them may be decreed to have no title in or to said described lots, or to either of them, but that the title thereto may be decreed to be in this plaintiff, discharged of all claim in law or in equity of the claims or demands of the said defendants or of either of them; that the said defendants and each of them may be perpetually enjoined and forbidden from beginning or prosecuting any suit at law or in equity against this plaintiff or his grantees to recover the possession thereof, or any part thereof, and may be perpetually forbidden and enjoined from setting up any claim or claiming any interest or estate therein adverse to the title of this said plaintiff, or from disturbing him and his said grantees in the quiet and peaceable enjoyment of the said premises, or any part thereof, and for such other or further order or relief in the premises as equity and good conscience may require, the circumstances of this case considered, and for costs of suit.

Plaintiff asks the following deeds declared void, as hereinbefore stated: From *Thomas B. Stevenson* to *Milton Fornia*, dated *April 13*, 1870, recorded in book "*T*" of deeds at page *408*; from *John E. Shepherd* to the defendant *Pearce*, *June 25*, 1874, and recorded in book "*Z*" of deeds at page *228*; from *Sarah E. Schoenheit* to *R. A. White et al.*, dated *October 24*, 1887.

[(*Signature and verification as in Form No. 5923.*)][1]

1. Where Plaintiff Seeks to have Land to be Taken for Road on Payment of Certain Instalments Freed from Such Burden on the Ground that Said Instalments have Not been Paid.

Form No. 16830.[2]

(Precedent in Lowmiller *v.* Fouser, 52 Ohio St. 124.)[3]

[(*Venue and title of court and cause as in Form No. 5929.*)][1]

The said plaintiff says, that he is in possession of the following described real property situate in *Whetstone* township, in the county of *Crawford* and state of *Ohio*, * * * being a strip *eighteen* feet wide on each side of the following line, beginning at the corner stone of the southwest corner of the southeast quarter of section (*20*) *twenty*, township (*3*) *three*, range (*17*) *seventeen*; thence south *eighty-nine* degrees and *fifty* minutes (*89° 50'*), east *eight* (*8*) chains and *twenty* (*20*) links to a stake; thence in the same direction *twelve* (*12*) chains and *thirty-six* (*36*) links to a stone; and this plaintiff is owner in fee simple of the above described premises.

This plaintiff further alleges, that the said defendants claim an

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *Ohio.* — Bates' Anno. Stat. (1897), § 5779, provides that "an action may be brought by a person in possession * * * against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest."

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 1, p. 156.

3. On demurrer, the petition in this case was held to be sufficient. The failure to make the payments as directed by the order defeated the right of the petitioner to have the road opened and cast a cloud upon the title of the plaintiff.

interest therein adverse to him, which plaintiff is advised and informed, and on such information and belief alleges, to be in substance and in fact as follows:

That on the petition of said *Samuel Fouser, Jonathan Beal, Samuel Shearer, Jacob Shearer, John C. Kurtz, J. G. Kelly, John Deebler, Isaac Beal, Michael Stoltz, Wensyl Uskalitz, J. A. Laughbaum, Henry Ruth, C. F. Keiss, John Gwinner, B. Beal,* to the board of county commissioners of *Crawford* county, *Ohio,* in which said *Samuel Fouser* was principal petitioner and the only petitioner who gave bond, the said board of commissioners of *Crawford* county, *Ohio,* on the *3d* day of *June,* A. D. 1890, established a county road on the lands of this plaintiff, and which road as established by said commissioners embraced the strip of land aforesaid, *thirty-six* feet wide, having the above described line as the center thereof, and said commissioners made at the same time an order, that said road should not be opened until certain compensation and damages which had previously been awarded to plaintiff by the said commissioners should be paid; that an appeal was taken from said award by plaintiff to the probate court; and upon said appeal the sum of *nine hundred and seventy-nine* ($979.00) dollars was awarded by the jury to this plaintiff as compensation and damages; that the county commissioners on the *6th* day of *December,* A. D. 1890, made an order that said road be not opened until the said petitioners for said road pay to this plaintiff *one hundred and forty-five* ($145.00) dollars on the *1st* day of *January,* A. D. 1891, *one hundred and forty-six* ($146.00) dollars on the *1st* day of *January,* A. D. 1892, *one hundred and forty-six* ($146.00) dollars on the *1st* day of *January,* A. D. 1893, *one hundred and forty-six* ($146.00) dollars on the *1st* day of *January,* A. D. 1894, and *one hundred and forty-six* ($146.00) dollars on the *1st* day of *January,* A. D. 1895; and that upon payment of said last installment by said petitioners on said last mentioned date the county commissioners assumed to pay the remainder of said compensation and damages; to which order of the county commissioners, in so far as the same extended the payment of said compensation and damages for the periods aforesaid, this plaintiff excepted, all of which will appear by the records of said commissioners.

And plaintiff says, that said order of said commissioners postponing the payment of plaintiff's said compensation and damages, and making the same payable by installments, was both unconscionable and unauthorized by the laws of *Ohio.*

This plaintiff alleges that the dwelling house on his farm in which he resides and his out-buildings stand within the limits of said proposed road; that his dwelling house is and has for some time been out of repair; and that plaintiff, before said road was petitioned for, made his plans and preparations to erect a new dwelling house within the bounds of said proposed road; that he had most of his material on the ground for that purpose, which is suffering serious damage by exposure, and plaintiff is left in uncertainty and doubt as to what use he shall make of said property, not knowing what the intentions of said defendants are in regard to paying said compensation and damages or the opening of said road:

Plaintiff further says, that since said first installment of *one hundred and forty-five* ($145.00) dollars fell due on said *1st* day of *January*, A. D. 1891, he requested payment thereof of the said principal petitioner for said road, but he neglected and refused to pay the same, and still neglects and refuses payment thereof, and all the defendants refuse to pay plaintiff any part of said award.

And again on the *23d* day of *March*, A. D. 1891, this plaintiff personally applied to said *Samuel Fouser*, the defendant, for payment of said installment which was again refused, and he then and there served upon said *Samuel Fouser* a written notice, that unless the same was paid forthwith, plaintiff would regard the road as abandoned by said defendants, and would file a petition in the court *of common pleas* to quiet his title as against said proposed road, and their right to construct the same upon his premises.

Plaintiff further alleges, that by reason of the premises said road and the opening thereof should be declared by this court to be abandoned by said defendants, and that his title to said strip of land should be forever quieted as against any claim of said defendants or any of them to pay any part thereof for the road proposed or otherwise.

[Wherefore plaintiff prays that said road and the opening thereof shall be declared by this court to be abandoned by said defendant, and that his title to said strip of land shall be forever quieted as against any claim of said defendants or any of them to pay any part thereof for the road proposed or otherwise and for all proper relief.

(*Signature and verification as in Form No. 5929.*)][1]

m. Where Record Title of Plaintiff to Land is Incumbered by an Undischarged Mortgage.

Form No. 16831.[2]

Norfolk, ss.

In the *Supreme Judicial* Court.

Between *Charles A. Smith*, of *Needham*, in the County of *Norfolk*, and Commonwealth of *Massachusetts*. Petitioner, and Certain persons whose names and residences are to the petitioner unknown.

Petition.

And said petitioner respectfully represents, First: That by deed of mortgage dated the *twenty-seventh* day of *July* in the year of our Lord one thousand eight hundred and *thirty* and recorded with *Norfolk* County Deeds, book *90*, page *236*, one *Joshua W. Smith*, of said *Need-*

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

2. *Massachusetts.*— Stat. (1882), c. 237, provides that when the record title to real estate is incumbered by an undischarged mortgage, and the mortgagor and those having estate in the premises have been in uninterrupted possession of the estate for twenty years after the expiration of the time limited in the mortgage for the full performance of the conditions thereof, he or they may apply to the supreme judicial court by petition, setting forth the facts and asking for a decree. And see Stat. (1885), c. 283; Stat. (1890), c. 427.

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 1, p. 156.

This form is copied from the original papers in the case.

ham, now deceased, conveyed in fee and mortgage unto one *Deborah Ellis* of *Medfield*, in said County of *Norfolk*, now deceased, a certain tract of land lying in said *Needham*, consisting of *six* acres, be the same more or less, bounded as follows:

South on land of *Lemuel Lyon*, *2d*, and *Elisha Lyon*, Esq., west, north and east on a town road; the foregoing description being the same contained in said mortgage, and in subsequent conveyances described as follows: Easterly by *Greendale* avenue and land late of *Caldwell*, now of *John W. Elliott*, northerly by *Great Plain* avenue, westerly by *South* street and southerly by land late of *Elisha H. Lyon* and of *Caldwell* aforesaid, now of the said *John W. Elliott*, containing *six and one-half* acres, more or less.

Second. That by the following described mesne conveyances and inheritance said premises were conveyed and came into the hands of your petitioner:

(1) The said *Joshua W. Smith* thereafterwards conveyed said estate to *Robert Smith* and *Amraphel Smith*, both of said *Needham*, by deed dated *April first*, 1893, recorded with said *Norfolk* Deeds, book *104*, page *227*, and

(2) Subsequently the said *Amraphel Smith*, deceased, and one *James Smith* of said *Needham* was duly appointed administrator of the goods and estate of the said *Amraphel Smith*, and the said *James Smith* under a decree of the *Probate* Court in and for said County of *Norfolk* duly authorizing the same, did sell and convey the interest of said *Amraphel Smith* in said property to the said *Robert Smith*.

(3) Thereafterwards the said *Robert Smith* conveyed the said estate to *Mary Walker*, wife of *William Walker*, *Jr.*, of said *Needham*, by deed dated *April twenty-third*, 1836, recorded with said *Norfolk* Deeds, book *111*, page *32*, and

(4) Thereafterwards the said *William Walker*, *Jr.*, and *Mary Walker*, his wife, conveyed the said estate to *Leonard Smith* of said *Needham* by deed dated the *tenth* day of *April*, A. D. 1839, recorded with said *Norfolk* Deeds, book *124*, page *115*.

(5) That said *Leonard Smith* deceased *September twenty-first*, 1887, leaving as his next of kin *Betsey K. Young*, a daughter, and *Charles A. Smith*, your petitioner, a son.

(6) That said *Betsey K. Young* thereafter by deed dated *June twenty-fifth*, 1888, conveyed her interest in said land to her brother, *Charles A. Smith*, aforesaid, your petitioner.

Third: That said deed of *William Walker*, *Jr.*, and wife, dated *April tenth*, 1839, to *Leonard Smith* conveyed said property subject to the aforesaid mortgage given by *Joshua W. Smith* to *Deborah Ellis*; that since said date nothing in regard to said mortgage appears in any way upon the records of said *Norfolk* County, and your petitioner avers that said mortgaged estate is now owned in fee by your petitioner, *Charles A. Smith*, and that your petitioner and those having their estate in the premises have been in the uninterrupted possession thereof for more than *twenty* years after the expiration of the time limited in said mortgage for the performance of the conditions thereof, and your petitioner further says that he was born *September twenty-eight*, 1848, in said *Needham*, on the

premises described in said mortgage deed from *Joshua W. Smith* to *Debora Ellis*, and has always lived at home on said premises; that his father, *Leonard Smith*, acquired title to said premises before his recollection and continued to occupy the same until his death; that your petitioner afterwards acquired his title by inheritance as aforesaid and from the other heirs of his said father; that he has never heard of said mortgage until the record thereof was discovered in a recent examination of title; that no interest has been paid on said mortgage within his recollection and he has never heard his father or any of his family mention said mortgage and is sure neither his father or any of his family have paid anything thereon within the past *thirty-five* years and there has been no act done within said time in recognition of the existence of the same as a valid mortgage; that he has every reason to believe that if payment had been made upon said mortgage within the past *twenty* years that he would have knowledge thereof.

Your petitioner does not know and after diligent search and inquiry has been unable to ascertain who are the person or persons, if any one, interested in said mortgage.

Wherefore your petitioner prays: —

First: That this Honorable Court will grant an order of notice to be served as the Court shall order to all persons interested in said mortgage and the debt intended to be secured thereby.

Second: That the Court will enter a decree setting forth the facts and its findings in relation thereto to be recorded in the proper registry of deeds and that thereafter no action shall be brought by any person or persons to enforce title under said mortgage.

Charles A. Smith.

Winfield S. Slocum, Counsel for Petitioner.

2. Cross-complaint or Counterclaim.[1]

1. Necessity for Cross-complaint — *Generally.* — Where the claim of defendant is a complete defense to the action, a cross-complaint is unnecessary and improper. Mills *v.* Fletcher, 100 Cal. 142; Bulwer Consol. Min. Co. *v.* Standard Consol. Min. Co., 83 Cal. 589; Hills *v.* Sherwood, 48 Cal. 386. As where defendant relies upon title in himself. Mills *v.* Fletcher, 100 Cal. 142; Miller *v.* Luco, 80 Cal. 257; Meeker *v.* Dalton, 75 Cal. 154; Germania Bldg., etc., Assoc. *v.* Wagner, 61 Cal. 349; Wilson *v.* Madison, 55 Cal. 5; Doyle *v.* Franklin, 40 Cal. 106. But see McKenzie *v.* A. P. Cook Co., 113 Mich. 452, where the court held that the defendant could assert his legal title by cross-bill; and Griffin *v.* Jorgenson, 22 Minn. 92, wherein it is held that, although matter set up in the answer may be a complete defense to the action alleged in the complaint, it may be pleaded as a counterclaim if it constitutes a cause of action in favor of the defendant and against the plaintiff, and is connected with the subject of plaintiff's action. Where the complaint sets forth the plaintiff's title, and also defendant's void title, a counterclaim in the answer setting up defendant's title is unnecessary and superfluous. Sloan *v.* Rose, 101 Wis. 523.

Where affirmative relief is desired by defendant, however, he should file a cross-complaint or counterclaim. Cheney *v.* Nathan, 110 Ala. 254; Stratton *v.* California Land, etc., Co., 86 Cal. 353; Hungarian Hill Gravel Min. Co. *v.* Moses, 58 Cal. 168; Winter *v.* McMillan, 87 Cal. 256; Mills *v.* Buttrick, 4 Colo. 123; Tucker *v.* McCoy, 3 Colo. 284; Putt *v.* Putt, 149 Ind. 30; Morarity *v.* Calloway, 134 Ind. 503; Killian *v.* Andrews, 130 Ind. 579; United Brethren, etc. *v.* Rausch, 122

a. By Defendant in Possession of Land in Controversy, Claiming as Owner, Against Plaintiff as Owner Under Some Paper Writing.

Ind. 167; Magowan *v.* Branham, 95 Ky. 581; McKenzie *v.* A. P. Cook Co., 113 Mich. 452; Vroman *v.* Thompson, 51 Mich. 452; Mueller *v.* Jackson, 39 Minn. 431; Betts *v.* Signor, 7 N. Dak. 399; Bartholomew *v.* Lutheran Congregation, 35 Ohio St. 567; Glasmann *v.* O'Donnell, 6 Utah 446; Wilson *v.* Hooser, 76 Wis. 387.

Equitable title in defendant may be set up by cross-complaint. Barnes *v.* Union School Tp., 91 Ind. 301.

Requisites of Cross-complaint, Generally. — For the formal parts of a cross-complaint in a particular jurisdiction see the title CROSS-COMPLAINTS, vol. 5, p. 991.

A cross-complaint is to be tested by substantially the same rules as the complaint. Johnson *v.* Pontious, 118 Ind. 270; Spencer *v.* McGonagle, 107 Ind. 410 (*citing* Wadkins *v.* Hill, 106 Ind. 543; Conger *v.* Miller, 104 Ind. 592). And must state all such facts as are required in a complaint for the same purpose. Winter *v.* McMillan, 87 Cal. 256; Conger *v.* Miller, 104 Ind. 592.

Must be germane to original bill; thus, where the original bill is brought to set aside a tax deed as a cloud upon the complainant's title, the defendant may present any matter having a bearing on the validity of the sale or deed, but cannot seek by cross-bill to establish any legal title not sought to be voided. Gage *v.* Mayer, 117 Ill. 632.

Grounds for equitable relief to support jurisdiction of the court need not be stated. Tucker *v.* McCoy, 3 Colo. 284.

Grounds upon which relief is asked must be stated with the same strictness as required of the complainant in his original bill. Tucker *v.* McCoy, 3 Colo. 284.

Real estate in controversy must be described in the cross-complaint. Conger *v.* Miller, 104 Ind. 592. Where the cross-complaint does not describe the real estate so that the description can be ascertained without reference to the other pleadings, it is bad. Conger *v.* Miller, 104 Ind. 592.

That opposite party claims adverse interest, or that his claim is unfounded or a cloud upon cross-complainant's title, must be stated. Conger *v.* Miller, 104 Ind. 592.

Precedent. — In Detwiler *v.* Schultheis, 122 Ind. 155, one paragraph of the cross-complaint alleged in substance the following state of facts: That the defendant is the owner of the real estate in controversy (describing it), and has been for fifteen years, and during the said period of time has been in possession thereof; that he has made large and valuable improvements thereon, and paid all taxes and other assessments against said property; that the said real estate is now of the value of six thousand dollars, and when the defendant purchased it it was of the value of but two thousand dollars; that the defendant derived title from one Peter Schlosh; that the plaintiff is setting up and asserting title to said real estate adverse to the defendant, is giving out in public speeches that he is the owner of said real estate, and has instituted an action in the Marshall Circuit Court to recover the possession thereof; that after the defendant had purchased the said real estate and paid the full consideration therefor, his grantor, the said Peter Schlosh, became insolvent, and so continued until his death; that, on the 4th day of June, 1869, the plaintiff recovered a judgment in the said Marshall Circuit Court against the said Schlosh for the sum of $2,000; that said judgment was a judgment for the foreclosure of a chattel mortgage, and that there was no personal judgment over against the said Schlosh; that at the time of the rendition of said judgment, and thereafter, the said Schlosh was the owner of sundry pieces of real property in the said county of Marshall, altogether of the value of $10,000; that, on the 9th day of April, 1879, nearly ten years after the rendition of said judgment, the plaintiff sued out an execution on said judgment, and directed and caused the same to be levied upon all of the different tracts and parcels of real estate to which the said Schlosh held title at the date on which said judgment was rendered, and thereafter at any time before the issuing of said execution, including the said real estate so belonging to the defendant, and caused the same to be advertised for sale on the said execution; that said Schlosh had sold and conveyed each and all of said pieces and parcels of property before the said execution issued; that the defendant was about to institute proceedings to enjoin said

sale as to his said real estate when the plaintiff, in person and by his attorney and agent transacting the said business for him, came to the defendant and informed him that he need pay no attention to said sale, that it was not the intention of the plaintiff to purchase or disturb defendant's title; that the plaintiff would bid it off at a nominal sum merely to get it out of the way, inasmuch as he had to have the real estate levied upon sold in the inverse order from that in which the said Schlosh had conveyed it; that for this reason only had the defendant's property been levied upon and advertised for sale; that this was necessary to enable the sheriff legally to sell other valuable tracts of said real estate which the plaintiff desired to have sold; that the plaintiff knew that the defendant could enjoin said sale and defeat his right to acquire any title to the defendant's said real estate; and if he would not enjoin said sale the plaintiff would bid off the defendant's said real estate at a nominal sum to get it out of the way; but it would not and should not be treated as a sale, and that the defendant need not trouble himself to redeem therefrom; that the defendant relied upon the promises and agreement thus made by the plaintiff, and permitted his said real estate to be sold without objection, and did not thereafter redeem from said sale, although the said real estate was purchased for the nominal sum of $1; that the plaintiff and his agent and attorney knew during all the time that the defendant was relying upon the said promises and agreement so made; that said sale was made on the 17th day of May, 1879; that at the time of said sale the said real estate was of the value of $6,000.

This paragraph was held to state a good cause of action to quiet title.

In Grignon *v.* Black, 76 Wis. 674, the action was to enjoin waste. A counterclaim was filed in addition to an answer denying the material allegations of the complaint, as follows:

"Further answering, as and for a counterclaim herein, alleges that *September 7*, 1863, a tax deed was duly issued to defendant, of said land, which deed was duly recorded on the same day; that said tax deed was foreclosed by action in the *circuit* court of *Outagamie* county, and judgment rendered in favor of the plaintiff in said action, and duly docketed *December 1*, 1864; that defendant immediately thereafter entered into possession of said land under claim of title, and has ever since been in the continual possession thereof, has usually cultivated and improved the same, paid the taxes thereon (except on *1-32* part thereof, for *one* or *two* years), and before this action was commenced had actually inclosed about *160* acres thereof, etc.; that said premises have been and are now known as a single lot, to wit, 'Private Claim *33*,' and are so designated and given by the United States, and are the same premises described in the complaint; that other tax deeds of said lands were issued to defendant, as follows: *September 4*, 1865, *May 16*, 1866, *May 14*, 1867, and *September 2*, 1871, — and were each recorded on the same day as issued. [Copies of said deeds and said judgment are annexed to said answer as Exhibits *A*, *B*, *C*, *D*, *E*, and *F*.]

That immediately upon the execution, etc., of each of said deeds, to wit, *September 4*, 1865, *May 16*, 1866, *May 14*, 1867, and *September 2*, 1871, this defendant entered into the possession of said land under claim of title thereto exclusive of any other right, founding such claim upon each said deeds at each said entries in addition to the prior deeds and judgment, and has been ever since in the continued occupation and possession of said premises for *fifteen* years and upwards, etc.; that defendant duly recorded in the office of the register of deeds notice of the payment by him of the taxes on said lands, copies of said notices being annexed as Exhibits *G*, *H*, and *I*.

That neither the plaintiffs, their ancestors, predecessors, nor grantors were seised or possessed of said premises within a period of *twenty* years immediately before the commencement of said action; that more than *three* years have elapsed since the recording of each of said deeds before the commencement of this action, during all of which time defendant was in the actual possession of said lands, claiming title under said deeds, and will rely on the statute of limitations in such case made and provided.

Wherefore, defendant demands judgment that the complaint be dismissed and the injunctional order be dissolved, and that the title absolute in and to the said real estate and premises described in the complaint, and included in said tax deeds and judgment, be

Form No. 16832.[1]

(Precedent in Cooper *v.* Jackson, 71 Ind. 247.)[2]

[(*Venue and title of court and cause as in Form No. 6740.*)][3]

The said defendant, *Relief Jackson*, by way of cross complaint against said plaintiff, avers and charges, that this defendant is the owner, and in the possession by himself, and his agents and lessees, of the following real estate in *Tippecanoe* county, *Indiana*, to wit: (*description*); that said real estate, so owned by said defendant as aforesaid, is of great value, to wit, of the value of *ten thousand* dollars. Said defendant further avers, that said plaintiff, by virtue of the pretended deed set out in his second paragraph of complaint, or by some other paper writing, the character or nature of which is to this defendant unknown, claims to hold title to said real estate, which said claim of title is adverse to the right and title of this defendant to said real estate, and which said claim of title, so made by the said plaintiff to said real estate, is unfounded, and that the same operates as a cloud upon the title of this defendant. Wherefore the defendant prays judgment and decree of the court, that the title of this defendant in and to said real estate be quieted, and that the cloud upon his title made by the unfounded claim of said plaintiff, be removed, and for general relief.

[(*Signature and verification as in Form No. 5915.*)][3]

b. By Defendant Out of Possession of Land in Controversy, Claiming as Owner, Against Plaintiff Who has Fenced Off Land Under Claim of Ownership.

Form No. 16833.[4]

(Precedent in Jeffersonville, etc., R. Co. *v.* Oyler, 60 Ind. 385.)[5]

[(*Venue and title of court and cause as in Form No. 6740.*)][3]

The said defendant, for answer to the plaintiff's complaint, answering, says, that respondent admits that the plaintiff is the owner in

adjudged to be in this defendant, and for costs of suit, and for such other and further judgment and relief in the premises as to the court shall seem just and equitable."

This was held to state a good cause of action to quiet title, although it did not state that the plaintiff was making claim to the land, as the complaint showed that.

In a suit to foreclose a mortgage, a cross-complaint by defendant alleging that he is the owner of the mortgaged property under a tax deed, pursuant to a sale antedating the mortgage, and that the other parties to the suit each claim an adverse interest to his title, is sufficient. Ludlow *v.* Ludlow, 109 Ind. 199.

A cross-complaint is sufficient which alleges that the cross-complainant is the owner of the property in controversy and that the plaintiff's claim thereto is a cloud upon cross-complainant's title. Rausch *v.* United Brethren, etc., 107 Ind. 1.

1. *Indiana.* — Horner's Stat. (1896), § 1070.

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 1, p. 188.

2. A demurrer to the counterclaim or cross-complaint in this case for want of sufficient facts was held by the supreme court to have been correctly overruled.

3. The matter to be supplied within [ ] will not be found in the reported case.

4. *Indiana.* — Horner's Stat. (1896), § 1070.

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 1, p. 188.

5. The answer in this case was held

fee of the *four* lots mentioned in the plaintiff's complaint, but insists that the said *four* lots do not extend to the middle of the track of the *Jeffersonville, Madison and Indianapolis Railroad Company*, but that the *western* line of each of said lots is *fifty* (*50*) feet east of the middle of said railroad tract; that the roadway of this respondent, at the point at which said lots respectively adjoin the same, is *one hundred* feet wide, and includes what the plaintiff claims to be *fifty* feet off the west end of each of said lots. This respondent claims, that, by virtue of the facts hereinafter stated, those lots in *Hamilton and Oyler's* addition to the city of *Franklin*, which adjoin the roadway of the *Jeffersonville, Madison and Indianapolis* Railroad, including the *four* lots mentioned in the plaintiff's complaint, were, in making and recording said plat, wrongfully made to appear to extend west to the centre of the railroad track of the railroad of this respondent, each lot as thus platted encroaching upon the roadway of this respondent and extending *fifty* feet west of the line to which the makers of said plat had a right to extend said lots; in other words, this respondent, by virtue of the facts stated and the title hereinafter pleaded, claims to be the owner, in fee-simple, of the ground through which its road passes, adjacent to said lots, extending from the centre of the track of said railroad, east, until it strikes said lots, and embracing *fifty* feet off, what the plaintiff claims to be, the west end of each of said lots.

The facts, upon which this respondent relies to support this claim, and as a defense to the plaintiff's action, are as follows, to wit: That, long prior to the construction, or even to the projecting, of the *Madison and Indianapolis* Railroad, by the state of *Indiana*, one *Garrett C. Bergen* was the owner in fee-simple of the north-east quarter of section No. *fourteen* (*14*) in township No. *twelve* (*12*) north, of range *four* (*4*) east, in *Johnson* county, *Indiana*, through which quarter section of land the said railroad was subsequently constructed, as hereinafter stated; that the said *Bergen* continued to be the owner, in fee-simple, of the whole of said quarter section, until he conveyed to the *Madison and Indianapolis Railroad Company*, and to *Robert Hamilton* and the plaintiff, as hereinafter stated; that, prior to the *22d* day of *June*, 1*843*, the state of *Indiana* had projected a railroad *one hundred* feet in width, from *Madison*, *Indiana*, through the [then] town, but now city, of *Franklin*, in said county of *Johnson*, to *Indianapolis*, in the county of *Marion*, in said state, and had constructed some *twenty* or more miles thereof, the said finished portion of said road commencing at *Madison*, *Indiana*, and extending northward in the direction of *Franklin* and *Indianapolis*, aforesaid.

That, prior to the last named date, the *Madison and Indianapolis Railroad Company* had become, and was, organized and incorporated as a railroad corporation by and under the laws of the state of *Indiana*, and had succeeded to the rights of the state, of, in and to the said *Madison and Indianapolis* Railroad, and become and was, under its

to be in the nature of a counterclaim rather than a cross-complaint, as it was called by the defendant. It was held sufficient by the supreme court, a demurrer having been sustained to it in the lower court on the ground that it did not state grounds sufficient to constitute a defense to the claim.

charter, entitled to complete and perpetually operate the unfinished portion thereof, including that part of it which was projected through said county of *Johnson*, no part of said road in said last named county being then constructed.

That the said *Madison and Indianapolis Railroad Company*, prior to and on said *22d* day of *June*, 18*43*, had surveyed the route of said railroad through *Johnson* county aforesaid, and through said quarter section of land, but had not made a final location of the road; that said *Garrett C. Bergen*, so being the owner of said quarter section of land, on said *22d* day of *June*, 18*43*, sealed, executed and delivered to the said railroad company his release or conveyance, of that date, whereby he, the said *Garrett C. Bergen*, for and in consideration of the advantage which might or would result to the public in general, and to himself in particular, by the construction of the *Madison and Indianapolis* Railroad as then surveyed, or as the same might be finally located, and for the purpose of facilitating the construction and completion of said work or road, did, for himself, his heirs, executors, administrators and assigns, release and relinquish, to the *Madison and Indianapolis Railroad Company* aforesaid, *one hundred* feet in width, as the right of way for so much of said railroad as might pass through said quarter section of land, and the said *Bergen*, by the same instrument, released and relinquished to said company all damages and right of damages, which he might sustain or be entitled to by reason of any thing connected with or consequent upon the construction of said road, or the repairing thereof when finally established and completed, a copy of which instrument is herewith filed, marked "Exhibit No. *1*," and is prayed to be taken as a part of this answer. And the defendant avers, that, after the execution of said instrument, and in the year ———, the said railroad was finally located and constructed through said quarter section of land, according to said previous survey of the route thereof, on the centre line of said *one-hundred*-foot strip of ground so relinquished to said company; and the said *Madison and Indianapolis* Railroad, from the time of said completion of said road to the time of the consolidation of the *Madison and Indianapolis Railroad Company* with the *Jeffersonville and Indianapolis Railroad Company*, as hereinafter stated, continuously occupied the said *one-hundred*-foot strip of ground so relinquished to that company, by occupying the centre line of said *one hundred* feet of ground with the track of its railroad, the middle of said track being, during all that time, on the said centre line of said *one-hundred*-foot strip of ground, and the trains and cars of said *Madison and Indianapolis Railroad Company* being continuously, during all that time, run daily and many times a day over said track; and the said defendant says, that the said plaintiff derives the only title he has, or pretends to have, to said land, from and through the said *Garrett C. Bergen*, by virtue of a deed of conveyance, dated, executed and delivered by the said *Bergen* and his wife to the said *Samuel P. Oyler* and one *Robert Hamilton* on the *8th* day of *November*, 18*65*, whereby the said *Bergen* and wife conveyed to the said *Oyler and Hamilton*, as far as they had a right thus to convey, all that part of said quarter section of land which then was and still is east of the

centre of said *Madison and Indianapolis* Railroad; the said conveyance, by the terms thereof, made the centre of said railroad track the west line of the *one hundred and fifty-five and one-half* (*155 1-2*) acres conveyed by said deed; that, at the time of the execution of said deed, the said railroad was in full operation on the centre of said *one-hundred*-foot strip of ground through said quarter section of land, running trains over the same daily and many times each day, and that the land conveyed by said deed was not then subdivided or laid off or platted as town or city lots, but included the ground which, by the subdivision and platting hereinafter mentioned, became and constituted the *four* lots mentioned in the complaint.

That afterwards, on the *29th* of *May*, 1*866*, the said *Hamilton and Oyler* laid off and platted the land so conveyed to them by said deed, with [into] town or city lots, as *Hamilton and Oyler's* addition to the city of *Franklin* aforesaid, the *four* lots mentioned in the plaintiff's complaint being a part of said addition, and, by the recording of said plat of said addition, the said *four* lots, part and parcel of the land so conveyed to said *Hamilton and Oyler* by said deed, for the first time became town or city lots in the month of *May*, 1*866*; that the said *Hamilton and Oyler*, in making and recording said plat of said addition, caused the said *four* lots mentioned in said complaint, as well as other lots in said addition, to be extended through the eastern half of said *one-hundred*-foot strip of ground to the centre of the track of said railroad, just as if said strip of ground never had been conveyed by said *Bergen* to said railroad company, as aforesaid, and just as if said railroad had never existed; and the said *Hamilton* and his wife having subsequently conveyed to said *Oyler* their interests in said lots, the said *Oyler* now pretends that the said conveyance of said strip of ground, by said *Bergen* and wife, to said *Madison and Indianapolis Railroad Company*, is not binding upon him.

And the defendant further avers, that, a short time prior to the making and recording of said plat, to wit: in *April*, 1*866*, the *Madison and Indianapolis Railroad Company* and the *Jeffersonville and Indianapolis Railroad Company*, in pursuance of the statutes of the state of *Indiana*, on that subject, by proper articles of association, duly recorded in the proper counties, consolidated and became one corporation, by the name of the *Jeffersonville, Madison and Indianapolis Railroad Company*, whereby the said last named company succeeded to all the property, rights, privileges and fanchises of the said *Madison and Indianapolis Railroad Company*, and by said consolidation all the title to and interest in said strip of ground, previously owned by the said *Madison and Indianapolis Railroad Company*, was vested in respondent, as fully as it was previously held by said company last named. And the said defendant further avers, that, ever since said consolidation, the defendant, or its lessee, has continuously operated said railroad over the centre of said *one-hundred*-foot strip of ground, by running trains daily, and many times each day, over the same. And this defendant insists that the running of trains by the *Madison and Indianapolis Railroad Company* over said railroad track, through said quarter section of land, prior to said consolidation, and by this defendant since said consolidation, as hereinbefore mentioned, con-

stituted not merely an occupancy of the narrow strip of ground upon which the superstructure of the road rests, but constituted an actual occupancy of the entire *one-hundred*-foot strip of ground, granted by the said *Bergen* and wife as aforesaid, and upon the centre of which said railroad was constructed and operated as aforesaid, and that the width of roadway necessary for the operation of said railroad, and for keeping the same in repair, is not an open question, but was settled and fixed at *one hundred* feet in width, by the relinquishment so made by the said *Bergen* to the said *Madison and Indianapolis Railroad Company*, and by the acceptance of said railroad company of said relinquishment; that the fence mentioned in said complaint was erected by the lessee of this defendant, to wit: by the *Pennsylvania Company*, upon the eastern line of the said *one-hundred*-foot strip of ground, and within *fifty* feet from the centre of the track of said railroad. And this defendant insists, that, by reason of the facts hereinbefore pleaded, the said lessee had a right to erect said fence at the place where it was erected and where it now stands. And this defendant insists, that, by force and effect of the matters hereinbefore pleaded, and not otherwise, this defendant is the owner, in fee-simple, of the *fifty* feet of ground between the centre of said railroad track and the said *four* lots mentioned in the complaint and claimed by the plaintiff as a part of said *four* lots; or, if respondent should be mistaken in this, respondent insists, that, at all events, respondent, by virtue of the facts hereinbefore pleaded, has a perpetual right of way over said *one-hundred*-foot strip of ground, for the use of said railroad, to the whole width of said *one-hundred*-foot strip of ground, and including the west end of said *four* lots, and that, so far as said *four* lots encroach upon said strip of ground, the plaintiff holds the same subject to the perpetual right of way of this defendant, so as afore-conveyed by said *Bergen* and wife to said *Madison and Indianapolis Railroad Company*, and that, whether respondent's interest in said strip of ground be a fee-simple or a perpetual right of way, the plaintiff has no cause of action against the respondent; and this respondent prays that this answer may be taken and considered as a cross-complaint in this cause, and that the respondent's title to said strip of ground adjacent to said *four* lots, extending *fifty* feet east of the centre of said track, may be quieted against the pretended claim of the plaintiff set up in his complaint.

[(*Signature and verification as in Form No. 5915.*)][1]

3. Disclaimer.[2]

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **Disclaimer.** — Where defendant claims no interest in the property in controversy, he should appear and disclaim any interest. Quint *v.* McMullen, 103 Cal. 381; Bulwer Consol. Min. Co. *v.* Standard Consol. Min. Co., 83 Cal. 589; Pennie *v.* Hildreth, 81 Cal. 127; Wall *v.* Magnes, 17 Colo. 476; Miller *v.* Curry, 124 Ind. 48; Walker *v.* Steele, 121 Ind. 436; Marot *v.* Germania Bldg., etc., Assoc. Number 2, 54 Ind. 37; Ellison *v.* Kittridge, 45 Mich. 475; Blodgett *v.* Dwight, 38 Mich. 596; Davis *v.* Read, 65 N. Y. 566; Howard *v.* Davis, 6 Tex. 174.

See also list of statutes cited *supra*, note 1, p. 155.

Requisites of Disclaimer, Generally. — For the formal parts of a disclaimer in

Form No. 16834.[1]

(*Title of court and cause as in Form No. 1331.*)

Now comes defendant by *Oliver Ellsworth*, his attorney, and for answer to plaintiff's petition says that he disclaims all title and interest adverse to the plaintiff in the lands described in plaintiff's petition. Wherefore he prays judgment for his costs in this action.

(*Signature and verification as in Form No. 5923.*)

4. Answer.[2]

a particular jurisdiction see the title DISCLAIMER, vol. 6, p. 838.

Defendant must disclaim all title absolutely and unconditionally. Ellison *v.* Kittridge, 45 Mich. 475.

Disclaimer as to Part of Land. — Where the defendant claims title to only a part of the land, he must specify the part which he disclaims, otherwise he will be treated as claiming the whole. Friedman *v.* Shamblin, 117 Ala. 454.

1. *Nebraska.* — Comp. Stat. (1897), § 4153.

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 2, p. 195.

2. Requisites of Answer, etc., Generally. — For the formal parts of an answer or plea in a particular jurisdiction see the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799; ANSWERS IN EQUITY, vol. 1, p. 854; PLEAS, vol. 13, p. 918.

Defendant's Claim — *Generally.* — The defendant must set up in his answer the right, title and interest that he claims in the property. Adams *v.* Crawford, 116 Cal. 495; Burris *v.* Kennedy, 108 Cal. 331; Landregan *v.* Peppin, 94 Cal. 465; Bulwer Consol. Min. Co. *v.* Standard Consol. Min. Co., 83 Cal. 589; Pennie *v.* Hildreth, 81 Cal. 127; Hyde *v.* Redding, 74 Cal. 493; People *v.* Center, 66 Cal. 551; Amter *v.* Conlon, 22 Colo. 150; Weston *v.* Estey, 22 Colo. 334; Wall *v.* Magnes, 17 Colo. 476; Miles *v.* Strong, 68 Conn. 273; Gage *v.* Du Puy, 134 Ill. 132; Whipple *v.* Earick, 93 Ky. 121; Stuart *v.* Lowry, 49 Minn. 91; Cook *v.* Friley, 61 Miss. 1; Scorpion Silver Min. Co. *v.* Marsano, 10 Nev. 370; Bishop *v.* Waldron, 56 N. J. Eq. 484; Powell *v.* Mayo, 26 N. J. Eq. 120; O'Hara *v.* Parker, 27 Oregon 156; Zumwalt *v.* Madden, 23 Oregon 185. Clark *v.* Darlington, 7 S. Dak. 148; Sloan *v.* Rose, 101 Wis. 523; Ely *v.* New Mexico, etc., R. Co., 129 U. S. 291; Goldsmith *v.* Gilliland, 10 Sawy. (U. S.) 606; Burton *v.* Huma, 37 Fed. Rep. 738.

Equitable Title. — If the claim or title relied on is an equitable one, the facts must be pleaded and cannot be shown under an allegation of title and ownership in fee. Stuart *v.* Lowry, 49 Minn. 91.

Where title is acquired pendente lite, it must be pleaded specially. Gage *v.* Reid, 118 Ill. 35.

Denial of Title or Possession in Plaintiff. — The defendant may, in his answer, deny title or possession alleged by plaintiff in his petition without setting up any title in himself. Sklower *v.* Abbott, 19 Mont. 228; Wolverton *v.* Nichols, 5 Mont. 89; Beale *v.* Blake, 45 N. J. Eq. 668; Churchill *v.* Onderdonk, 59 N. Y. 134; Barnard *v.* Simms, 42 Barb. (N. Y.) 304. However, the defendant must deny the plaintiff's title specifically, and where the denial is in general terms it is not sufficient, and proof of plaintiff's title need not be introduced. Wagar *v.* Bowley, 104 Mich. 38; Bennett *v.* Chaffe, 69 Miss. 279. But see, to the effect that a general denial of plaintiff's title is sufficient, Pennie *v.* Hildreth, 81 Cal. 127; Morrill *v.* Douglass, 14 Kan. 293; Wakefield *v.* Day, 41 Minn. 344; Jellison *v.* Halloran, 40 Minn. 485.

In Adams *v.* Crawford, 116 Cal. 495, it was held that where the defendant was in possession, but the plaintiff alleged title and ownership in himself, the question of title and ownership in plaintiff might be raised under general denial.

Where the petition alleged that defendant claimed title in the land, the failure of defendant to set up in his answer his claim of title affirmatively could not deprive him of the right to have the question of possession tried, the fact of possession by plaintiff having been denied in the answer. Babe *v.* Phelps, 65 Mo. 27.

An answer denying the allegations of the plaintiff's petition generally, and denying specifically that the plaintiff

a. That Defendant is Owner and Entitled to Possession of Land in Controversy by Reason of United States Patent.

Form No. 16835.[1]

(Precedent in Robinson *v.* Hall, 33 Kan. 140.)[2]

had no title to, interest in or possession of the property, was sufficient defense. Pierce *v.* Thompson, 26 Kan. 714.

General Denial. — In *Indiana*, it is held that all defenses, whether legal or equitable, partial or complete, may be given in evidence under the general denial. Jackson *v.* Neal, 136 Ind. 173; Mason *v.* Roll, 130 Ind. 260; Messick *v.* Midland R. Co., 128 Ind. 81; Hamilton *v.* Byram, 122 Ind. 283; O'Donahue *v.* Creager, 117 Ind. 372; Ratliff *v.* Stretch, 117 Ind. 526; Eve *v.* Louis, 91 Ind. 457; Hogg *v.* Link, 90 Ind. 346; West *v.* West, 89 Ind. 529; Nutter *v.* Fouch, 86 Ind. 451; Porter *v.* Mitchell, 82 Ind. 214; Milner *v.* Hyland, 77 Ind. 458; Sharpe *v.* Dillman, 77 Ind. 280; Over *v.* Shannon, 75 Ind. 352; Green *v.* Glynn, 71 Ind. 336; Graham *v.* Graham, 55 Ind. 23. And in *Kansas*, Flint *v.* Dulany, 37 Kan. 332.

Waiving Allegations of Vacancy and Possession. — Where complaint alleges plaintiff's ownership and that land is vacant, and the answer denies such allegations, but goes on to set forth defendant's title to the real estate, defendant waives the allegations of vacancy and possession, since they do not go to the merits of the controversy, but only to the plaintiff's right to present the matters in controversy for the determination in a particular form of action, and the court being competent to determine the controversy must do so if the parties present it for its determination. Mitchell *v.* McFarland, 47 Minn. 535.

Precedent — That Defendant is Owner of Premises by Virtue of Tax Deed. — In Male *v.* Brown, 11 S. Dak. 340, is set out in part the following answer:

"And for a further and affirmative defense the defendant alleges that she is the owner in fee simple of the lands described in the plaintiff's complaint; that in the year 1892 said land was legally liable for taxation, and was duly assessed for taxation by the taxing officers of *Hand* county, *South Dakota*, and the taxes for said year were duly spread upon the tax books of said *Hand* county, and became a lien upon said land; that no part of said taxes was paid for said year of 1892 by any person, and the said land was duly sold for the delinquent taxes of said year of 1892 on the *6th* day of *November*, 1893, by the treasurer of said *Hand* county, according to law, to one *F. Blackman*, and the amount for which said land was sold was $*19.68*, that a certificate of purchase for said land was duly executed and delivered by the treasurer of said *Hand* county to said *F. Blackman*, who afterwards, to-wit, on the *5th* day of *January*, 1894, paid the subsequent taxes on said land for the year 1893, amounting to $*11.66*, and on the *21st* day of *January*, 1895, paid the subsequent taxes for the year 1894, amounting to the sum of $*9.81*, and on the *25th* day of *January*, 1896, paid the subsequent taxes for the year 1895, amounting to the sum of $*14.96*; that no person redeemed said land from said tax sale, and on the *18th* day of *December*, 1896, upon the surrender of such certificate of purchase, the treasurer of said *Hand* county, in the state of *South Dakota*, executed, in due form of law, and delivered to said *F. Blackman*, a treasurer's deed for the land so sold, being the same land that is described in the plaintiff's complaint, whereby the said *F. Blackman* became and was the owner in fee simple of said land, and thereafter, to-wit, on the *28th* day of *June*, 1897, the said *F. Blackman* and *Ethleen Blackman*, his wife, sold and conveyed to said defendant, by a good and sufficient deed of conveyance, executed and delivered to this defendant, the land aforesaid, and all the estate, right, title, interest, claim, property, and demand of said *F.* and *Ethleen Blackman* in and to the same, whereby the defendant became, and now is, the owner of said land in fee simple."

A demurrer to the answer was overruled.

1. *Kansas.* — Gen. Stat. (1897), c. 96, § 1.

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 2, p. 196.

2. No objection was made to the form of the answer in this case. The plaintiff filed a reply, and on trial

[(*Venue and title of court and cause as in Form No. 1325.*)][1]

1. Said defendant, for answer to the petition of the plaintiff, denies each and every allegation of the plaintiff's petition herein.

2. For further answer, said defendant says that he is the owner, in fee simple, of the lands in the petition described, to wit, the west half of the southwest quarter of section *35*, township *20*, range *22*, in *Linn* county, *Kansas*, and has been such owner for more than *twenty-three* years last past, and is entitled to the possession of the same; that his title is derived from and through a patent of the United States to himself for said land; that said plaintiff has never been, and is not now, in the possession of said lands or any part thereof; that said plaintiff has some claim of title to said premises, the nature and character of which is unknown to the defendant, which claim is injurious to the defendant's use and enjoyment of said premises, and which throws a cloud upon the defendant's said title, and injures the marketableness of said land, to the defendant's great injury. The defendant further says that he has at all times paid the taxes on said premises and has at all times had the peaceable and exclusive ownership and use of said premises.

3. Said defendant further says, that the plaintiff's cause of action arose more than *three* years before the beginning of this action.

4. That the plaintiff's cause of action arose more than *five* years before the beginning of this action.

5. That the plaintiff's cause of action arose more than *ten* years before the beginning of this action.

Wherefore, the defendant prays judgment against said plaintiff, quieting the title of the defendant in and to said premises, and decreeing and declaring void the plaintiff's claim of title to said premises, or to any part thereof, and forever enjoining said plaintiff and all persons claiming under or through him, from setting up or prosecuting any claim of title to said premises, or any part thereof, and for other equitable relief, and costs.

[(*Signature and verification as in Form No. 5917.*)][1]

b. That Defendant, Who Claims as Owner of Land in Controversy Under a Sheriff's Deed, be Allowed to Redeem Premises from Plaintiff, Who Claims Under a Foreclosure Sale.

Form No. 16836.[2]

(Precedent in Coombs *v.* Carr, 55 Ind. 304.)[3]

the court found that the defendant was the owner in fee simple of the lands in controversy and that the plaintiff had no title or interest therein.

1. The matter to be supplied within [] will not be found in the reported case.

2. *Indiana.* — Horner's Stat. (1896), § 1070.

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 2, p. 196.

3. The complaint in this case averred that the plaintiffs were owners in fee simple and in possession of the lands, particularly describing them, and that by virtue of a certain sheriff's deed the defendant claimed title to same adverse to the plaintiff. The form set out in the text is the third paragraph of the answer to said complaint. It was held, on demurrer, by the supreme court, reversing a judgment of the lower court, that this paragraph was a sufficient answer.

[(*Venue and title of court and cause as in Form No. 1323.*)
For answer to the complaint in the above cause, the defendant says,][1]

That on the *27th* day of *May*, 1872, at the *May* term of the court *of common pleas* of *Clark* county, one *George Spriesterbach*, by the consideration of said court, recovered a judgment, without relief from valuation, or appraisement laws, against one *Joseph Carr*, as principal, and *William Prather*, as his surety, for the sum of *four hundred and five* dollars, and costs of suit, taxed at *fifty-six* dollars and *forty* cents. Afterwards, on *June 25th*, 1872, and while such judgment was in full force, unappealed from, unreversed and unsatisfied, the said judgment plaintiff, *George Spriesterbach*, caused a writ of execution to be duly issued upon said judgment, under the seal of the said court, and attested by the clerk thereof, directed to the sheriff of said county, commanding him to levy the said sums of money of the property of said defendants, in said county of *Clark*, subject to execution. On the day when said judgment was rendered, immediately prior thereto, and up to the *20th* day of *October*, 1873, the said *Joseph Carr* was the sole owner, in fee-simple, and in the possession, of the real estate described in the plaintiff's complaint, and he had then and since no other real estate whatever, and he had no personal property, goods, or chattels in said county, or anywhere else, subject to execution. During all of said period of time he was a resident householder of *Indiana*, and the amount of personal property owned by him did not exceed *three hundred* dollars, and the same, before said sale, was set apart to him, in the manner prescribed by law, as exempt from execution. The said real estate in the complaint described was of the probable value of *seven thousand five hundred* dollars, — and that is now its cash value. At the date of said judgment there were *four* mortgage liens upon said real estate, thus particularly described. The first was dated *August 10th*, 1871, in favor of one *Mordecai B. Cole*, for *one thousand two hundred and fifty-three* dollars and *eighteen* cents. The second was dated *August 15th*, 1871, in favor of one *David H. Coombs*, for *two thousand two hundred and eighty* dollars and *forty* cents. The third was dated *August 16th*, 1871, and was in favor of *James Carr*, *Rebecca Carr*, *Robert L. Howe*, and the present plaintiffs, *David* and *Elisha Carr*, for *three thousand seven hundred and thirty-six* dollars and *seventy-five* cents, in the aggregate, the amount apparently due each mortgagee being separately stated. And the fourth was dated *November 13th*, 1871, in favor of *James Beggs*, for *five hundred* dollars.

On the *26th* day of *June*, 1872, by virtue of said writ of execution, the said sheriff levied the said writ upon the real estate of the said *Joseph Carr*, particularly described in the plaintiff's complaint, as the property of the said *Joseph Carr*. After due and legal advertisement, the said sheriff, on *October 19th*, 1872, sold the said premises, between the hours prescribed by law, at the court-house door, in *Charleston*, at public sale, to one *John H. Stotsenburg*, for the sum of *ten* dollars cash in hand, then and there paid, he being the highest

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

and best bidder therefor. On the said day, the said sheriff executed to the said purchaser a certificate of sale of the said premises, in due form of law, and on *November 27th*, 1872, the said purchaser duly assigned, in writing, the said certificate of purchase to this defendant. The said *Joseph Carr* and *William Prather*, or any other person legally authorized thereto, having failed to redeem the said premises within the period prescribed by law, the said sheriff, on *October 20th*, 1873, executed, acknowledged, and delivered to the defendant, a deed for all of the said premises, conveying to him all the interest of the said *Joseph Carr* therein, it being the same deed specified particularly in the plaintiff's complaint.

The defendant further says, that, on the *1st* day of *October*, 1872, the said *David H. Coombs* brought an action in the *Clark circuit* court, to foreclose his said mortgage, making as defendants thereto all of the said mortgage creditors above named, and the said *Joseph Carr* and his wife. The said defendants, mortgagees above named, all appeared in said action and severally filed their cross-complaints against the said *Joseph Carr* and wife, and such proceedings were had therein, at the *October* term, 1872, of the said *Clark circuit* court, with the consent of the said *Joseph Carr* and wife, that, on the *17th* day of *October*, 1872, by the consideration of said court, judgments and decrees of foreclosure were rendered in favor of said *David H. Coombs* and said cross-complainants, of whom the plaintiffs herein formed a part, and against the said *Joseph Carr* and wife, for the amounts stated by the said parties above named, and agreed upon between them and said *Joseph Carr* and wife, to be due upon their several mortgages and the notes thereby secured, and this defendant avers that the judgments of foreclosure, therein rendered in favor of the said *David* and *Elisha Carr*, *Robert L. Howe* and *Rebecca Carr*, were for much more in amount than was actually due upon said mortgages and the notes secured thereby, as these plaintiffs then and there well knew.

The said *George Spriesterbach*, or the said *John H. Stotsenburg*, or this defendant, were not either jointly or severally made parties in any manner to said foreclosure proceedings above recited, had no notice thereof by summons or otherwise, made no appearance thereto, gave no consent to said proceeding, and no judgment was rendered in said cause against them or either of them.

Afterwards, an order of sale was issued on said decree of foreclosure, to the sheriff of *Clark* county, against the said *Joseph Carr* and wife, and on *November 16th*, 1872, the sheriff of *Clark* county, without any notice to this defendant or the said *Stotsenburg*, his assignor, sold whatever interest the said *Joseph Carr* and wife had in said premises, to the plaintiffs herein, for the sum of *seven thousand five hundred* dollars.

On the same day, said sheriff executed and delivered to them a certificate of sale therefor, and on *November 17th*, 1873, the said sheriff executed and delivered to these plaintiffs a deed conveying to them whatever interest the said *Joseph Carr* and wife had in said premises. And the defendant says, that, although the said premises had been sold on *October 19th*, 1872, as hereinbefore recited, neither

the plaintiffs herein, nor any of said mortgage creditors or judgment creditors above named, either redeemed or offered to redeem the said premises from the sale under the judgment of the said *Spriesterbach.*

The plaintiffs herein have and claim no other title or right, legal or equitable, to said premises, than such, if any, as they have acquired in the manner above recited, by and through said sheriff's deed. All the interest and right in said premises, either legal or equitable, which this defendant has in said premises, was acquired by him through the sheriff's deed upon the sale under said *Spriesterbach's* judgment, and he never has asserted or claimed any other right or interest therein. And, by virtue of said interest, he claims and desires to exercise the right to redeem the said mortgaged premises, by paying to the plaintiffs herein, the proper amount due to them upon a just and honest accounting, either in this action, if it can be had, or within a reasonable time hereafter, and he offers to pay whatever sum may be found due, upon a proper accounting. Beyond such rights he asserts no claim whatever to said premises.

Wherefore [the defendant prays that an account may be taken of the amount due the plaintiffs, and that the defendant be allowed to redeem said mortgaged premises upon payment of whatever may be found so due, and that defendant be granted all other proper relief.

(*Signature and verification as in Form No. 5915.*)][1]

c. That Land in Controversy was Appropriated by State for Public Purposes and State Transferred Land by Deed to Defendant for Public Purposes.

Form No. 16837.[2]

(Precedent in Malone *v.* Toledo, 28 Ohio St. 645.)[3]

[(*Venue and title of court and cause as in Form No. 1336.*)][4]

1. The city of *Toledo*, for answer to the petition of plaintiff, denies that said plaintiff is the owner of, and has the legal title to, the premises in said petition described.

2. For a *second* and further defense, the said city of *Toledo* says that in the year one thousand eight hundred and *thirty-six*, the state of *Ohio*, acting through the board of canal commissioners, who were thereto duly authorized by the laws of the state in force at the time, located (the then so-called) *Wabash and Erie* canal from the state line between the states of *Ohio* and *Indiana*, to the *Maumee* bay, at or near the town of *Manhattan*, in the said county of *Lucas*, and immediately thereafter the said state of *Ohio*, acting through the board of canal commissioners aforesaid, by virtue of laws then in force, appropriated, entered upon, and occupied the land upon the line and

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

2. *Ohio.* — Bates' Anno. Stat. (1897), § 5779.

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 2, p. 196.

3. Plaintiff demurred to the second defense of the answer in this case. The demurrer was overruled.

4. The matter to be supplied within [ ] will not be found in the reported case.

between the points above named for the location of the said canal, and in the year one thousand eight hundred and *thirty-seven*, constructed thereupon the said *Wabash and Erie* canal through the whole length of said location from the said state line to *Manhattan*.

That among the lands so appropriated, entered upon, and occupied by the state of *Ohio*, was a strip of land *one hundred* feet in width, extending from *Swan* creek, within the city of *Toledo*, at the point where the said canal crossed the said creek by an aqueduct to the outlet of the said canal into *Maumee* bay or river, in the township of *Manhattan* aforesaid, which said land so occupied by the said state was well marked and defined, and was commonly known by the local designation of *Manhattan* branch of the said canal.

That the premises described in said petition are entirely within and a part of said strip of land appropriated, entered upon, and occupied as aforesaid.

That the said state of *Ohio*, after the said appropriation of the said lands and the entering upon and occupation of the same by the construction thereon of the canal, continued in the possession thereof until the possession of the same was transferred to the said city of *Toledo*, as hereinafter set forth, although in the meanwhile the name of the said canal had been by the state changed from the *Wabash and Erie* canal to that of the *Miami and Erie* canal.

This defendant further states that on the *20th* day of *February*, one thousand eight hundred and *sixty-eight*, the governor of the said state of *Ohio*, by the authority and requirement of the act of the General Assembly, passed March 26, 1864, entitled "an act to authorize the city of Toledo to enter upon and occupy the Miami and Erie canal as a public highway and for sewerage and water purposes," granted by deed duly executed to the said city of *Toledo* all the rights which by the said act he was authorized and required to convey to the said city, and the said state of *Ohio*, some time in the year one thousand eight hundred and *sixty-nine*, entirely abandoned said part of said canal described aforesaid for canal purposes.

Defendant further says that on January 31, 1871, the General Assembly of the state of Ohio passed an act entitled "an act supplementary to an act to authorize the city of Toledo to enter upon and occupy a part of the Miami and Erie canal as a public highway and for sewerage and water purposes, passed March 26, 1864," and by the authority and requirement of the said last-named act, the governor of the state of *Ohio*, by deed duly executed, on the *second* day of *March*, in the year one thousand eight hundred and *seventy-one*, granted to the said city of *Toledo* whatever interest there remained to the state of *Ohio* in the bed of that part of the *Miami and Erie* canal which had been abandoned in pursuance of the act of the General Assembly first above recited, and relinquished and transferred the same to the said city of *Toledo*.

Defendant further says that by virtue of the said acts of appropriation and occupation the said state of *Ohio* acquired title in fee-simple to the said strip of land, *one hundred* feet in width, extending from *Swan* creek, in the city of *Toledo*, where the said aqueduct crossed the same by the well-known designated boundaries of the

said canal, to its outlet into the *Maumee* bay or river, in the township of *Manhattan*, and as part of said strip of land, also to the premises described in said petition; and that, by virtue of the said acts of the General Assembly, and the grants aforesaid, made in pursuance thereof, the said title to the said strip of land, including the premises described in said petition, has been transferred to the said city of *Toledo*, and is now vested in said city, and that the said city is entitled to the full possession thereof.

[(*Signature and verification as in Form No. 5929.*)][1]

5. Decree or Judgment.[2]

1. The matter to be supplied within [ ] will not be found in the reported case.

2. Requisites of Decree or Judgment, Generally. — For the formal parts of a decree or judgment in a particular jurisdiction see the title JUDGMENTS AND DECREES, vol. 10, p. 645.

The relief granted must be such as the pleadings and the evidence in the case warrant. McDonald *v.* McCoy, 121 Cal. 55; Bryan *v.* Tormey, 84 Cal. 126; Batchelder *v.* Baker, 79 Cal. 265; Von Drachenfels *v.* Doolittle, 77 Cal. 295; Gibbons *v.* Peralta, 21 Cal. 629; Gage *v.* Reid, 104 Ill. 509; Borgner *v.* Brown, 133 Ind. 391; American Emigrant Co. *v.* Fuller, 83 Iowa 599. And the decree must conform to the prayer of the bill. Gage *v.* Curtis, 122 Ill. 520 (*citing* Hall *v.* Towne, 45 Ill. 493; Ward *v.* Enders, 29 Ill. 519).

All Interests must be Settled. — A decree or judgment must declare the rights, interests and title of the parties, and assign title to the party entitled thereto. Pennie *v.* Hildreth, 81 Cal. 127; Rogers *v.* Turpin, 105 Iowa 183; Loring *v.* Hildreth, 170 Mass. 328; Mason *v.* Black, 87 Mo. 329; Dolen *v.* Black, 48 Neb. 688; Bunz *v.* Cornelius, 19 Neb. 107; Blatchford *v.* Conover, 40 N. J. Eq. 205; Powell *v.* Mayo, 26 N. J. Eq. 120; Smith *v.* Miller, 66 Tex. 74. A general finding of title in plaintiff, however, cuts off every claim of defendant. Bisel *v.* Tucker, 121 Ind. 249; Indiana, etc., R. Co. *v.* Allen, 113 Ind. 581; Great Bend Land, etc., Co. *v.* Cole, 52 Kan. 790; Marion County *v.* Welch, 40 Kan. 767.

That defendant's claim is invalid and wholly without merit is proper. People *v.* Center, 66 Cal. 551; Windom *v.* Wolverton, 40 Minn. 439.

Cloud Caused by Instrument of Title. — Where the cloud is caused by some instrument of title, such instrument may be ordered to be surrendered or canceled. Johnston *v.* Smith, 70 Ala. 108; Lockett *v.* Hurt, 57 Ala. 198; McLennan *v.* McDonnell, 78 Cal. 273; Clayton *v.* Spencer, 2 Colo. 378; Redmond *v.* Packenham, 66 Ill. 434; DuVal *v.* Wilmer, 88 Md. 66; Polk *v.* Rose, 25 Md. 153; Nickerson *v.* Loud, 115 Mass. 94; Clouston *v.* Shearer, 99 Mass. 209; Mason *v.* Black, 87 Mo. 329; Cox *v.* Clift, 2 N. Y. 118; Hall *v.* Fisher, 9 Barb. (N Y.) 17; Kay *v.* Scates, 37 Pa. St. 31; Almony *v.* Hicks, 3 Head (Tenn.) 39; Johnson *v.* Cooper, 2 Yerg. (Tenn.) 524; Yancey *v.* Hopkins, 1 Munf. (Va.) 419. Or reformed. Grove *v.* Jennings, 46 Kan. 366; Fox *v.* Coon, 64 Miss. 465. And defendant be divested of the title to the land and that it be vested in plaintiff. Redmond *v.* Packenham, 66 Ill. 434; Grove *v.* Jennings, 46 Kan. 366; Mason *v.* Black, 87 Mo. 329. And a decree merely establishing or confirming a title, without reference to the removal of a cloud therefrom, or to quieting it in relation to such cloud, is erroneous. Harms *v.* Kransz, 167 Ill. 421.

Claimant may be enjoined from further prosecuting his claim. Johnston *v.* Smith, 70 Ala. 108; Brooks *v.* Calderwood, 34 Cal. 563; Pratt *v.* Kendig, 128 Ill. 293; Barnet *v.* Cline, 60 Ill. 205; Polk *v.* Reynolds, 31 Md. 106; Hodges *v.* Griggs, 21 Vt. 280.

Conveyance of title may be ordered. Bryan *v.* Tormey, 84 Cal. 126; Redmond *v.* Packenham, 66 Ill. 434; Reed *v.* Reber, 62 Ill. 240; Great Bend Land, etc., Co. *v.* Cole, 52 Kan. 790; McFarland *v.* Baugh, (Ky. 1891) 15 S. W. Rep. 249; Russell *v.* Deshon, 124 Mass. 342; Hodges *v.* Griggs, 21 Vt. 280. But where no trust relation or other equitable ground is shown, a decree for conveyance should not be made. Reed *v.*

Reber, 62 Ill. 240. In this case, the court said: "The court [below] erred in requiring defendant below to convey his tax title to complainants. There is nothing in the bill to show that there was any contract, trust relation, or other equitable grounds, requiring appellant to convey his title to complainants. The proper relief in such cases is, that the holder of the outstanding title, his heirs and assigns, be perpetually enjoined from its assertion."

Delivery of possession may be ordered. Bryan *v.* Tormey, 84 Cal. 126; Kitts *v.* Austin, 83 Cal. 167; People *v.* Center, 66 Cal. 551; Green *v.* Spring, 43 Ill. 280; Holden *v.* Holden, 24 Ill. App. 106; Wyland *v.* Mendel, 78 Iowa 739; Forniquet *v.* Forstall, 34 Miss. 87; Bartholomew *v.* Lutheran Congregation, 35 Ohio St. 567.

On Disclaimer. — In a statutory action to determine an adverse claim, the disclaimer of the defendant entitles the plaintiff to judgment determining that such defendant has no estate or interest in the premises to which the action relates, notwithstanding such defendant in his answer, in addition to his disclaimer, puts in issue other allegations of the complainant. So far as he is concerned, the disclaimer is the end of the controversy. Donohue *v.* Ladd, 31 Minn. 244.

Execution of Judgment. — Where the judgment declares the rights of the respective parties, the court below may at any time direct such process or make such orders as may be necessary to carry its judgment into execution. Smith *v.* Miller, 66 Tex. 74.

Precedents. — In Gibbons *v.* Peralta, 21 Cal. 629, upon a prayer in substance that the deed from Peralta to Galindo be delivered up to be canceled; that Pacheco be compelled to execute to himself and to the other purchasers from Hays a quitclaim deed to their respective parcels; that Peralta be compelled to acknowledge the deed of October 13th, 1852, or to execute a new one; and that each of the defendants be enjoined from any further attempts at alienating or incumbering any portion of the tract conveyed by the deed of Peralta to Hays, the court entered the following decree: "It is ordered, adjudged, and decreed, that the several sales and conveyances, to wit: by *Vincente Peralta* to *Francisco Galindo*, made and executed on the *seventeenth* day of *September*, 1857, are fraudulent, null, and void, as to the plaintiff and those in whose behalf he sues; and by *Francisco Galindo* to *Juan S. Pacheco*, made and executed on the *twenty-fourth* day of *September*, 1858, were and each of them are likewise fraudulent and void as to the plaintiff and those claiming under him, so far as they in any manner affect the land of plaintiff as described in his complaint. And it is further ordered, adjudged and decreed, that the said defendants, *Galindo*, *Peralta*, and *Pacheco*, be and they are hereby perpetually enjoined from disposing of, alienating, incumbering, or conveying any portion of the land of plaintiff as herein described; and that the defendants pay the costs incurred by the plaintiff herein, amounting to *one hundred and ninety-one* dollars and *seventy-five* cents." An appeal by the plaintiff from this decree, on the ground that it did not afford adequate relief, was not sustained.

In Davis *v.* Lennen, 125 Ind. 185, the order was in part as follows: "That the title of the said *Clarinda Davis* be forever quieted and set at rest as to all and each of said defendants, and that they, and each of them, be forever divested of all right, title, interest and claim in and to said real estate, and every part thereof."

In Entreken *v.* Howard, 16 Kan. 551, there is set out the following journal entry, omitting title: "And now comes the said *Joel Abbott* by his attorney *W. R. Wagstaff*, and the said *Horace B. Smith* still failing to plead, answer or demur to the said petition, and thereupon this cause came on for hearing on the petition and testimony offered in this cause; and the court having heard the evidence and arguments of counsel, and being fully advised in the premises does find that the defendant *Horace B. Smith* has been duly notified of the pendency and prayer of said petition by *six* weeks' publication in the *Miami County Advertiser*, a newspaper published at *Paola*, and of general circulation in said county of *Miami* in the state of *Kansas*, as required by law; and the court further finds that the said *Joel Abbott* has the legal title to, and is in the peaceable possession of, the premises described in said petition, to-wit, the S. E. *1-4* section *9*, township *17*, range *24* E. of sixth principal meridian in *Kansas*. It is therefore considered by the court that *Joel Abbott*,

Form No. 16838.[1]

(Precedent in Tourtelotte *v.* Pearce, 27 Neb. 60.)[2]

[(*Venue and title of court as in Form No. 11853.*)][3]

Now on this day this cause came on to be heard upon the pleadings and proof adduced by the several parties upon the issues joined between the said plaintiff and the said defendant, *Jacob Sichl*; and the court, having duly considered the same and listened to the arguments of counsel, and being well advised in the premises, doth find the issues so as aforesaid joined between the said plaintiff and the said defendant, *Jacob Sichl*, in favor of the plaintiff, and against the said defendant.

And the court finds that the said plaintiff has been in the undisturbed, peaceable, notorious, open, and [exclusive] adverse possession of the premises described in the petition, to-wit, lots numbered *one* and *two* in block numbered *thirty-one*, in *Greggsport*, an addition to *Nebraska City*, in said county of *Otoe*, for more than *ten* years last past, before the commencement of this action, claiming to own the same as against all the world, and especially as against the said defendants herein, and against the claims of the said defendant, *Jacob Sichl*, and that the plaintiff is entitled to a decree quieting his said title as prayed in his said petition herein.

It is therefore considered, adjudged, and decreed by the court in said cause, that the title and possession of the said plaintiff in and to the said premises, to-wit, lots numbered *one* and *two* in block numbered *thirty-one*, in *Greggsport*, an addition to *Nebraska City*, in said county of *Otoe*, be and the same is hereby forever settled and quieted in the plaintiff as against all claims or demands in law or in equity by the said defendant, *Jacob Sichl*, and those to claim or claiming by, through, or under him.

That the deeds from *Sarah E. Schoenheit* to *R. A. White et al.*, dated *October 24*, 1887, recorded in book of deeds No. *23* of the records of *Otoe* county, *Nebraska*, at page *188*; the deed from the said *R. A. White et al.*, to the defendant, *Jacob Sichl*, dated *November 8*, 1887, and recorded in the records of said county at page *487* of book *22* of deeds, and all other deeds in said chain of title be, and the same are hereby, canceled and removed as clouds upon the title of the said plaintiff in and to said described premises.

And it is herein further ordered and decreed that the said defend-

plaintiff, has the legal title to and possession of the premises in said plaintiff's petition described; and it is further considered and adjudged by the court, that the claim of the said *Horace B. Smith* to title in and to said described premises is null and void as against the title of the plaintiff." Two objections were made to this decree; one, that the petition was not sufficient to sustain it, and the other that the records showed no affidavit for publication. As the question arose in a collateral proceeding, the objections were not considered.

1. *Nebraska.* — Comp. Stat. (1899), §§ 4150, 4151.

See also list of statutes cited *supra*, note 1, p. 155; and, generally, *supra*, note 2, p. 203.

2. It was held that the decree in this case should have alleged that the adverse possession of the property in controversy was exclusive. This defect in the decree has been remedied in the form set out in the text.

3. The matter to be supplied within [ ] will not be found in the reported case.

ant, *Jacob Sichl*, and those claiming or to claim by, through, or under him, be, and he and they hereby are, perpetually enjoined and forbidden to claim any right, title, interest, or estate in or to said premises, by virtue of said deeds or either of them, hostile or adverse to the possession and title of the said plaintiff therein; and said defendant, *Jacob Sichl*, and those claiming under him are hereby perpetually forbidden and enjoined from commencing or bringing any suit at law or in equity to disturb the said plaintiff in his said possession and title thereto, and from setting up any claim or interest or estate therein adverse to the title of the plaintiff therein, and from disturbing the plaintiff in the quiet and peaceable enjoyment of said described premises.

And it is further considered and adjudged that the plaintiff have and recover his costs in this behalf expended, against the defendant, *Jacob Sichl*, taxed at $ ———, and execution is awarded therefor.

[(*Signature as in Form No. 11853.*)][1]

II. Proceedings to Compel Adverse Claimant to Real Property to Bring Action to Determine Claim.[2]

1. Petition.[3]

a. In General.

Form No. 16839.[4]

Commonwealth of Massachusetts. *Middlesex*, ss.

Supreme Judicial Court.

Charles E. Merrill of *Braintree*, in the County of *Norfolk.* — Petitioner to Quiet Title.

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **Statutes** relating to proceedings to compel parties setting up adverse claims to real property to bring an action to determine such claims within a time limited, or to show cause why they should not be compelled to do so, exist in the following states, to wit:

Maine.—Rev. Stat. (1883), c. 104, § 48.

Massachusetts. — Pub. Stat. (1882), c. 176, § 2; Stat. (1893), c. 340, § 1.

Missouri. — Rev. Stat. (1899), § 647.

Pennsylvania. — Laws (1893), p. 415, § 2.

3. **Requisites of Bill, Complaint or Petition, Generally.** — See *supra*, note 1, p. 156.

That plaintiff is owner of an estate of freehold or an unexpired term of not less than ten years need not be averred. An averment that plaintiff is in actual possession of the property, "claiming" either an estate of freehold or an unexpired term of not less than ten years, setting forth the estate claimed, whether of inheritance, for life, or for years, is sufficient. The statutory proceeding is not in the first instance for the purpose of settling the title, but is preliminary to an action which the adverse claimant may be compelled to bring, and the order of the court does not respect the title, but the institution of the suit. Dyer *v.* Baumeister, 87 Mo. 134.

Prayer for Relief. — The prayer should be that the defendant may be summoned to show cause why he should not bring an action to try his alleged claim.

Maine.—Rev. Stat. (1883), c. 104, § 47.

Massachusetts. — Pub. Stat. (1882), c. 176, § 1.

Missouri. — Rev. Stat. (1899), § 647.

Pennsylvania. — Laws (1893), p. 415, § 2.

4. *Massachusetts.* — Pub. Stat. (1882), c. 176, § 2; Stat. (1893), c. 340, § 1.

See also list of statutes cited *supra*, note 2, this page; and, generally, *supra*, note 3, this page.

This form is copied from the original papers in the case.

To the Honorable the Judges of the *Supreme Judicial* Court:

Respectfully represents *Charles E. Merrill* of *Braintree*, in the County of *Norfolk*, that he is the owner in fee simple absolute of a certain parcel of land with the buildings thereon situated on *Broadway*, in the City of *Cambridge*, in said County of *Middlesex*, being lots *One* and *Two* on a plan of lands in that part of said *Cambridge* called *Cambridgeport* belonging to *N. M. Jewett*, by *W. A. Mason & Company*, surveyors, dated *February 10*, 1897, and recorded with *Middlesex South District* Deeds, Book of Plans *102*, plan *10*, together bounded and described as follows:—

Beginning at a point on the Southerly side of *Broadway* distant *one hundred and twenty-seven* feet Northwesterly from the nearest corner of *Broadway* and *Sixth* Streets by a line running thence on the Southerly side of *Broadway eighty* feet, thence turning at a right angle and running Southwesterly by land of owners unknown *forty-six and one-half* feet; thence turning at a right angle and running Southeasterly by Lots *Three* and *Four* on said plan *eighty* feet; thence turning at a right angle and running Northeasterly by *Jordan Place* shown on said plan *forty-six and one-half* feet to point of beginning; containing *3720* square feet; the said premises having been conveyed to the said petitioner by *Joseph H. Barnes*, Junior, and *Louis L. G. De Rochemont*, Trustees by deed dated *April 3*, 1899, and recorded with said Deeds, Book *2726*, page *314*.

That upon the real estate records in said County of *Middlesex* he appears to be the owner as aforesaid of the premises and is in possession of the same, claiming an estate of freehold therein.

That his record title to such real estate is clouded by an adverse claim, or the possibility of such claim made or to be made, by one *Emeline D. Makepeace*, whose last known address was *New York*, in the County and State of *New York*.

That on *June 20*, 1867, by deed recorded with said Deeds, Book *1020*, page *361*, one *Leander M. Hannum* became the owner in fee simple of said Lot *Two*, being *40* feet in width upon said *Broadway*, and being the Northwesterly half of the above described premises as shown in the sketch hereto annexed and marked "*A*."

That on *June 22*, 1869, by deed recorded with said Deeds, Book *1110*, page *552*, the said *Leander M. Hannum* became the owner in fee simple of the Southeasterly half of said Lot *One*, and being *20* feet in width upon said *Broadway*, as shown in the sketch hereto annexed and marked "*B*."

That on *June 15*, 1875, by deed recorded with said Deeds, Book *1392*, page *51*, the said *Emeline D. Makepeace* became the owner in fee simple of the Northwesterly half of said Lot *One*, being *20* feet in width upon said *Broadway*, and being situated between the two parcels conveyed to the said *Leander M. Hannum* as aforesaid, as shown on the sketch hereto annexed and marked "*C*."

That the record title of said last described parcel is still held by the said *Emeline D. Makepeace*.

That your petitioner is informed and believes that the said *Emeline D. Makepeace* has never taken possession of nor exercised any owner-

ship or control over the said parcel of land since the said date of *June 15*, 1875.

That your petitioner is informed and believes that the said *Leander M. Hannum* on or about the said *June 15*, 1875, took possession of the said parcel of land deeded to the said *Emeline D. Makepeace* as aforesaid without the consent of the said *Emeline D. Makepeace*, and that he and his assigns have exercised ownership and control over the same and have continued in possession thereof since said date to the present time.

That your petitioner holds the said premises by mesne conveyances from the said *Leander M. Hannum*.

Wherefore your petitioner prays: —

(1) That the said *Emeline D. Makepeace*, adverse claimant, may be summoned to show cause why she should not bring an action to try such claim, or in default in bringing such suit that she be forever debarred therefrom.

(2) And for such other and further relief as to this Court may seem meet.

Charles E. Merrill,
by *Robert F. Herrick*, Attorney.

b. Inserted in Writ.[1]

Form No. 16840.[2]

Commonwealth of *Massachusetts*.

Essex, ss.

To the sheriff of any county in the said commonwealth, or his deputy, Greeting:

We command you to summon the inhabitants of the town of *Ipswich*, in said county of *Essex*, if they be found in your precinct, to appear before our justices of our *Supreme Judicial* Court, holden at *Salem*, within and for our said county of *Essex*, on the *first Monday* of *October*, A. D. 1888, then and there, in our said court to answer unto the proprietors of *Jeffries Neck Pasture*, a corporation duly established by law and having its place of business at *Ipswich*, in said county, petitioner, on a petition to quiet title.

And the petitioner avers that it is the owner in fee of a certain tract of land situate in *Ipswich*, in said county of *Essex*, and is in possession thereof, taking the rents and profits of the same. Said tract of land is bounded and described as follows, to wit: (*describing it*).

The premises contain *thirty* or *forty* acres, more or less, and are known as *Eagle Hill*; and the petitioner says it is credibly informed

1. **Petition Inserted in Writ.** — If the petitioner prefers, the petition may be inserted like a declaration in a writ and served by copy like a writ of original summons. Me. Rev. Stat. (1883), c. 104, § 48; Mass. Pub. Stat. (1882), c. 176, § 2.

2. *Massachusetts*. — Pub. Stat. (1882), c. 176.

See also statutes cited *supra*, note 1, this page; and, generally, *supra*, note 3, p. 206.

This form is copied from the original papers in Jeffries Neck Pasture *v.* Ipswich, 153 Mass. 42. The prayer of the petition was granted, and the respondents ordered to bring an action to try their title.

and believes that the defendants make some claim adverse to the petitioner's estate therein.

Wherefore your petitioner prays that the defendants may be ordered to bring action and try their title to the premises above described, if any they claim therein, or be forever debarred and estopped from having or claiming any right or title adverse to your petitioner in the premises hereinbefore described, and for costs, to the damage of the said corporation, as it says, the sum of *five thousand* dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings thereon.

Witness, *Marcus Morton*, Esquire, at *Salem*, the *twenty-third* day of *August* in the year of our Lord one thousand eight hundred and *eighty-eight*. *Dean Peabody*, Clerk.

c. Against Nonresident.[1]

Form No. 16841.[2]

(Precedent in Higgins *v.* Beckwith, 102 Mo. 458.)[3]

[(*Title of court and cause as in Form No. 5921.*)][4]

Now comes the above-named plaintiff, *Alfred J. Higgins*, and says that he is the owner in fee of the following described real estate lying and being in *Sullivan* county, *Missouri*, to wit: *Thirty* acres off of the north side of the northeast quarter of the northwest quarter, and the west half of the northwest quarter of section number *1*, in township number *63*, of range number *22*, and he is in the possession of the same; and he further avers that he is credibly informed and believes that the defendant, *Warren Beckwith*, makes some claim to said real estate adverse to the estate of your petitioner, the plaintiff herein. He further avers that said defendant, *Warren Beckwith*, is a non-resident of the state. Plaintiff, therefore, prays the court for an order that he, the said defendant, *Warren Beckwith*, may be summoned to show cause why he should not bring an action to try the alleged title to said real estate, if any he has or claims.

A. J. Higgins, plaintiff.

By *A. C. Eubanks*, Attorney.

(*Verification.*)[5]

2. Order.[6]

a. To Show Cause Why Defendant should Not be Compelled to Commence Action to Quiet Title.[7]

1. **Against Nonresident.** — Where person proceeded against is a nonresident, the fact of nonresidence shall be alleged in the petition or in an affidavit filed in the court. Mo. Rev. Stat. (1899), § 647.

2. *Missouri.* — Rev. Stat. (1899), § 647. See also list of statutes cited *supra*, note 2, p. 206; and, generally, *supra*, note 3, p. 206.

3. No objection was made to the petition in this case.

4. The matter to be supplied within [ ] will not be found in the reported case.

5. **For a form of verification** in a particular jurisdiction see the title VERIFICATIONS.

6. **For the formal parts** of an order in a particular jurisdiction see the title ORDERS, vol 13, p. 356.

7. **Order to Show Cause.** — In several states, the statutory proceeding relating to the quieting of title is not in the first

Form No. 16842.[1]

(Precedent in Higgins *v.* Beckwith, 102 Mo. 459.)[2]

[(*Venue and title of court as in Form No. 10703.*)][3]

Alfred J. Higgins, plaintiff,
vs.
Warren Beckwith, defendant.

Now on this *twenty-fifth* day of *May*, 1*885*, the above entitled cause being called for hearing and the matters and facts alleged in the petition, filed by the plaintiff in this cause, being duly considered, and after hearing the testimony in said cause, it is ordered and adjudged by the court that the prayer of plaintiff's petition be granted, and it is further ordered and adjudged by the court that the defendant, *W. Beckwith*, be notified and summoned to be and appear before the *circuit* court of *Sullivan* county, *Missouri*, to be begun and held at the courthouse in the city of *Milan* in said county, on the *sixteenth* day of *November*, 1*885*, and on or before the *third* day of said term, if the term shall so long continue; if not, then before the end of the term, show cause, if any he has, why he should not be compelled to commence an action against the plaintiffs or their legal representatives to try the alleged title, if any he has, to the following described real estate, to-wit: *Thirty* acres off of the north side of the northeast quarter of the northwest quarter, and the west half of the northwest quarter of section *one* (*1*), in township *sixty-three* (*63*), of range *twenty-two* (*22*), it being the same land as that mentioned in the petition filed herein; and if the said defendant, *Warren Beckwith*, makes default, to be forever barred from having or claiming any right to said real estate above described.

[(*Signature and date as in Form No. 10179.*)][3]

b. For Notice by Publication to Show Cause Why Prayer of Petition should Not be Granted.[4]

Form No. 16843.[5]

Commonwealth of Massachusetts. — *Norfolk*, ss. — *Supreme Judicial* Court. — On the foregoing petition it is ordered, that the petitioner give notice to *Deborah Ellis*, in said petition named, or her heirs and representatives, and to all other persons interested, to appear before the Justices of our said *Supreme Judicial* Court to be holden at *Dedham*, within and for said County of *Norfolk*, on the *first Monday* of *April*, A. D. 1*900*, by causing each of said persons who is within this

instance for the purpose of quieting the title, but is preliminary to an action which the adverse claimant may be compelled to bring. The order of the court does not respect the title, but the institution of the suit. Dyer *v.* Baumeister, 87 Mo. 134.

And see list of statutes cited *supra*, note 2, p. 206.

1. *Missouri.* — Rev. Stat. (1899), § 647.

See, generally, *supra*, note 7, p. 209.

2. No objection was made to the order in this case.

3. The matter to be supplied within [ ] will not be found in the reported case.

4. **For forms relating to publication** see generally the title PUBLICATION, p. 1.

5. *Massachusetts.* — Stat. (1893), c. 340, § 2.

See also list of statutes cited *supra*, note 2, p. 206.

This form is copied from the original papers in the case.

Commonwealth to be served with an attested copy of said petition and of this order thereon *fourteen* days at least before the *first Monday* of *April*, A. D. 1900:

And also by causing a like attested copy of said petition and order to be sent through the mail as soon as may be by a registered letter addressed to each of said persons who is not within this Commonwealth:

And also by causing a like attested copy of said petition and order to be published *once* in each month for *six* successive months in the "*Boston Daily Advertiser*," a newspaper printed in *Boston* in our County of *Suffolk*, the last publication to be *thirty* days at least before the *first Monday* of *April*, A. D. 1900:

That the said *Deborah Ellis* or her heirs and representatives, and all other persons interested, may then and there show cause why the prayer of said petition should not be granted.

Louis A. Cook, Clerk.

September 11, 1899.

3. Decree or Judgment.[1]

Form No. 16844.[2]

(Precedent in Webster *v.* Tuttle, 83 Me. 272.)[3]

[(*Venue and title of court and cause as in Form No. 12121.*)][4]

This cause came on for hearing and it appearing that the court has full jurisdiction, and that the defendant appeared and has disobeyed the order of court to bring an action and try his title to the real estate described in plaintiff's petition, and the court having maturely considered the matter: It is ordered and decreed, that the said *John Tuttle* shall be, and hereby is, forever debarred and estopped from having or claiming any right or title adverse to the petitioner in the premises described in her petition.

[(*Signature as in Form No. 12121.*)][4]

Form No. 16845.[5]

(Precedent in Higgins *v.* Beckwith, 102 Mo 461.)[6]

[*Alfred J. Higgins*, plaintiff, against *Warren Beckwith*, defendant.][7]

Now on this day this cause coming on for final trial, and the plain-

1. **For the formal parts** of a judgment or decree in a particular jurisdiction see the title JUDGMENTS AND DECREES, vol. 10, p. 645.

2. *Maine.* — Rev. Stat. (1883), c. 104, § 48, provides that where claimants disobey the order of the court to bring an action to try their title, the court shall enter a decree that they be forever barred and estopped from having or claiming any right or title adverse to the petitioner in the premises described.

See also list of statutes cited *supra*, note 2, p. 206.

3. Upon exceptions taken to the decree in this case, it was held valid.

4. The matter to be supplied within [ ] will not be found in the reported case.

5. *Missouri.* — Rev. Stat. (1899), § 647.

See also list of statutes cited *supra*, note 2, p. 206.

6. No objection was made to the judgment in this case, except that it was rendered without jurisdiction over the person of the defendant.

7. The matter enclosed by [ ] will not be found in the reported case.

tiff being present in court and answering ready for trial, and it appearing to the satisfaction of the court that on the *twenty-fifth* day of *May*, 1*885*, plaintiff filed in this cause his petition in which he alleges that he is the owner and in the actual possession of the following described tract of land in said county, to wit: *Thirty* acres off of the north side of the northeast quarter of the northwest quarter, and the west half of the northwest quarter of section number *1*, in township *63*, of range number *22*, and averring that he is credibly informed and believes that the defendant makes some claim to said land adverse to the plaintiff, and praying that he be summoned to show cause why he should not bring an action to try his alleged title, if any; and afterwards, to-wit, on said *twenty-fifth* day of *May*, 1*885*, said court made an order of record requiring notice to be given defendant to bring an action to try his alleged title; and whereas said notice was duly issued on the *second* day of *October*, 1*885*, and has been duly served on the defendant; and whereas it further appears from the records of this court that on the *twenty-second* day of *May*, 1*886*, at the *May* term of said *circuit* court, said cause was continued by agreement; and the defendant failing and refusing to answer or plead, or to comply with the order of this court, ordering him to bring an action to try his title: It is ordered, adjudged and decreed by the court that defendant be and he is hereby forever debarred and estopped from having or claiming any right or title to the land and premises herein described adverse to the petitioner and those claiming by or through him, and that plaintiff recover of and against said defendant his costs herein laid out and expended.

QUI TAM ACTION.

See the title PENALTIES, FORFEITURES, FINES AND AMERCEMENT, vol. 13, p. 747.

QUO WARRANTO.

By Harold N. Eldridge.

CROSS-REFERENCES.

For Forms in Quo Warranto Proceedings to Oust an Officer for Bribery, see the title BRIBERY, vol. 4, p. 1.

For other Forms in Quo Warranto Proceedings Against Corporations for Abuse, Misuse and Nonuse of Franchise, see the title CORPORATIONS, vol. 5, p. 523.

For Form of Information in Quo Warranto Proceedings to Oust City from Unlawful Assumption of Power to Impose License Tax, see the title INTOXICATING LIQUORS, vol. 10, *Form No. 11781.*

For Forms in Quo Warranto Proceedings Against Corporations for Entering Into Combinations to Monopolize Business, see the title MONOPOLIES, vol. 12, p. 381.

See also the GENERAL INDEX to this work.

I. APPLICATION FOR LEAVE TO FILE INFORMATION.[1]

1. At common law, the ancient mode of proceeding for usurpations of public offices or franchises was by a writ of quo warranto, and this old writ s the foundation of the more modern proceeding by information in the nature of quo warranto. During the reign of Queen Anne, a statute was passed upon the subject of informations, in the nature of quo warranto, in cases of usurpations of, or intrusions into public offices or franchises, and the statute forms the basis of the remedy in England and in the United States at the present day in cases of this character, except where the proceedings have been established, modified or changed by statute. Territory *v.* Virginia Road Co., 2 Mont. 96.

Statutes relating to quo warranto, information in nature of quo warranto and substituted actions exist as follows:

Alabama. — Civ. Code (1896), § 3417 *et seq.*

Arizona. — Rev. Stat. (1901), § 3794 *et seq.*

Arkansas. — Sand. & H. Dig. (1894), § 7364 *et seq.*

California. — Code Civ. Proc. (1897), § 802 *et seq.*

Colorado. — Mills' Anno. Code (1896), § 289 *et seq.*

Connecticut. — Gen. Stat. (1888), §§ 1046, 1300 *et seq.*

Florida. — Rev. Stat. (1892), § 1781 *et seq.*

Georgia. — 2 Code (1895), § 4878 *et seq.*

Idaho. — Rev. Stat. (1887), § 4612 *et seq.*

Illinois. — Starr & C. Anno. Stat. (1896), c. 112.

Indiana. — Horner's Stat. (1896), § 1131 *et seq.*

Iowa. — Code (1897), § 4313 *et seq.*

Kansas. — Gen. Stat. (1897), c. 96, § 97 *et seq.*

Kentucky.—Bullitt's Civ. Code (1895), § 480 *et seq.*

Maine. — Rev. Stat. (1883), c. 77, § 5.

Maryland. — Pub. Gen. Laws (1888), art. 69, §§ 4, 5, 8.

Massachusetts. — Pub. Stat. (1882), c. 186, § 17.

Michigan. — Comp. Laws (1897), § 9939 *et seq.*

Minnesota. — Stat. (1894), § 5961 *et seq.*

Mississippi. — Anno. Code (1892), § 3520 *et seq.*

Missouri. — Rev. Stat. (1899), § 4457 *et seq.*

Montana. — Code Civ. Proc. (1895), § 1410 *et seq.*

Nebraska. — Comp. Stat. (1899), §§ 4007, 6292 *et seq.*

Nevada. — Comp. Laws (1900), §§ 3415 *et seq.*, 3783 *et seq.*

New Hampshire. — Pub. Stat. and Sess. L. (1901), c. 204, § 4.

New Jersey. — Gen. Stat. (1895), p. 2632, § 1 *et seq.*

New Mexico. — Comp. Laws (1897), § 2685, subs. 95, 175.

New York. — Code Civ. Proc. (1897), §§ 1797 *et seq.*, 1948 *et seq.*, 1983 *et seq.*

North Carolina. — Code Civ. Proc. (1900), § 603 *et seq.*

North Dakota. — Rev. Codes (1895), § 5741 *et seq.*

Ohio. — Bates' Anno. Stat. (1897), § 6760 *et seq.*

Oklahoma. — Stat. (1893), § 4559 *et seq.*

Oregon. — Hill's Anno. Laws (1892), § 354 *et seq.*

Pennsylvania. — Bright. Pur. Dig. (1894), p. 1773, § 1 *et seq.*

Rhode Island. — Gen. Laws (1896), c. 222, § 4, c. 263.

South Carolina. — Code Civ. Proc. (1893), § 424 *et seq.*

South Dakota. — Dak. Comp. Laws (1887), § 5345 *et seq.*

Tennessee. — Code (1896), § 5165 *et seq.*

Texas. — Rev. Stat. (1895), art. 4343 *et seq.*

Utah. — Rev. Stat. (1898), § 3609 *et seq.*

Vermont. — Stat. (1894), §§ 993, 1617 *et seq.*

Virginia. — Code (1887), § 3022 *et seq.*

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 5780 *et seq.*

West Virginia. — Code (1899), c. 109, § 6 *et seq.*, c. 123, § 3.

Wisconsin. — Stat. (1898), § 3463 *et seq.*

Wyoming. — Rev. Stat. (1887), § 3092 *et seq.*

United States. — Rev. Stat. (1878), § 563, par. 14, § 629, par. 14, § 1786.

Effect of Statutes — *Generally.* — A few of the statutes have expressly abolished writs of quo warranto and informations in the nature of quo warranto as known at common law, and have provided a remedy in place thereof, which is a civil action. Kan. Gen. Stat. (1897), c. 96, § 97; N. Y. Code Civ. Proc., § 1983; People *v.* Hall, 80 N. Y. 117; People *v.* Clute, 52 N. Y. 576; People *v.* Cook, 8 N. Y. 67; People *v.* Conover, (Supreme Ct.) 6 Abb. Pr. (N. Y.) 220; Thurston *v.* King, (Supreme Ct. Spec. T.) 1 Abb. Pr. (N. Y.) 126; N. Car. Code Civ. Proc. (1900), § 603; Davis *v.* Moss, 81 N. Car. 303; Saunders *v.* Gatling, 81 N. Car. 298; Okla. Stat. (1897), § 4559; Hill's Anno. Laws Oregon (1892), § 354; S. Car. Code Civ. Proc. (1893), § 424; Alexander *v.* McKenzie, 2 S. Car. 81; Ames *v.* Kansas, 111 U. S. 449. Most of the statutes, however, do not expressly abolish the common-law proceeding by writ or information, although it has been held that the statutory remedy "was manifestly intended to be, and is, a complete one, covering the whole subject, taking the place of the common-law remedy." State *v.* Elliott, 117 Ala. 172.

In *California*, proceedings by quo warranto were abolished in 1872, and the substitute was a civil action by the attorney general in the name of the people against any person usurping, intruding into, or unlawfully holding or exercising, any office or franchise. In 1879, when the present constitution of the state went into effect, the superior court was authorized to issue writs of quo warranto, and in 1880 the code of civil procedure was amended to conform in this respect to the constitution. It has been held that whether or not the effect of the constitution and amendment reviving the writ of quo warranto is to repeal by implication the statute of 1872, providing for an action against persons who usurp offices or franchises, makes little difference, as the power under a writ of quo warranto is quite as broad as under the statute. People *v.* Dashaway Assoc., 84 Cal. 114.

In *Colorado*, the statute relating to the usurpation of office or franchise has no application to original proceedings in the supreme court by information in the nature of quo warranto which take place under the constitution and the common-law rule of pleading prevails. People *v.* Reid, 11 Colo. 138. But that the statute has replaced the old statutory remedy by information in the district courts see People *v.* Reid, 11 Colo. 138; Central, etc., Road Co. *v.* People, 5 Colo. 39; Atchison, etc., R. Co. *v.* People, 5 Colo. 60; Hexter *v.* Clifford, 5 Colo. 168.

In *Texas*, the remedy and mode of procedure prescribed by statute is cumulative. Rev. Stat. (1895), art. 4348.

In *Virginia*, it has been held that the writ of quo warranto has not been abolished by the statute. Bland and Giles County Judge Case, 33 Gratt. (Va.) 443.

Equitable Proceeding. — In *Rhode Island*, by statute, the title to any office, to determine which the writ of quo warranto lies at common law, may be brought in question by a petition in equity. Gen. Laws (1896), c. 263, § 1.

In *Tennessee*, it is held that quo warranto proceedings are unknown. State *v.* Turk, Mart. & Y. (Tenn.) 287; State *v.* White's Creek Turnpike Co., 3 Tenn.

Ch. 163; State *v.* McConnell, 3 Lea (Tenn.) 332; Boring *v.* Griffith, 1 Heisk. (Tenn.) 456; Atty.-Gen. *v.* Leaf, 9 Humph. (Tenn.) 753; Hyde *v.* Trewhitt, 7 Coldw. (Tenn.) 59. And the code has provided for a suit by a bill in equity to attain the purposes of a common-law writ or information. Tenn. Code (1896), § 5165 *et seq.*; Hyde *v.* Trewhitt, 7 Coldw. (Tenn.) 59; State *v.* McConnell, 3 Lea (Tenn.) 332.

Only Form of Proceeding Changed. — It is only the form of the proceeding which has been done away with by the statute. The jurisdiction and power of the courts are not touched by the statutes, even if they could be. People *v.* Thacher, 55 N. Y. 525; People *v.* Hall, 80 N. Y. 117; Territory *v.* Hauxhurst, 3 Dak. 205; People *v.* Clayton, 4 Utah 421. And the statutory system preserves substantially the principles of the common-law remedy. State *v.* Elliott, 117 Ala. 172.

Quo Warranto a Civil Proceeding. — The ancient writ of quo warranto was a civil proceeding. State *v.* Real Estate Bank, 5 Ark. 595; State *v.* Ashley, 1 Ark. 279; State *v.* Anderson, 26 Fla. 240; Vanatta *v.* Delaware, etc., R. Co., 38 N. J. L. 282; State *v.* West Wisconsin R. Co., 34 Wis. 197; Ames *v.* Kansas, 111 U. S. 449. And so is an information in the nature of a quo warranto, which has superseded the old writ. Rex *v.* Francis, 2 T. R. 484; People *v.* Dashaway Assoc., 84 Cal. 114; Atchison, etc., R. Co. *v.* People, 5 Colo. 60; Buckman *v.* State, 34 Fla. 48; State *v.* Gleason, 12 Fla. 190; State *v.* Anderson, 26 Fla. 240; People *v.* Bruennemer, 168 Ill. 482; Distilling, etc., Co. *v.* People, 156 Ill. 448; People *v.* Boyd, 132 Ill. 60; People *v.* Shaw, 13 Ill. 582; Jones *v.* State, 112 Ind. 193; State Bank *v.* State, 1 Blackf. (Ind.) 267; Reed *v.* Cumberland, etc., Canal Corp., 65 Me. 53; Lindsey *v.* Atty.-Gen., 33 Miss. 508; Commercial Bank *v.* State, 4 Smed. & M. (Miss.) 439; State *v.* Equitable Loan, etc., Assoc., 142 Mo. 325; State *v.* Lupton, 64 Mo. 415; State *v.* Vail, 53 Mo. 97; State *v.* Stewart, 32 Mo. 379; State *v.* Lingo, 26 Mo. 496; State *v.* Alt, 26 Mo. App. 673; Osgood *v.* Jones, 60 N. H. 543; State *v.* Roe, 26 N. J. L. 215; State *v.* Hardie, 1 Ired. L. (23 N. Car.) 42; State *v.* McDaniel, 22 Ohio St. 354; Com. *v.* Burrell, 7 Pa. St. 34; Com. *v.* Philadelphia County, 1 S. & R. (Pa.) 382; Respublica *v.* Wray, 3 Dall. (Pa.) 490; State *v.* Kearn, 17 R. I. 391; Cleary *v.* Deliesseline, 1 McCord L. (S. Car.) 35; State *v.* De Gress, 53 Tex. 387; State *v.* Smith, 48 Vt. 266; Com. *v.* Birchett, 2 Va. Cas. 51; Gunton *v.* Ingle, 4 Cranch (C. C.) 438; Foster *v.* Kansas, 112 U. S. 201. Having long before the revolution lost its character of a criminal proceeding in everything except form. Ames *v.* Kansas, 111 U. S. 449; State *v.* Moores, 56 Neb. 1. *Contra*, that the proceeding is in the nature of a criminal prosecution, Capital City Water Co. *v.* State, 105 Ala. 406; State *v.* Real Estate Bank, 5 Ark. 595; State *v.* Campbell, 120 Mo. 396; Vanatta *v.* Delaware, etc., R. Co., 38 N. J. L. 282; State *v.* Roe, 26 N. J. L. 215; People *v.* Cook, 8 N. Y. 67.

Proceeding Not an Action Under the Statute. — It has been held in several states that a quo warranto proceeding is not an action in the sense used in the statute and is not controlled by provisions regulating practice in ordinary suits. Capital City Water Co. *v.* State, 105 Ala. 406; State *v.* Kennedy, 69 Conn. 220; Territory *v.* Virginia Road Co., 2 Mont. 96; Vanatta *v.* Delaware, etc., R. Co., 38 N. J. L. 282; State *v.* Roe, 26 N. J. L. 215; People *v.* Jones, 18 Wend. (N. Y.) 601. But is governed by the common-law rules of pleading. State *v.* Kennedy, 69 Conn. 220; State *v.* Dahl, 69 Minn. 108; State *v.* Tracy, 48 Minn. 497; State *v.* Sharp, 27 Minn. 38; Territory *v.* Virginia Road Co., 2 Mont. 96; State *v.* Taylor, 25 Ohio St. 279; State *v.* Sullivan, 8 Ohio Cir. Dec. 346; State *v.* Walnut Hills, etc., Road Co., 7 Ohio Cir. Dec. 453.

Application for Leave to File Information. — At common law, leave of court was necessary before the information could be filed. Harris *v.* Pounds, 66 Ga. 123; State *v.* Utter, 14 N. J. L. 84; Houston *v.* Neuse River Navigation Co., 8 Jones L. (53 N. Car.) 476; Com. *v.* Arrison, 15 S. & R. (Pa.) 127; State *v.* Schnierle, 5 Rich. L. (S. Car.) 299; State *v.* Smith, 48 Vt. 14; U. S. *v.* Lockwood, 1 Pin. (Wis.) 359. And this is so by statute in several states.

New York. — Code Civ. Proc., § 1799.

North Carolina. — Code Civ. Proc. (1900), § 606.

Ohio. — Bates' Anno. Stat. (1897), § 6769.

South Carolina. — Code Civ. Proc. (1893), § 427.

South Dakota. — Dak. Comp. Laws (1887), § 5347.

1. Motion.[1]

Form No. 16846 [2]

(Precedent in State *v.* Gleason, 12 Fla. 192.)[3]

Ex parte State of *Florida*, *ex rel. Almon R. Meek*, Attorney-General of the state of *Florida*.

And now the said Attorney-General moves the court for leave to file an information[4] in the nature of a quo warranto, against *William H. Gleason*, exercising the functions, franchise and powers of the office of *Lieutenant-Governor* of the said state, and for due process according to the prayer of said information.

Almon R. Meek, Attorney-General.

Utah. — Rev. Stat. (1898), § 3617.

Virginia. — Code (1887), § 3025.

West Virginia. — Code (1899), c. 109, § 9.

Information must Accompany Application. — In some states, it is provided by statute that the prosecuting attorney shall at the time of his application present to the court the information which he purposes to file. Va. Code (1887), § 3025; W. Va. Code (1899), c. 109, § 9.

1. Motion. — At common law, the application was by motion. State *v.* Burnett, 2 Ala. 140; State *v.* McDiarmid, 26 Ark. 480; People *v.* Thornton, 186 Ill. 162; People *v.* The Golden Rule, 114 Ill. 34; People *v.* Waite, 70 Ill. 25; People *v.* Mobley, 2 Ill. 215; People *v.* Paisley, 81 Ill. App. 52; Com. *v.* Smead, 11 Mass. 74; Territory *v.* Ashenfelter, 4 N. Mex. 85; People *v.* Tibbets, 4 Cow. (N. Y.) 358; State *v.* Buchanan, Wright (Ohio) 233; Com. *v.* Douglass, 1 Binn. (Pa.) 77; State *v.* Smith, 48 Vt. 14; Com. *v.* James River Co., 2 Va. Cas. 190.

Requisites of Motion, Generally. — For the formal parts of a motion in a particular jurisdiction see the title MOTIONS, vol. 12, p. 938.

In Name of Attorney General. — An application for a rule to show cause why an information in the nature of a quo warranto to oust one holding a public office should not be exhibited must be in the name of the attorney general. State *v.* Schnierle, 5 Rich. L. (S. Car.) 299.

But this is now determined largely by statute, for which see statutes cited *supra*, note 1, p. 217.

Motion should request the court to grant leave to file information and direct process to issue. People *v.* Paisley, 81 Ill. App. 52. Or ask for an order upon the adverse party to show cause at some subsequent stated term of the court why an information praying for a writ should not be filed, and for an order as to the manner of making up the evidence to be used in said showing of cause. State *v.* Smith, 48 Vt. 14.

Precedents. — In People *v.* Mobley, 2 Ill. 215, the attorney for the people of the state moved the court for a rule to be made on Mordecai Mobley to show cause, if any he could, why the said attorney should not have leave to file an information in the nature of a quo warranto in the court in behalf of said people, on the relation of Charles Matheny, against said Mobley, for having illegally usurped, intruded into and unlawfully executed and for still unlawfully executing and holding the office of clerk of the Sangamon Circuit Court.

In Territory *v.* Ashenfelter, 4 N. Mex. 85, the attorney general appeared in open court and moved for a rule upon Singleton M. Ashenfelter, predicated on the affidavit of relator, Edward C. Wade, to show cause, if any he had, why said attorney general should not have leave to file an information in the nature of a quo warranto in the court on behalf of the territory of New Mexico, on relation of said Wade, and against said Ashenfelter, for having illegally ursurped and intruded into the office of district attorney of the third judicial district of said territory.

2. *Florida.* — Rev. Stat. (1892), § 1781.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, this page.

3. No objection was made to the form of the motion in this case.

4. The information is set out *infra*, Form No. 16880.

2. Petition.[1]

1. Petition. — In several states, it is provided by statute that application for leave to file an information shall be by petition. Ariz. Rev. Stat. (1901), § 3794; 2 Ga. Code (1895), § 4878; Crovatt *v.* Mason, 101 Ga. 246; Harris *v.* Pounds, 66 Ga. 123; Starr & C. Anno. Stat. Ill. (1896), c. 112, par. 1; People *v.* Thornton, 186 Ill. 162; People *v.* McFall, 124 Ill. 642; People *v.* Callaghan, 83 Ill. 128; People *v.* Moore, 73 Ill. 132; People *v.* Paisley, 81 Ill. App. 52; Mass. Pub. Stat. (1882), c. 186, § 17; Tex. Rev. Stat. (1895), art. 4343.

Requisites of Petition, Generally. — For the formal parts of a petition in a particular jurisdiction see the title PETITIONS, vol. 13, p. 887.

Petition must contain a statement of facts sufficient to authorize the court, or a judge, to frame an order granting leave, so that the defendant therein, by answering, pleading or demurring thereto, may tender the court for determination such issues of law or fact as are usual in actions at law that are prosecuted in courts of record. People *v.* Paisley, 81 Ill. App. 52. The facts involved are usually title to the office, or some interest therein, alleged to be in petitioner, and the usurpation and holding illegally of such office by respondent. Harris *v.* Pounds, 66 Ga. 123.

Relator's Claim to Office Bona Fide Made. — When an application for leave to file an information in the nature of a writ of quo warranto to inquire into the right of a person exercising the duties of a public office is based on the claim of the relator to the office, it must be shown that such claim is bona fide made, and if the facts are set forth upon which the relator bases his claim so that the question presented be one of law, the court will, in the exercise of its judgment, pass upon the legal effect of the claim as made and grant or refuse the leave to file the information. Crovatt *v.* Mason, 101 Ga. 246.

Relator must Show Prima Facie Better Title. — Relator, in his application for leave to file an information to contest his claim to office, must show affirmatively upon his application that he has at least prima facie the better title. Crovatt *v.* Mason, 101 Ga. 246 (*citing* Collins *v.* Huff, 63 Ga. 207). And where his title to the office depends upon an election, he cannot assail that election as wholly invalid, because he thereby destroys his own title. Collins *v.* Huff, 63 Ga. 207.

Probable Ground for Allowing Information. — In *Illinois*, the petition should show that there is "probable ground" for allowing the information to be filed. People *v.* Callaghan, 83 Ill. 128; Starr & C. Anno. Stat. Ill. (1896), c. 112, par. 1.

Embraced with Information in One Paper. — In East Dallas *v.* State, 73 Tex. 370, the petition for leave to file an information and the information itself were embraced in one paper. The paper was signed by the county attorney on behalf of the state, was sworn to by the relator and contained a prayer that it be filed as an information, that the respondents be cited and that upon the hearing the state have judgment ousting them from the franchises attempted to be exercised by them over the disputed territory. It was held that while the statute seemed to contemplate a separate petition and a separate information, the policy of the Texas laws was to look to the substance and not to the form of pleadings, and to uphold them when they contained allegations sufficient in substance to maintain the action or the defense, as the case might be, without reference to the form in which they were presented. The paper was ordered to be filed.

Attaching Documentary Papers. — In Harris *v.* Pounds, 66 Ga. 123, it was held that while it may be more desirable to attach copies of documentary papers relied on as evidence, as exhibits, to a petition for leave to file an information, yet this being a common-law suit, there is no rule under the Georgia practice that makes it indispensable to the hearing as in equity.

Verification. — Petition should be verified by affidavit. Harris *v.* Pounds, 66 Ga. 123. And see list of statutes cited *supra*, note 1, p. 217. And as to the facts on which the prosecutor rests his right or title to the office, the verification should be positive, but on the question of usurpation on the part of the respondent, it is sufficient that the facts be verified on information and belief. Harris *v.* Pounds, 66 Ga. 123.

Another Precedent. — In Harris *v.* Pounds, 66 Ga. 123, the following peti-

Form No. 16847.[1]

Georgia — *Hall* County.

To the Honorable *John B. Estes*, Judge of the *Superior* Court of said County:

The petition of *Elijah S. Wiley*, *Aaron R. Pass* and *Warner G. Henderson*, citizens and residents of said county and state, respectfully shows unto your Honor,

That on the *14th* day of *March*, 1879, the Court *of Ordinary* of said county, sitting for county purposes, passed an order establishing as a public road of said county, a road commencing at the *Stringer's Ford* road, near the old *Harmony Grove Church* place, near the graveyard; thence along the *Jordan Whelchel* road about *one-fourth* of a mile; thence to the right along the brow of the hill to a certain new bridge across the *Chattahoochee* river, in the *570th* District G. M. of said county.

And that on the day and year aforesaid, the said Court *of Ordinary*, sitting for county purposes as aforesaid, passed another order, establishing as one of the public roads of the said county; said road commencing at the said new bridge on the said *Chattahoochee* river, in the farming lands of *Jordan* and *Davis Whelchel*, and running by the residence of *James Blackstock*, along and near the old *Water's Ferry*

tion, with amendment, for leave to file an information in the nature of a quo warranto, is set out in substance:

That some time prior to the thirty-first day of December, 1838, Nesbit and Hendrick deeded to Fuller *et al.*, trustees of Fountain M. E. Church Camp-ground, at Fountain, Warren county, two hundred acres of land, for the use of said camp-ground and church, which deed has been lost or destroyed. That on the thirty-first day of December, 1838, the legislature incorporated said camp-ground for thirty years, and invested the trustees and grantees with usual powers. That the charter expired the thirty-first day of December, 1868. That afterward, in April, 1877, when all of the original trustees were dead or had removed from the state, defendants, without legal warrant or authority from the M. E. Church, and without having been appointed by said church or its constituted authorities, petitioned the superior court of Warren county to incorporate said camp-ground, and to appoint them trustees thereof, which was done by the presiding judge. That defendants continued unlawfully to hold said trusteeship until removed by the Quarterly Conference sitting at Barnett, on the thirty-first day of August, 1878, when and where, and by said conference, plaintiffs were appointed trustees of said camp-ground. That said appointment has been regularly recorded in the clerk's office of Warren superior court. Plaintiffs allege, if the appointment of defendants was legal, they have now been removed by the conference under authority of law. That defendants threaten to proceed against plaintiffs as trespassers should they enter on said camp-ground, etc. They pray, therefore, for leave to file the information requiring the defendants to show by what authority of right or law they hold the above mentioned office of trustees, etc., and that they be removed. By an amendment to their petition, plaintiffs set out that the M. E. Church, at a regular Quarterly Conference, elected the grantees in the deed from Hendrick and Nesbit, trustees to manage the property, etc. That said deed, a copy of which was attached, stipulated that the land was conveyed in trust for the use of said church, and trustees were to be subject to the control and direction of said church, and that all vacancies were to be filled by the M. E. Church. This petition, with amendment, was held sufficient in law.

1. *Georgia.* — 2 Code (1895), § 4878 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 221.

This petition is copied from the original papers in the case and was held sufficient on demurrer.

road and intersecting the *Gainesville* and *Clark's Bridge* road near the *two*-mile post on said *Clark's Bridge* road. Copies of which said orders are hereto attached marked Exhibits "*A*" and "*B*," and reference thereto is prayed.

And your petitioners show, that in pursuance of said *two* orders, so passed as aforesaid, the Commissioners of Roads in and for the *411th* District G. M. and the *570th* District G. M., of said county, did on the ——— day of *March*, 1879, put a number of the road hands of said districts to cut, lay out and work said roads, so described in said orders, for the use and benefit and travel of the public; and said road, so laid out and worked as aforesaid, makes what is now known as the *New Bridge* road in said county. And that on the ——— day of *March*, 1879, immediately after the said *New Bridge* road was so established, laid out and worked, as aforesaid, the public accepted the same as a public road of said county, by working, using and traveling the same, and have continued so to do up to the present time.

And your petitioners further show, that your petitioners and other citizens of said county and state, did on the ——— day of ———, 187–, by private subscription, erect and build a bridge on said *New Bridge* road across the *Chattahoochee* river on said road for the free use, benefit and travel of the public. And that said bridge, so erected as aforesaid, was accepted and used as such by the public, as such free bridge, by having the free and uninterrupted use of the same; and that the said public did freely pass upon and over the same, from the ——— day of *March*, 1879, till the ——— day of *July*, 1879.

And your petitioners further show that on the said ——— day of *July*, 1879, *Davis Whelchel*, *Robert E. Green* and *Alexander S. Whelchel*, of said county, without lawful warranty or authority of law, did erect on, upon, within and across said free bridge, so erected as aforesaid, a gate, and placed a lock thereon, whereby to lock up and fasten said gate and bridge, and thereby to prevent the public and your petitioners, from having the free and uninterrupted use and enjoyment of said bridge for the purposes for which the same has been erected, and from passing over the same; and have kept said bridge and gate so locked and shut up from said ——— day of *July*, 1879, up to the present time.

And your petitioners further allege, that the said *Davis Whelchel*, *Robert E. Green* and *Alexander S. Whelchel*, without having any charter under the laws of said state, and without being a body corporate and politic, and without having the rights and privileges conferred by law upon the owners and proprietors of chartered bridges, under the laws of said state, during all the time aforesaid, to-wit: from the ——— day of *July*, 1879, till the filing of this petition, claim and insist that the said *Davis Whelchel*, *Robert E. Green* and *Alexander S. Whelchel*, are entitled to the rights, privileges and franchises of public bridges chartered under the laws of the state of *Georgia*, and that the said *Davis Whelchel*, *Robert E. Green* and *Alexander S. Whelchel*, have, during all the time aforesaid, to-wit: from said ——— day of *July*, 1879, up to the time of the filing of this petition, without lawful

warrant or authority of law, usurped to themselves the rights, privileges and franchises conferred upon the owners and proprietors of public bridges chartered under the laws of said state — and by some pretended right, during the time aforesaid, by charging the public and your petitioners toll, or pay for the privilege of crossing or passing over and upon said bridge, and by said pretended right, they, the said *Davis Whelchel*, *Robert E. Green* and *Alexander S. Whelchel*, have had, taken, demanded and received, large sums of money, to-wit: the sum of ——— dollars from the public and from divers citizens of said county, and from your petitioners, for the privilege of crossing said bridge, and the said *Davis Whelchel*, *Robert E. Green* and *Alexander S. Whelchel*, have taken entire charge and control of said bridge during all the time aforesaid, and are now exercising said pretended right, authority and franchise, by charging, collecting and receiving toll and pay for crossing said bridge, from the public and divers citizens of said county and from your petitioners.

And your petitioners further show and allege, that all of the aforesaid acts of the said *Davis Whelchel*, *Robert E. Green* and *Alexander S. Whelchel* are unlawful and without authority of law, and that all said actings and doings, of the said *Davis Whelchel*, *Robert E. Green* and *Alexander S. Whelchel* in the premises are usurpations and contrary to law and without authority of law and in violation of the rights, privileges and liberties of the public, the citizens of said county and your petitioners.

Wherefore, your petitioners pray that your Honor grant unto them leave to file an information in the name of the state in the nature of a quo warranto, calling upon said *Davis Whelchel*, *Robert E. Green* and *Alexander S. Whelchel* to show by what law, warrant or authority, that they and each of them, claim to exercise the rights, privileges and franchises conferred by law upon the owners and persons who keep public bridges, chartered under the laws of said state, and why said gate, so erected as aforesaid, should not be removed and why the said *Davis Whelchel*, *Robert E. Green* and *Alexander S. Whelchel*, and each of them, should not be required to desist from exacting, demanding, having, collecting or receiving, any pay or toll from your petitioners, or from any other person or persons, for the right or privilege of passing said *Chattahoochee* river, at, upon and across said bridge as afore described, and also why judgment of Ouster should not be entered against them for the usurpations aforesaid.

M. L. Smith, *G. H. Prior*, *W. S. Pickrell*,
Petitioners' Attorneys.

II. AFFIDAVIT IN SUPPORT OF MOTION OR PETITION TO FILE INFORMATION.[1]

1. **Necessity for Affidavit.** — Motion or petition for leave to file an information should be supported by affidavit. Lynch *v.* Martin, 6 Houst. (Del.) 487; People *v.* Thornton, 186 Ill. 162; People *v.* Waite, 70 Ill. 25; State *v.* Paisley, 81 Ill. App. 52; Vrooman *v.* Michie, 69 Mich. 42; People *v.* Tibbets, 4 Cow. (N. Y.) 358, note; Com. *v.* Douglass, 1 Binn. (Pa.) 77; Com. *v.* James River Co., 2 Va. Cas. 190; U. S. *v.* Lockwood, 1 Pin. (Wis.) 359.

And see list of statutes cited *supra*, note 1, p. 217.

1. Against Private Person, for Usurping and Unlawfully Holding Office.[1]

Requisites of Affidavit, Generally.— For the formal parts of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

Entitling. — Affidavit need not be entitled in any cause. Haight *v.* Turner, 2 Johns. (N. Y.) 371.

Must be Full and Positive. — The affidavits made in support of an application for an information in the nature of a writ of quo warranto must be complete and sufficient in every respect, and contain positive allegations and a precise statement of the facts on which the prosecutor assails the title of the respondent to the office or the franchise in question. Lynch *v.* Martin, 6 Houst. (Del.) 487 (*citing* Rex *v.* Sargent, 5 T. R. 466.) In Vrooman *v.* Michie, 69 Mich. 42, the court said: "It has been held by the King's Bench that the chief object in requiring leave to file an information is to prevent vexatious prosecution, and the rule is inflexible that there must be affidavits so full and positive from persons knowing the facts as to make out a clear case of right in in such a way that perjury may be brought if any material allegation is at fault."

Case must be fairly stated, and where the application and affidavits unfairly state a case against the defendant in such manner that he is unable to answer it, although his title be good and he could make perfect answer to the case if fairly stated, the court will discharge the rule. Lynch *v.* Martin, 6 Houst. (Del.) 487 (*citing* Rex *v.* Jefferson, 5 B. & Ad. 855, 27 E C. L. 214.)

Suppressing Material Facts. — Where the affidavit suppresses some material fact, the court will discharge the rule. Lynch *v.* Martin, 6 Houst. (Del.) 487 (*citing* Rex *v.* Hughes, 7 B. & C. 708, 14 E. C. L. 111).

Must Show Title in Relator. — Relators, on application against intruders into offices or franchises claimed by the relators, must show a title in themselves. Miller *v.* English, 21 N. J. L. 317.

Defendant Elected Contrary to the Provision of Particular Charter. — Where the application for the information was upon the ground that defendant was elected to a borough office contrary to the provisions of the charter of such borough, the affidavit must state that the charter was accepted or that the usage has been in conformity to it. Rex *v.* Barzey, 4 M. & S. 253.

Names of Illegal Voters. — On a motion for a rule to show cause why an information should not be filed against a sheriff for usurping office on the ground that illegal votes were cast for him in a certain election district, the affidavit should set forth the names of the persons so voting if known, and if their names be unknown such fact should be stated. Lynch *v.* Martin, 6 Houst. (Del.) 487.

Information and Belief. — Where the allegations of the affidavit are made on information and belief merely, the court will discharge the rule. Lynch *v.* Martin, 6 Houst. (Del.) 487 (*citing* Rex *v.* Newling, 3 T. R. 310). An affidavit that the deponent "understands and believes," or "has heard and believes," or "has been informed and believes," when it has reference to statements alleging the usurpation of the office merely, has been considered sufficient under certain circumstances, as where the usurpation was not denied by the respondent, who made no answer to the application; but the rule is otherwise when the allegations go to the validity of the title of the respondent to the office in question. Lynch *v.* Martin, 6 Houst. (Del.) 487.

1. Another Precedent. — In Com. *v.* Douglass, 1 Binn. (Pa.) 77, the affidavit, omitting formal parts, was as follows:

"*Ebenezer Ferguson* of the district of *Southwark* in the county of *Philadelphia*, being duly sworn, doth depose and say, that this deponent, being a justice of the peace in and for the county of *Philadelphia*, on *Saturday* the *5th* day of *November last*, (1803) in company with several of the aldermen of the city of *Philadelphia*, and justices of the peace of the said county, waited upon *Matthew Lawler*, Esq., mayor of the said city, to be informed of the time and place at which the election of the inspectors of the prison of the city and county of *Philadelphia* would be held, that they might participate in said election. That upon making the inquiry of the said mayor, he declined to give the information desired. That on *Monday* the *7th* day of the said month of *November*, the deponent, in

Form No. 16848.[1]

(Precedent in People *v.* Mobley, 2 Ill. 215.)[2]

State of *Illinois*, *Sangamon* County, sct.

Charles R. Matheny, states on oath, that heretofore, and long prior to the *fourth* day of *May*, 1835, he was legally and properly appointed clerk of the *Circuit* Court of *Sangamon* county, by the *Circuit* Court thereof, and was duly sworn, entered into the necessary and proper official bonds required by law to be taken, and was legally possessed and exercised the powers of said office, receiving the emoluments and enjoying the immunities and privileges appertaining to said office, from the time of his said appointment and induction therein until the *4th* day of *May*, 1835; that from and after his said investment of said office, he never abandoned or forfeited the same, nor was he ever removed or displaced from said office by the judgment of any court, nor has the said *Circuit* Court, since his said investment of the office aforesaid, as he is advised, (and believes to be true,) been abolished. He further states, that on the *4th* day of *May*, 1835, a certain *Mordecai Mobley*, illegally claiming the said office as clerk, under color of a void and illegal appointment as clerk of said *Circuit* Court, (as he is advised and believes,) made after the *13th* of *February*, 1835, unlawfully usurped, intruded into, and unlawfully held and executed said office of clerk of said *Circuit* Court, and from and since the *4th* day of *May*, 1835, hath, and still unlawfully held and executed said office of clerk aforesaid, and from and since the *4th* day of *May*, 1835, hath, and still doth unlawfully receive, take, and enjoy the emoluments, rights and privileges of the office aforesaid, and from and since the *4th* day of *May*, 1835, the said *Mobley* illegally hath and still doth refuse to allow the said *Matheny* to hold and execute the said office, or to receive the emoluments, or to enjoy the rights, privileges and emoluments thereof; and that he is desirous that a rule may be made upon the facts stated herein, on motion of the attorney for the People of the state of *Illinois*, in the *First* Judicial Circuit, upon the said *Mobley*, to show cause why leave should not be given to file an information in behalf of the People of the state of *Illinois*, in the nature of a quo warranto, upon the relation of the said *Matheny* against said *Mobley*, for usurping, intruding, and unlawfully holding and executing said office as aforesaid. *C. R. Matheny.*

Sworn to and subscribed this *11th* day of *July*, A. D. 1835, before me, *Thomas Moffett*, Jus. Peace.

company with a great number of the said aldermen and justices, to wit, (*six* aldermen and *eight* justices) waited upon the said mayor at his office, a few minutes after *nine* o'clock in the *morning*, it being the day appointed by law for holding the said election of inspectors of the prison, and inquired of the said mayor to be informed of the time and place of holding the said election, as this deponent together with the said aldermen and justices wishes to participate in the choice of the said inspectors. The said mayor replied that the appointment of inspectors was already made."

1. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 112, par. 1.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 224.

2. Leave was granted to file an

Form No. 16849.

(Precedent in Territory *v.* Ashenfelter, 4 N. Mex. 86.)[1]

Territory of *New Mexico*, County of *Sierra*.

Edward C. Wade, of lawful age, being duly sworn, upon his oath states that heretofore, to-wit, in the month of *March*, A. D. 1884, he was, by the governor of the territory of *New Mexico*, in due form of law, nominated for the office of district attorney for the *Third* judicial district of said territory; that such nomination was transmitted and submitted to the legislative council of said territory, and by said council confirmed, advised and consented to, and that thereafter, on the *eleventh* day of *March*, A. D. 1884, the said governor, by and with the advice and consent of said legislative council, then in session at the capitol of said territory, said advice and consent being given upon said nomination as aforesaid, appointed and commissioned him as such district attorney of said *Third* judicial district in due form of law; that he thereupon and thereafter took the oath of office, and entered upon his duties as such district attorney, and was legally possessed of and performed the duties of said office, and exercised the powers and received the emoluments thereof, from the time of his said appointment to and induction into said office, as aforesaid, until the *ninth* day of *November*, A. D. 1885; that from and after his induction into said office, as aforesaid, he never resigned, abandoned, or forfeited the same, nor was he ever removed or displaced from said office by the judgment of any court, nor has the said office, since his appointment thereto, been abolished, or its tenure in anywise changed or altered, nor has his term expired; that, by virtue of his said appointment, he was (as he is advised and believes) legally entitled to hold said office, perform the duties and receive the emoluments thereof, for the full term of *two* years, and thereafter until his successor to said office shall be lawfully appointed and qualified. He further states that on the *ninth* day of *November*, A. D. 1885, one *Singleton M. Ashenfelter*, illegally claiming said office under color of an unauthorized, illegal, and void appointment, (as affiant is advised and believes,) made long after the date of affiant's appointment, by the governor of the territory of *New Mexico*, without the advice and consent of the legislative council of said territory, and at a time when said council was not in session, usurped, intruded into, and unlawfully (as affiant is advised and believes) held said office of district attorney for the said *Third* judicial district of the territory of *New Mexico*, and still does unlawfully (as affiant is advised and believes) hold said office, perform and execute the powers and duties thereof, and claim the emoluments of the same; and that since the said *ninth* day of *November*, A. D. 1885, the said *Singleton M. Ashenfelter* unlawfully (as affiant is advised and believes) excluded, and still excludes, this affiant from said office, and has refused, and still

information in this case. The information is set out *infra*, Form No. 16871.

1. Leave to file information was granted in this case, in accordance with the desire of the affiant expressed in the affidavit.

See, generally, *supra*, note 1, p. 224.

The process in this case is set out *infra*, Form No. 16913.

refuses, to allow this affiant to hold and execute the said office or to receive the emoluments thereof. Affiant further says that he is desirous that the title of this affiant and of said *Ashenfelter* to said office, and the right to exercise its functions, and receive its emoluments, should be judicially inquired into and determined, and that to that end a rule may be made upon the facts herein stated, upon motion of the attorney general of the territory of *New Mexico*, for said territory, upon the said *Singleton M. Ashenfelter* to show cause, if any he hath, why leave should not be given to file an information in the nature of a quo warranto in behalf of said territory, upon the relation of this affiant, the said *Edward C. Wade*, against the said *Singleton M. Ashenfelter* for usurping, intruding into, and unlawfully holding and exercising said office as aforesaid.

Edward C. Wade.

Subscribed and sworn to before me this *tenth* day of *November*, A. D. 1*885*.

George R. Bowman, Clerk.

Form No. 16850.

(Precedent in Com. *v.* Douglass, 1 Binn. (Pa.) 77.)[1]

[Commonwealth of *Pennsylvania*, *City and* County of *Philadelphia*. } ss.][2]

John Clement Stocker, of the city of *Philadelphia*, Esq., being duly sworn, doth depose and say, that being one of the aldermen of the said city, on the *5th* day of *November last*, (1*803*) he called on *Matthew Lawler*, Esq., mayor of the said city, and inquired of him at what time and place the election of inspectors of the prison of the *city and* county of *Philadelphia* would be held, the appointment of the time and place of holding the said election being vested in the mayor, and this deponent believing that as alderman of the said city, he had a legal right to participate in the said election. To the inquiry made as aforesaid by this deponent, the said mayor replied, "The law points out the time." This deponent said, "I believe it is on *Monday next*." The mayor replied "Yes." The deponent inquired of the said mayor "at what place do you hold the election?" To which the mayor answered, that he had not made up his mind. This deponent further inquired "At what hour do you intend to open the election?" To which the mayor again replied, "I have not as yet made up my mind as to the time, but I shall summon as many as the law directs." This deponent then addressed the mayor and said: "You will have no objection to let me know the time and place of the said election, if I shall call on you on *Monday* morning." The mayor replied, "I shall summon as many as the law directs, but I shall not let you know." This deponent observed that he hoped they had the same thing in view, the choice of good men. The mayor said he hoped so, but that he would not let this deponent know when it was to take place. The deponent replied that he

1. It was held in this case that good and legal grounds were shown to file the information prayed for by the relators. See also, *supra*, note 1, p. 224.

2. The matter enclosed by [·] will not be found in the reported case.

thought it was hard to be debarred of his right to know the time and place of the election and to participate in it. The mayor again replied, "that I might think as I pleased, but that he should summon whom he pleased, and would not let me know when or where." That *John Douglass*, Esq. was present during the conversation.

[(*Signature and jurat as in Form No. 864.*)][1]

2. Against Corporation.

Form No. 16851.[2]

(Precedent in People *v.* The Golden Rule, 114 Ill. 35.)[3]

[(*Venue as in Form No. 16848.*)][1]

Charles P. Swigert, being duly sworn, upon oath deposes and says that he is Auditor of Public Accounts of the state of *Illinois*, and has been for *one* year last past; that as he is informed and believes, *O. S. Barnum* and others filed in the office of the Secretary of State of the state of *Illinois*, on the *21st* day of *February*, 1884, a certficate signed and acknowledged, and proposing to organize a body corporate, not for pecuniary profit, under an act concerning corporations, in force *July 1*, 1872, and that on said *February 21*, 1884, said Secretary of State issued his certificate, under his hand and the great seal of State, declaring the said corporation duly organized under the name "*The Golden Rule.*" *O. S. Barnum*, *J. H. Wallace*, *T. S. Stamps*, *John Troutman* and *W. B. Young* were elected as directors to manage and control the business of its corporate existence, and they accepted said office and entered upon the performance of its duties. Affiant is informed, and understands from information furnished him by the officers of said association, that the real and actual business of said corporation, as carried on by and under the direction of said directors since its organization, is, and has been, to solicit and receive applications for membership in said corporation, and to grant to such persons as were and are accepted as members, a certificate, which, together with the rules and regulations of said corporation, bound it, upon the death of a member, to serve notice of such death upon the surviving members thereof, and to make collections of money, or receive contributions from the surviving members, and to pay out *seventy-five* per cent. of the money so received, not exceeding $*1500*, to a person named therefor in the deceased member's application, and *twenty-five* per cent. thereof to the *two* persons who hold or held valid existing certificates of membership in said corporation, number next above and below the number of the certificate held by the deceased member.

As further and more fully illustrating the manner of doing business, and the kind of business done by said corporation, affiant attaches hereto, and refers to, a blank form of application for member-

1. The matter to be supplied within [] will not be found in the reported case.

2. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 112, § 1 *et seq.*
See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 224.

3. In this case it was held that probable cause was shown for allowing the information to be filed.

ship, and marked "Exhibit *A*." Also blank form of certificate, marked "Exhibit *B*." Also book of constitution and by-laws of said corporation, marked "Exhibit *C*." All of which papers and exhibits were received by me from the officers of said corporation, as illustrative of the business done by it.

Charles P. Swigert.

[(*Jurat as in Form No. 16848.*)][1]

III. COUNTER-AFFIDAVIT IN OPPOSITION TO MOTION OR PETITION.[2]

Form No. 16852.

(Precedent in People *v.* North Chicago R. Co., 88 Ill. 540.)[3]

[(*Title of court and cause as in Form No. 10823.*)
State of *Illinois*, } ss.][1]
Cook County. }

Valentine C. Turner, being duly sworn, says: That he is the president of the *North Chicago City Railway Company*, mentioned in the petition herein; that on the *23rd* day of *May*, 1859, the common council of the city of *Chicago* passed an ordinance granting permission to said company to construct and operate, by animal power, railways on several streets in the North Division of the city, and, among others, on *North Clark* street, from *North Water* street, near the business center, for a distance of about *two and one-half* miles to the city limits, which was accepted by said company, and immediately said line of railway was constructed on *North Clark* street, and operated by said company.

And the deponent further says, that after constructing the line on *North Clark* street to the city limits, said company, desiring to extend its *Clark* street line beyond the city limits and in the township of *Lake View*, for a distance of about *one-half* mile, the supervisor of the town of *Lake View*, being a town under the township organization law, on the *2d* day of *March*, 1861, gave his assent and consent, in writing, for said company to lay down, maintain and operate its railway in, over and along *Green Bay* road, in said township of *Lake View*, from the city limits northwards, to a point *forty* rods north of the north line of the S. W. *1-4 28*, *40* N., *14* E., provided said railway should be laid by the *1st* day of *September*, 1861.

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **Counter-affidavit.** — It is competent for the respondent to meet by counter-affidavit the case made by the relator. Lynch *v.* Martin, 6 Houst. (Del.) 487; People *v.* Thornton, 186 Ill. 162; People *v.* North Chicago R. Co., 88 Ill. 537; People *v.* Waite, 70 Ill. 25; Vrooman *v.* Michie, 69 Mich. 42. And where the affidavit on the part of the relator is clearly and satisfactorily answered by that on the part of the respondent, the rule should be discharged. Lynch *v.* Martin, 6 Houst. (Del.) 487 (*citing* Rex *v.* Rolfe, 4 B. & Ad. 840, 24 E. C. L. 174; Rex *v.* Orde, 8 Ad. & El. 420, 35 E. C. L. 418, note; Reg. *v.* Quayle, 11 Ad. & El. 508, 39 E. C. L. 153; Rex *v.* Sargent, 5 T. R. 466).

For the formal parts of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

3. It was held in this case that leave to file an information was properly refused.

And the deponent further says, that by virtue of the authority contained in its act of incorporation, and such consent of the supervisor, said company did lay down its railway in *Green Bay* road, from the city limits to the point named in such consent, before the *1st* day of *September*, 1861, which formed an extension of their *Clark* street line, and from the time of its construction the said railway in *Green Bay* road, down to the present time, has been operated by said company as a part of its line, from the business center of the city of *Chicago* on *North Clark* street, charging the same fare from the northern end to any part of the city, precisely the same as if the entire line lay within the city limits.

And the deponent further says, that on the *2d* day of *October*, 1863, the supervisor of the said town of *Lake View* gave a like consent, in writing, for said company to lay down, maintain and operate their railway in, upon and along a public highway, called in the petition herein the *Evanston* road, to *Albert* street, and thence on *Albert* street to the *Green Bay* road, provided said railway should be laid by the *1st* day of *June*, 1864; and the deponent says, that the point designated in such last consent as the place of commencement, was the then terminus of their *Clark* street line, as previously constructed, and the distance of the line described in the last consent was about *two* miles.

And the deponent further says, that said company, by virtue of its charter and such consent, did lay down and construct such railway, mentioned in last consent, before the *1st* day of *June*, 1864, and from about the time it was completed to the present time it has been operated by said company with cars propelled by a steam dummy, and such line is an extension of the lines previously constructed in *Clark* street, in the city of *Chicago*, and in *Green Bay* road, in *Lake View*.

And the deponent further says, that the inhabitants of *Lake View*, generally, are engaged in business in the city of *Chicago*, and almost all passengers who travel the tracks laid in the *Green Bay* road, the *Evanston* road and *Albert* street, also in the same trip, pass on and over the *Clark* street track within the city of *Chicago*, and the business transacted in *Lake View* by said company feeds and supports the lines operated in the city.

And the deponent further says, that there is no public conveyance of any kind for the transportation of passengers in the town of *Lake View*, and by which they can travel to and from points in the city of *Chicago*, save the cars of said company, and there is no public conveyance by which passengers can reach *Graceland Cemetery*, the northern terminus of the line, and several other cemeteries in said town, save by the cars of said company.

And the deponent further says, that such tracks in *Lake View* were laid at the earnest solicitation of inhabitants of that town, of the owners of property abutting upon the roads and streets occupied, and no objection has ever been made to the operation of such tracks as a railway, so far as the officers of the company know, except as made by the petition herein, and deponent believes that it is the almost universal desire of the inhabitants of *Lake View*, and those who travel on the railway, that it should be operated by steam.

And the deponent further says, that the said petitioner, *Judson M. W. Jones*, purchased the property owned by him about *four* years ago, several years after said streets were occupied by the railway company, from persons who had acquiesced in the use of the streets and roads by the railway company, and with full knowledge of the claim of right to use them for such purposes.

And the deponent further says, upon information and belief, that this proceeding is to accomplish some private and personal end, the precise character of which is unknown to him, and is contrary to the public interest.

Valentine C. Turner.

Subscribed and sworn to before me, this *8th* day of *September* A. D. 1875.

Austin J. Doyle, Clerk.

IV. ORDER OR RULE TO SHOW CAUSE WHY INFORMATION SHOULD NOT BE FILED.[1]

Form No. 16853.

(Precedent in State *v.* Hancock, 2 Penn. (Del.) 256.)[2]

[(*Title of court and cause as in Form No. 9371.*)][3]

October Term, A. D. 1899. To wit, *October 24*, A. D. 1899, upon motion of *Henry Ridgely, Jr.*, Esquire, to the *Superior* Court of the state of *Delaware* in and for *Kent* county, a rule is granted on you (*naming the defendants*) to appear and be before the judges of our

1. **Necessity of Rule** — *At Common Law.* — On application for leave to file an information, the practice at common law was to afford the defendant an opportunity of being heard against granting such leave. A rule to show cause was therefore generally entered. State *v.* McDiarmid. 26 Ark. 480; Lynch *v.* Martin, 6 Houst. (Del.) 487; Harris *v.* Pounds, 66 Ga. 123; People *v.* Thornton, 186 Ill. 162; People *v.* McFall, 124 Ill 642; People *v.* The Golden Rule, 114 Ill. 34; People *v.* Moore, 73 Ill. 132; People *v.* Waite, 70 Ill. 25; State *v.* Gummersall, 24 N. J. L. 529; Miller *v.* English, 21 N. J. L. 317; People *v.* Tibbetts, 4 Cow. (N. Y.) 358, note; People *v.* Richardson, 4 Cow. (N. Y.) 97, note; State *v.* Buchanan, Wright (Ohio) 233; Com. *v.* McCarter, 98 Pa. St. 607; Com. *v.* Arrison, 15 S. & R. (Pa.) 127; Com. *v.* Jones, 12 Pa. St. 365; Com. *v.* Sprenger, 5 Binn. (Pa.) 353; Com *v.* Douglass, 1 Binn. (Pa.) 77; State *v.* Smith, 48 Vt. 14; U. S. *v.* Lockwood, 1 Pin. (Wis.) 359.

Under Statute. — In several states, where leave of court is necessary, the court or judge may, in its or his discretion, direct notice to be given to the defendant previous to granting leave, and may hear the defendant in opposition to the application. N. Y. Code Civ. Proc., § 1799; N. Car. Code Civ. Proc. (1900), § 606; Bates' Anno. Stat. Ohio (1897), § 6769; S. Car. Code Civ. Proc. (1893), § 427; Dak. (S. Dak.) Comp. Laws (1887), § 5347; Utah Rev. Stat. (1896), § 3617. And in *Illinois*, under the statute, the court may or may not dispense with the rule, as in its opinion the exigencies of the case demand. People *v.* Thornton, 186 Ill. 162; People *v.* McFall, 124 Ill. 642; People *v.* Moore, 73 Ill. 132.

Rule to Inspect Books. — Upon a rule to show cause, the court will grant a rule for the inspection of books belonging to the corporation. Bull. N. P. 210.

For the formal parts of an order or rule in a particular jurisdiction consult the title ORDERS, vol. 13, p. 356.

2. The rule in this case was discharged on the ground that the venue was laid in the wrong county.

See, generally, note 1, this page.

3. The matter to be supplied within [ ] will not be found in the reported case.

said *Superior* Court of the state of *Delaware* in and for *Kent* county, at *Dover*, on *Friday*, the *27th* day of *October*, A. D. 1899, at *ten* o'clock *A.* M., to show cause, if any you have, why leave should not be granted to *Robert C. White*, Attorney-General of the state of *Delaware*, to file an information against you (*naming the defendants*) in the following words and figures, to wit: (*Here was set out the information.*)

Form No. 16854.[1]

(Precedent in People *v.* Mobley, 2 Ill. 217.)[2]

[(*Title of court as in Form No. 11800.*)][3]

The People, on the relation of *Charles R. Matheny* v. *Mordecai Mobley.* } Motion.

This day, *Stephen A. Douglas*, Attorney for the People of the state of *Illinois*, in and for the *First* Judicial Circuit, and on motion grounded upon an affidavit of *Charles R. Matheny*, filed on the last day of the last special term of this court, and now here produced.

It is ordered that a rule be made on *Mordecai Mobley*, now acting as clerk of this court, returnable to the *fourth* day of the present term, to show cause, if any he can, why the said attorney for the People of the said state should not have leave from this court to file an information, in the nature of a quo warranto, against the said *Mobley* (upon the relation of *Charles R. Matheny*) for having usurped, intruded into, and illegally holding and executing the office of clerk of the *Circuit* Court of *Sangamon* county, and that a copy of this rule be served upon said *Mobley* by the sheriff, and returnable to the *fourth* day of the present term.

Form No. 16855.[4]

New Jersey Supreme Court.

State of New Jersey, on the relation of *John Doe*, against *Richard Roe.* } On Quo Warranto.

Upon reading and filing the affidavit of *John Doe*, the relator in the above entitled cause, and sufficient cause appearing therefor, it is, on motion in behalf of said attorney general,

Ordered, that *Richard Roe*, the above named defendant, show cause before the *Supreme* Court of the state of *New Jersey*, on the *first Tuesday* of *June next*, at the state-house in the city of *Trenton*, at *eleven* o'clock in the *fore*noon of said day, or as soon thereafter as counsel can be heard, why a writ of quo warranto should not issue in the above entitled cause, directed to the said defendant, *Richard Roe*, to show by what warrant or authority he claims to have, use and enjoy

1. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 112, par. 1.
See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 232.

2. The rule in this case was made absolute.

3. The matter to be supplied within [ ] will not be found in the reported case.

4. *New Jersey.* — Gen. Stat. (1895), p. 2632, § 1.
See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 232.

the office, liberties and franchise of (*stating office which it is claimed defendant has usurped*), returnable at a short day to be fixed by this court, why leave should not be granted to the said *John Doe* to file an information in the matter of said quo warranto, and why the said defendant, *Richard Roe*, should not appear and demur or plead thereto at a short day to be fixed by this court, and why such further order should not be made as will expedite the hearing and determination of this cause.

And it is further ordered that the above said parties have leave to take depositions before the *Supreme* Court commissioner on *four* days' notice of the time and place of taking the same, to be used on the argument thereof.

On motion of *Andrew Jackson*, Attorney General.

Dated the *fifteenth* day of *May*, 1898.

Let the above rule be entered in the minutes.

John Marshall, Justice *Supreme* Court.

V. NOTICE OF TAKING DEPOSITION FOR USE ON HEARING OF RULE.[1]

Form No. 16856.[2]

(*Title of court and cause as in Form No. 16855.*)

To *Richard Roe*, Esq.,

Take notice, that pursuant to the annexed rule entered in the above entitled cause, depositions to be used on the hearing thereon before the *Supreme* Court will be taken by the above named relator, *John Doe*, on behalf of the attorney general, before *James Black*, Esq., *Supreme* Court commissioner for the state of *New Jersey*, at his office, No. *1 Montgomery* street, in the city of *Jersey City*, on the *twenty-fourth* day of *May*, 1898, commencing at *ten* o'clock in the *fore*noon of said day, and continuing until the testimony on the part of said relator is completed, when and where you may attend and cross-examine the witnesses produced, if you shall see fit so to do.

(*Date and signature of attorney as in Form No. 7234.*)

VI. PROOF OF SERVICE OF RULE AND NOTICE.

Form No. 16857.[3]

State of *New Jersey*, } ss.
County of *Hudson*. }

Samuel Short, of full age, being duly sworn according to law, on his oath says, that on the *tenth* day of *June*, 1898, at the city of *Trenton*, in said county of *Mercer*, he personally served upon *Richard Roe*, the defendant named in the within proceeding, a copy of the within rule to show cause, duly certified by the clerk of the *Supreme*

1. **For the formal parts** of a notice in a particular jurisdiction see the title NOTICES, vol. 13, p. 212.

2. *New Jersey*. — Gen. Stat. (1895), p. 2632, § 1.
See also list of statutes cited *supra*, note 1, p. 217.

3. *New Jersey*. — Gen. Stat. (1895), p. 2632, § 1.
See also list of statutes cited *supra*, note 1, p. 217.
The rule is set out *supra*, Form No. 16855.

Court of the state of *New Jersey*, together with a copy of the within notice of taking depositions, by delivering to and leaving with the said *Richard Roe* said copies; that the person so served was personally known to this affiant to be the same individual described in said rule and notice as *Richard Roe*; that this affiant, at the time he delivered said copies to the said *Richard Roe*, then and there read the within rule and notice to said *Richard Roe*.

(*Signature and jurat as in Form No. 858.*)

VII. ORDER OR RULE GRANTING LEAVE TO FILE INFORMATION.[1]

1. Leave to File. — If, on rule to show cause why information should not be filed, the case shown by the application for leave to file is not such as puts the matter beyond dispute, the rule will be made absolute for the information in order that the question concerning the right may be properly determined. Harris *v.* Pounds, 66 Ga. 123; U. S. *v.* Lockwood, 1 Pin. (Wis.) 359; Bull. N. P. 210

For the formal parts of an order or rule in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

Precedents. — In People *v.* Mobley, 2 Ill. 215, the order making the rule in that case absolute was as follows: "And afterward, to wit, on the *16th* day of *July*, 18*35*, the said *Mobley* being in court, by his attorney, says, that he has no reason to urge why the State's attorney shall not have leave to file the information as prayed for by him. Whereupon it is ordered, that the rule heretofore entered in this matter be made absolute, and that leave be given to file the information aforesaid."

In People *v.* Tibbets, 4 Cow (N. Y.) 384, the court ordered the following rule for leave to file:

"Rule. — That the Attorney-General have leave to file an information or informations, in the nature of a quo warranto, under the act entitled 'an act to prevent fraudulent bankruptcies by incorporated companies, to facilitate proceedings against them, and for other purposes,' passed April 21st, 1825, against *Elisha Tibbets*, etc., to try by what warrant, or authority, the said last named persons, or any of them, claim to hold and exercise the office of directors of the *Franklin Fire Insurance Company*. And it is further ordered, that, within *20* days after filing such information and notice thereof to the defendants, the appearance of the defendants be entered in the book of common rules; and that the defendants plead to the said information or informations within the same time; and further, that all subsequent pleadings, if any, on the part of the defendants, shall be served within *ten* days after service upon them of the pleading to be answered; and if the defendants shall neglect to plead, or answer, within the times above limited, their default or defaults may be entered; and thereupon, judgment of ouster shall be given against them, or such of them as make default upon motion to be made to this court, unless such defaults are set aside."

In State *v.* Marlow, 15 Ohio St. 114, the order granting leave to file information was as follows:

"The State of *Ohio*, on the relation of *T. E. Grisell*, against *William Marlow*.	*District* court of *Wyandot* county. Motion for leave to file an information in the nature of a quo warranto.

It appearing to me that the prosecuting attorney of said *Wyandot* county is interested in the above cause, and that an information, in the nature of a quo warranto, ought to be filed in said cause, in the *district* court of said county, it is ordered, that *T. E. Grisell*, a member of the bar in said county, have leave to file, in said court, an information in the nature of a quo warranto, against the said *William Marlow*, and prosecute the same in place of said prosecuting attorney.

Wm. Lawrence,
Judge of the court *of common pleas* of the *3d* judicial district of *Ohio*, and one of the judges of the *district* court of the said county of *Wyandot*.

April 19, 18*64*."

Form No. 16858.[1]

(*Title of court and cause as in Form No. 16855.*)

On motion in behalf of the attorney general, upon the affidavits read and filed herein, it is

Ordered, that leave be granted to the relator above named to file an information in the nature of a quo warranto in this cause, and that process issue against the above named defendant.

On motion of

Jeremiah Mason, Attorney for Relator.

VIII. COMPLAINT, INFORMATION, PETITION OR SUGGESTION.[2]

An objection was made to the sufficiency of this leave to file, which was not considered by the court.

1. *New Jersey.* — Gen. Stat. (1895), p. 2632, § 1.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 235.

2. Requisites of Complaint, Information, Petition or Suggestion — Generally. — For the formal parts of a complaint, information, petition or suggestion in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; INFORMATIONS IN CRIMINAL CASES, vol. 9, p. 768.

For statutory requisites of complaint, petition, information or suggestion see list of statutes cited *supra*, note 1, p. 217.

Joinder of Defendants. — Where several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons in order to try their respective rights to such office or franchise.

Arizona. — Rev. Stat. (1901), § 3797.

California. — Code Civ. Proc. (1897), § 808.

Colorado. — Mills' Anno. Code (1896), § 294.

Idaho. — Rev. Stat. (1887), § 4617.

Illinois. — Starr & C. Anno. Stat. (1896), c. 112, par. 1.

Indiana. — Horner's Stat. (1896), § 1140.

Iowa. — Code (1897), § 4320.

Michigan. — Comp. Laws (1897), § 9957.

Missouri. — Rev. Stat. (1899), § 4459.

Nebraska. — Comp. Stat. (1899), § 6302.

Nevada. — Comp. Laws (1900), §§ 3420, 3793.

New Jersey. — Gen. Stat. (1895), p. 2632, § 1.

North Carolina. — Code Civ. Proc. (1900), § 614.

North Dakota. — Rev. Codes (1895), § 5750.

Ohio. — Bates' Anno. Stat. (1897), § 6767.

Oregon. — Hill's Anno. Laws (1892), § 364.

Rhode Island. — Gen. Laws (1896), c. 263, § 2.

South Carolina. — Code Civ. Proc. (1893), § 436.

South Dakota. — Dak. Comp. Laws (1887), § 5355.

Tennessee. — Code (1896), § 5178.

Texas. — Rev. Stat. (1895), art. 4344.

Utah. — Rev. Stat. (1898), § 3615.

Vermont. — Stat. (1894), § 1620.

Wisconsin. — Stat. (1898), § 3474.

Title — *Generally.* — In the absence of statutory regulations, the common-law rule prevails, requiring the title to be the same as in a criminal prosecution. Osgood *v.* Jones, 60 N. H. 543.

For statutory requisites as to title see list of statutes cited *supra*, note 1, p. 217.

Proceeding by Attorney General, ex-officio. — The proper title of a case commenced by information prosecuted by the attorney general, acting ex officio in behalf of the state, is as follows: "The State of *Maine*, by information of *Thomas B. Reed*, attorney general, vs., *The Cumberland and Oxford Canal Corporation*." Reed *v.* Cumberland, etc., Canal Corp., 65 Me. 132.

Proceeding Upon Relation of Private Person. — Where the action is in the name of the people on the relation of an individual to test the right to an office, the name of the relator must be joined with the people as plaintiff. Montgomery *v.* State, 107 Ala. 372; People *v.* Walker, 23 Barb. (N. Y.) 304.

In State *v.* Price, 50 Ala. 568, the action was commenced by summons and complaint in the name of the "State of *Alabama*, on the information of

1. Against Corporation.

Jesse Carter, *Nelson W. Perry*, *Willis G. Clark*, *Henry B. Willey*, and *Thomas Manser*, who also are joined as plaintiffs with the State of *Alabama*, against *Caleb Price*, *Joseph C. Smith*, *Fred Bromberg*, *A. E. Buck*, and *Hugh Monroe*." And where title is in these words: "*The Territory of Dakota*, *ex rel. Peter O. Peterson*, plaintiffs, *v. James Hauxhurst*, defendant," and the allegations of the complaint are "*Peter O. Peterson*, one of the above named plaintiffs, alleges," etc., "wherefore plaintiffs allege that plaintiff, *Peter O. Peterson*," etc., there is a sufficient compliance with the statute. Territory *v.* Hauxhurst, 3 Dak. 205.

In Territory *v.* Hauxhurst, 3 Dak. 205, it is said that the following title is frequently employed without objection: "*The Territory of Dakota*, *ex rel. John Doe* and *John Doe* v. *Richard Roe*." And see to the same effect People *v.* De Bevoise, 27 Hun (N. Y.) 596; People *v.* Ryder, 12 N. Y. 433; State *v.* Dousman, 82 Wis. 541; State *v.* Palmer, 24 Wis. 63. But a complaint in the name of the people alone, on the relation of Mr. Hawes, is insufficient and defective. People *v.* Walker, 23 Barb. (N. Y.) 304.

In Hargrove *v.* Hunt, 73 N. Car. 24, an action in the name of "*T. L. Hargrove*, Attorney General of *North Carolina*, in the name of the people of the state, and upon the relation of *N. N. Tuck*," was held, on demurrer, to be sufficient to satisfy a statute which provided that "an action may be brought by the Attorney General in the name of the people of this state upon his own information or upon the complaint of any private party," etc., although it would have been better if the action had been in the name of "the people of the state of *North Carolina* upon the relation of *N. N. Tuck*," etc. The court said: "The simple fact that the name of the attorney general is set forth in the complaint, although unnecessary, cannot defeat the action. It may be treated as surplusage, or it may be construed as an assent on his part to the bringing of this action, which in fact he had given in writing."

Proceeding by Private Person. — A suit brought by a private person under a statute which provides that on refusal of the public prosecutor to commence proceedings they may be commenced by a private person, should be entitled: "State of *Iowa*, on the relation of *Charles Gilmore*, vs. *Jacob Minton*," and not "*Charles Gilmore* vs. *Jacob Minton*." State *v.* Minton, 49 Iowa 591.

Time of Presentation. — In *Michigan*, it has been held that an information is not defective which does not state the time of presentation in the caption. This is by reason of a statute which makes it unnecessary that a pleading be entitled of any particular day. People *v.* Miller, 15 Mich. 354.

Commencement. — Under a statute which provides that the prosecuting attorney shall exhibit an information in the nature of a quo warranto on the relation of any person desiring to prosecute the same, who shall be mentioned in such information as the relator, the information should be exhibited not by the relator but by the prosecuting attorney, and should commence as follows: "*John M. Wallace*, prosecuting attorney of the *eleventh* judicial circuit of the state of *Indiana*, comes here into the *Circuit* Court of the County of *Randolph*, on, etc., and for the said state on the relation of *George W. Baird*, of, etc., according to the form of the statute in such case made and provided, gives the court here to understand and be informed," etc.; and an information will be held insufficient, on special demurrer, which commences as follows: "The State of *Indiana*, on the relation of *George W. Baird*, v. *Ariel K. Eaton*. On information for writ of quo warranto. The said *George W. Baird*, the relator in this behalf, for and in the name of the state of *Indiana*, comes now here into the said *Randolph Circuit* Court, by *John M. Wallace*, prosecuting attorney of the *eleventh* judicial circuit of the state of *Indiana*, and gives the Court now here to understand and be informed, that the said *Ariel K. Eaton*, late of said county, *gentleman*, on the *15th* of *September*, 184*1*, was then and there county auditor," etc. Eaton *v.* State, 7 Blackf. (Ind.) 65.

Interest of Relator — *Generally.* — When the information is filed in the name of the state, by the attorney general or other similar officer, it will be presumed that he does so in his official capacity, and for the purpose of vindicating the rights of the state. State *v.* Berkeley, 140 Mo. 184. But

a. Municipal Corporation, for Exercising Control Over Territory Not a Part of Municipality.

where the information is filed at the instance of a private individual, the interest of such individual in the matter must be shown. Crovatt *v.* Mason, 101 Ga. 246; Davis *v.* Dawson, 90 Ga. 817; Jones *v.* State, 153 Ind. 440; State Bieler, 87 Ind. 320; Reynolds *v.* State, 61 Ind. 392; State *v.* Berkeley, 140 Mo. 184; State *v.* Vann, 118 N. Car. 3; State *v.* Hall, 111 N. Car. 369; Com. *v.* Jones, 12 Pa. St. 365; State *v.* Tuttle, 53 Wis. 45.

Nature of interest of relator must be clearly stated, so that the court may as a matter of law determine whether it is such an interest as will give the person a standing in court, and merely to aver some interest is not sufficient. State *v.* Ireland, 130 Ind. 77; Reynolds *v.* State, 61 Ind. 392. A statement in the information that the relator "claims an interest" is not an allegation of an issuable fact, but simply a conclusion of the pleader, and is insufficient. State *v.* Ireland, 130 Ind. 77.

Inhabitant and Tax-payer. — Where the complaint is against a public officer, it is unnecessary to show that relator is entitled to the office in question or has any interest in its emoluments. State *v* Vann, 118 N. Car. 3; State *v.* Hall, 111 N. Car. 369. It is enough if he is shown to be an inhabitant and tax-payer of the jurisdiction over which the officer exercised his duty or power. Crovatt *v.* Mason, 101 Ga. 246; Davis *v.* Dawson, 90 Ga. 817; Houghtalling *v.* Taylor, 122 N. Car. 141; State *v.* Vann, 118 N. Car. 3; State *v.* Hall, 111 N. Car. 369; State *v.* Tuttle, 53 Wis. 45. As that relator is a citizen of the city of Dawson, said state, and a tax-payer therein. Davis *v.* Dawson, 90 Ga. 817. Or that relator "is a citizen of the state of *Georgia*, and of the county of *Glynn*, and of the city of *Brunswick* therein, and as such citizen he has an interest in and is entitled to all the privileges of a citizen in the election of officers to the said city and in the office of mayor of said city." Crovatt *v.* Mason, 101 Ga. 246.

That defendant holds and executes the office or franchise must be stated. People *v.* Ridgley, 21 Ill. 65.

Office or franchise should be described. People *v.* Ridgley, 21 Ill. 65.

Time and Place of Usurpation. — An allegation that "for the space of *two* days last past" the defendant has usurped, etc., sufficiently fixes the time of usurpation, since the "*two* days last past" clearly refer to the two days next preceding the presenting of the information. People *v.* Miller, 15 Mich. 354.

In State *v.* Parkhurst, 9 N. J. L. 427, it was objected that the information was informal and insufficient because it did not state with certainty the time and place of the supposed intrusion; as to the place, containing Hunterdon in the margin and Essex in the body, and as to the time, leaving it to be collected by reference only to the time of filing the information. The court said: "To these objections, if there be anything in them, the doctrine of amendments at common law, aided by the statute of jeofails, which is expressly extended to informations of this kind, I think afford a sufficient answer."

Stating Grounds of Proceeding — *Generally.* — It was a peculiarity of both the quo warranto and information in the nature of quo warranto that the state was bound to show nothing and the defendant was required to show his right to the franchise or office in question, and if he failed to show authority judgment went against him. People *v.* Dashaway Assoc., 84 Cal. 114; People *v.* Ridgley, 21 Ill. 65. And in case of usurpation of a public or corporate franchise or office, it is sufficient, in order to put the defendant to an answer, to allege such usurpation in general language. State *v.* McDiarmid, 27 Ark. 176; People *v.* Reclamation Dist. No. 136, 121 Cal. 522; People *v.* Dashaway Assoc., 84 Cal. 114; People *v.* Abbott, 16 Cal. 358; People *v.* Woodbury, 14 Cal. 43; Enterprise *v.* State, 29 Fla. 128; People *v.* Cooper, 139 Ill. 461; People *v.* Ridgley, 21 Ill. 65; Clark *v.* People, 15 Ill. 213; People *v.* Crawford, 28 Mich. 88; People *v.* De-Mill, 15 Mich. 164; People *v.* River Raisin, etc., R. Co., 12 Mich. 389; People *v.* Mayworm, 5 Mich. 146; State *v.* Vallins, 140 Mo. 523; State *v.* Berkeley, 140 Mo. 184; People *v.* McIntyre, 10 Mont. 166; People *v.* Knox, 38 Hun (N. Y.) 236; People *v.* Hudson Bank, 6 Cow. (N. Y.) 217; People *v.* Niagara Bank, 6 Cow. (N. Y.) 196; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358; Atty.-Gen. *v.* Petersburg, etc., R. Co., 6 Ired. L. (28 N. Car.) 456; State *v.*

Pennsylvania, etc., Canal Co., 23 Ohio St. 121; State *v.* Sullivan, 8 Ohio Cir. Dec. 346; State *v.* Stevens, 29 Oregon 464; Com. *v.* Commercial Bank, 28 Pa. St. 383; Com. *v.* Young, 2 Pearson (Pa.) 163; People *v.* Clayton, 4 Utah 421; State *v.* Dahl, 65 Wis. 510 (*disapproving* State *v.* Messmore, 14 Wis. 115). As that defendant has intruded into, usurped and unlawfully exercises the functions of the office in question. State *v.* Vallins, 140 Mo. 523; State *v.* Berkeley, 140 Mo. 184; State *v.* Stevens, 29 Oregon 464; State *v.* Dahl, 65 Wis. 510. Or that defendant is in possession of the office, or is exercising the corporate franchise without lawful authority. People *v.* Reclamation Dist. No. 136, 121 Cal. 522; People *v.* Abbott, 16 Cal. 358; People *v.* Woodbury, 14 Cal. 43; People *v.* Cooper, 139 Ill. 461; People *v.* Clayton, 4 Utah 421. And there need be no allegation of the particular circumstances constituting the usurpation. People *v.* Reclamation Dist. No. 136, 121 Cal. 522; People *v.* Clayton, 4 Utah 421. Although it is not uncommon in this country for such circumstances to be alleged. People *v.* Dashaway Assoc., 84 Cal. 114; Territory *v.* Virginia Road Co., 2 Mont. 96; Com. *v.* Commercial Bank, 28 Pa. St. 383. Where facts are unnecessarily stated, they will not be treated as surplusage, however. Enterprise *v.* State, 29 Fla. 128; People *v.* Knox, 38 Hun (N. Y.) 236. If they are not denied, they will stand as admitted. People *v.* Knox, 38 Hun (N. Y.) 236. And if they show a clear legal right in defendant the information is insufficient. Enterprise *v.* State, 29 Fla. 128.

In *Alabama*, in State *v.* Price, 50 Ala. 568, it was held that a complaint under the statute should, so far as practicable, specify the objections intended to be made to the title of the defendant. But the allegation in this case was that defendants are "and have been for some time past unlawfully holding and exercising the offices of the board of commissioners of revenue of *Mobile* county, *Alabama*, by administering the finances of the county, exercising control over the county property, taking steps toward the erection of a new court house, and by doing and performing various other acts and things which pertain to the office of the board of commissioners of *Mobile* county, when in fact they had and have no lawful right or title to hold or exercise said office," and this allegation was held sufficient on demurrer, on the authority of Lee *v.* State, 49 Ala. 43, in which case the allegation was that the defendant "for the space of *one* week or more, *last past*, had used, and still did use, the liberties and franchises of solicitor," etc., "in violation of the existing laws of said state."

In *Colorado*, under the statute, the facts constituting the offense should be stated, and not conclusions. People *v* Brown, 23 Colo. 425; Central, etc., Road Co. *v.* People, 5 Colo. 39; Atchison, etc., R. Co. *v.* People, 5 Colo. 60.

In *North Carolina*, under the statute, where the object sought is the forfeiture of the charter of a corporation, the "grounds" of forfeiture must be set forth briefly. Atty.-Gen. *v.* Petersburg, etc., R. Co., 6 Ired. L. (28 N. Car.) 456.

In *Tennessee*, where the proceeding is by bill in equity, it should set forth briefly and without technical forms the grounds upon which suit is instituted, and the suit will be conducted as other suits in equity. Tenn. Code (1896), § 5171.

Plain Statement of Facts. — Under statute, in many jurisdictions, the substituted proceedings by complaint or petition should consist of a plain statement of the facts which constitute the ground of the proceeding. Territory *v.* Hauxhurst, 3 Dak. 205; Jones *v.* State, 153 Ind. 440; Jones *v.* State, 112 Ind. 193; State *v.* Bieler, 87 Ind. 320; State *v.* Beck, 81 Ind. 500; Reynolds *v.* State, 61 Ind. 392; State *v.* Kingan, 51 Ind. 142; Horner's Stat. Ind. (1896), § 1133; Iowa Code (1897), § 4317; Neb. Comp. Stat. (1899), § 6295; State *v.* Stein, 13 Neb. 529; Nev. Comp. Laws (1900), § 3787; People *v.* Ryder, 12 N. Y. 433; People *v.* Albany, etc., R. Co., (Supreme Ct. Spec. T.) 7 Abb. Pr. N. S. (N. Y.) 265; Ballinger's Anno. Codes & Stat. Wash. (1897), § 5782; State *v.* Van Brocklin, 8 Wash. 557.

Certainty of an Indictment. — In the following cases it was held that the information should be of the same degree of certainty as an indictment: Lynch *v.* Martin, 6 Houst. (Del.) 487; Lavalle *v.* People, 68 Ill. 252; Donnelly *v.* People, 11 Ill. 552; Minck *v.* People, 6 Ill. App. 127. *Contra*, that the degree of certainty necessary in an indictment is not required, Independent Medical College *v.* People, 182 Ill. 274. And that the better doctrine is that the pleading shall conform as far as possible to the general principles and rules

which govern in ordinary civil actions. Independent Medical College *v.* People, 182 Ill. 274; Distilling, etc., Co. *v.* People, 156 Ill. 448; People *v.* Miller, 15 Mich. 354.

Information Need Not Strictly Follow Application. — The officer of the state, who is required *ex officio* to prepare the information and make out the declaration on which the state *ex relatione* of the relators rests its case, is not narrowed to the rigid rule of strictly following the petition of the relators, but may amplify and enlarge the facts and the prayer, not going out of the substantial subject-matter complained of before the judge and the judgment granting the prayer and directing the information filed. Whelchel *v.* State, 76 Ga. 644.

Contradictory Averments. — Where, in an information against persons for unlawfully assuming to exercise corporate powers, several alleged illegal acts which contradict each other are set out in the same paragraph, the paragraph is bad. State *v.* Foulkes, 94 Ind. 493.

Prayer for Relief. — In State *v.* Philips, 30 Fla. 579, the conclusion of a sufficient information was as follows: "Whereupon the said Attorney-General prays advice of this court in the premises, and due process of law against the said *A. B. Philips* in this behalf, to answer the said people by what warrant or authority he claims to use, enjoy, exercise and perform the franchise, functions and powers aforesaid, and that upon his failure thereof, a judgment of ouster be entered against the said *A. B. Philips*, and that in said judgment the said *W. A. Mac Williams* be restored to the said office of Municipal Judge of the said city of *St. Augustine, Florida*."

In People *v.* Northern R. Co., 42 N. Y. 217, the complaint asked the judgment of the court:

"1st. Adjudging and deciding that said *Northern Railroad Company* has remained insolvent for more than *one* whole year; has for *one* year and more neglected to pay or discharge its notes and other evidences of debt, and for more than *one* year has suspended the ordinary and lawful business of such corporation: has surrendered all the rights and privileges, and franchises, granted by any act of incorporation, or acquired under any laws of this state; and has been dissolved; and that it be forever excluded from all corporate rights, privileges, and franchises.

2d. That the several persons named or referred to as defendants in this complaint, have occupied and used, within this state, the franchises of a corporation, contrary to the laws of this state, to the injury of the people of the state, and in violation of law; and that they, and each, and every of them, be forever excluded, prohibited, restrained, and enjoined by the order of this court from occupying, setting up, or exercising any of the corporate rights, privileges, or franchises formerly possessed by the said *Northern Railroad Company*, and that a temporary injunction to the above effect may be immediately granted.

3d. That said persons named as defendants, or referred to as such, be fined in the sum of $2,000 each, for their said usurpation, pursuant to section 441 of the Code, and may be compelled to pay the costs of this action.

5th. That the people of the state of *New York* may have in this action such other, or such different, or such further relief, as may be agreeable to law and equity."

The prayer was granted.

In People *v.* Nolan (Supreme Ct. Spec. T.) 10 Abb. N. Cas. (N. Y.) 471, the relief demanded by the complaint was that the said John Swinburne may be adjudged to have been duly elected mayor of the city of Albany, as is therein averred, and that the defendant, Nolan, has no such right to hold said office of mayor after the first Tuesday of May, 1882, as he claims and pretends to have, "and that the plaintiffs may recover of the defendant the costs of this action, and that the defendant be evicted and excluded from said office, and be adjudged to pay to the plaintiff a fine of *two thousand* dollars." This prayer was held to be identical in form with that in People *v.* Ryder, 12 N. Y. 433, which was held good on demurrer, and the same form was also adopted and used in People *v.* Cook, 14 Barb. (N. Y.) 259, and in People *v.* Thacher, 55 N. Y. 525, and is the one in general use in actions of this character.

Conclusion. — In *Illinois*, informations must conclude "against the peace and dignity of the same people of the state of *Illinois*." Ill. Const. (1870), art. 6, § 23; Chesshire *v.* People, 116 Ill. 493; Minck *v.* People, 6 Ill. App. 127; Donnelly *v.* People, 11 Ill. 552.

Signature. — The rules that apply to

Form No. 16859.[1]

(Precedent in State *v.* Cincinnati, 20 Ohio St. 27.)[2]

[(*Title of court and cause as in Form No. 6433.*)][3]

At the term of *December*, 1869, *Francis B. Pond*, attorney-general of the state of *Ohio*, who sues for the said state in this behalf, comes here before the judges of the supreme court of the said state, on the ——— day of ———, one thousand eight hundred and *seventy*, at the term aforesaid, and for the said state of *Ohio*, gives the said court to understand and be informed, that the city of *Cincinnati*, for a long time, now last past, to wit: since *May 16*, 1870, continuously until now, hath used, and now doth at *Cincinnati*, to wit: at the county aforesaid, use, without any lawful warrant, grant or charter the following liberty, privilege, and franchise, to-wit: that of apportioning into wards of said city, and extending her government and control over, as if lawfully part thereof, the following described premises and real estate, all being within the county of *Hamilton* in said state, and bounded as follows: Commencing at the mouth of the *Little Miami* river; thence north-eastwardly along the east branch of said river to the south line of section *fifteen*, town *four*, fractional range *two*; thence west with said south line of section *fifteen*, to the south-west corner of said section; thence north along the section line between sections *fifteen* and *twenty-one* and sections *sixteen* and *twenty-two*, to

informations of a criminal character and require them to be signed and authenticated by the prosecuting attorney do not apply to informations in the nature of a quo warranto. State *v.* Campbell, 120 Mo. 396. And an information filed by the consent of the district attorney and in his name, but not officially signed by him, was held good in Kane *v.* People, 4 Neb. 509.

In State *v.* Stevens, 29 Oregon 464, a complaint was held not to be insufficient because it did not allege that the action was instituted by the district attorney in his official capacity, where it was brought in the name of the state upon the relation of a private party and was signed by the district attorney in his official capacity. This was held sufficient to comply with the provisions of section 357 of Hill's Code, authorizing such proceeding, if indeed the action could not be maintained under the statute in the name of the state by a private relator without the consent of the district attorney.

Verification. — Suggestion or information should be verified. Hill's Anno. Laws Oregon (1892), § 359; Bright. Pur. Dig. Pa. (1894), p. 1774, § 7; Hunnicutt *v.* State, 75 Tex. 233. And see list of statutes cited *supra*, note 1, p. 217. But this is so by some statutes only when prosecuted by a private individual. Sand. & H. Dig. Ark. (1894), § 7372; Vt. Stat. (1894), § 1618. And not when commenced by the state. Sand. & H. Dig. Ark. (1894), § 7372; State *v.* Sullivan, 8 Ohio Cir. Dec. 346.

In *Oregon*, when the action is upon the relation of a private party, the pleadings on behalf of the state should be verified by such relator as if he were the plaintiff in the action, or otherwise, as provided in section 80 of the code, which relates to verification in general. In all other cases, such pleadings shall be verified by the prosecuting attorney in like manner, or otherwise, as provided in such section. Hill's Anno. Laws Oregon (1892), § 359.

That facts alleged in the information are positively true within the knowledge of the relator need not be stated, where the language is as direct and positive as in the nature of things relator can conscientiously make it. Hunnicutt *v.* State, 75 Tex. 233.

1. *Ohio.* — Bates' Anno. Stat. (1897), § 6760 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 2, p. 236.

2. There was a judgment of ouster in this case.

3. The matter to be supplied within [ ] will not be found in the reported case.

the south-east corner of section *twenty-three*; thence west with the section line between sections *twenty-two* and *twenty-three*, sections *twenty-eight* and *twenty-nine*, and sections *thirty-four* and *thirty-five* in town *four*, fractional range *two*, and the sectional line between sections *four* and *five*, sections *ten* and *eleven*; thence north with the east line of section *seventeen* to the south-east corner of section *eighteen*; thence with the section line between sections *seventeen* and *eighteen*, sections *twenty-three* and *twenty-four*, sections *twenty-nine* and *thirty*, to the south-east corner of section *thirty-six*; thence south with the west line of section *twenty-nine* to the south-west corner thereof; thence by section line between sections *thirty-four* and *thirty-five* in town *three*, fractional range *two*, to the eastern boundary of *Green* township; thence south with the eastern boundary lines of *Green* and *Delhi* townships, to the north-east line of the incorporated village of *Riverside*; thence south-west with said north-east line of the incorporated village of *Riverside* to the *Ohio* river; and thence up the *Ohio* river to the place of beginning, excepting therefrom so much of said premises as upon said *sixteenth* day of *May*, 1870, constituted and composed the city of *Cincinnati*, which said territory, less said exception, is not, nor has at any time since said last-named day been, part of said city, nor within the government or control of said city, or its municipal authorities and officers for any purpose, except so far as the police court of said city is concerned; but is, and hath during said time, been within, and governed by the several incorporated villages of *Columbia*, *Woodbury*, *Avondale*, *Clifton*, *Cumminsville* and *Riverside*, in said *Hamilton* county, in part, and in part, that is to say — about *sixteen* sections of *640* acres of land, each, is farm lands, and not incorporated for municipal purposes, nor contiguous to, nor necessary for the uses of said city of *Cincinnati*; which said liberty, privilege and franchise, the said city of *Cincinnati*, during all said time, hath usurped, and now doth usurp upon the state of *Ohio*, to its great damage and prejudice.

Wherefore, the said attorney-general prays the advice and judgment of the said the *supreme* court of the state of *Ohio*, in the premises, and due process of law against the city of *Cincinnati* aforesaid, in this behalf, to be made to answer unto the state of *Ohio*, by what warrant she claims to have, use and enjoy the liberty, privilege and franchise aforesaid.

Francis B. Pond, Attorney-general.

b. Private Corporation, for Forfeiture of Franchise or Privileges.[1]

1. Forfeiture of Franchise. — Corporations are creatures of the law, and when they fail to perform duties which they were incorporated to perform and in which the public have an interest, or do acts which are not authorized or are forbidden them to do, the state may annul their franchise and dissolve them by an information in the nature of a quo warranto. People *v.* Dashaway Assoc., 84 Cal. 114.

Requisites of Complaint, Information or Petition — Generally. — See *supra*, note 2, p. 236.

All facts essential to the right to enforce a destruction of the corporate franchise must be set forth. Crawfordsville, etc., Turnpike Co. *v.* Fletcher, 104

(1) In General.

Ind. 97. And a case must be stated which, if admitted to be true or proved, will support a judgment of ouster and forfeiture. Harris *v.* Mississippi Valley, etc., R. Co., 51 Miss. 602.

Proper Venue must be Shown. — It must affirmatively appear, in an action brought to vacate a charter of a corporation, that a statutory requirement that such action be brought either in the county in which it has its principal office or, if it have no principal office, in any county in which it does business has been complied with. State *v.* Mobile, etc., R. Co., 108 Ala. 29.

Proceeding must be Against Corporation as Such. — The proceeding against a corporation for the forfeiture of its franchise must be against the corporation as such. Smith *v.* State, 21 Ark. 294; People *v.* Stanford, 77 Cal. 360; Distilling, etc., Co. *v.* People, 156 Ill. 448; North, etc., Rolling Stock Co. *v.* People, 147 Ill. 234; People *v.* Spring Valley, 129 Ill. 169; Mud Creek Draining Co. *v.* State, 43 Ind. 236; State *v.* Independent School Dist., 44 Iowa 227; Atty.-Gen. *v.* McArthur, 38 Mich. 204; State *v.* Commercial Bank, 33 Miss. 474; Noel *v.* Aron, (Miss. 1891) 8 So. Rep. 647; State *v.* Barron, 57 N. H. 498; People *v.* Rensselaer, etc., R. Co., 15 Wend. (N. Y.) 113; People *v.* Niagara Bank, 6 Cow. (N. Y.) 196; State *v.* Taylor, 25 Ohio St. 279; State *v.* Pennsylvania, etc., Canal Co., 23 Ohio St. 121; State *v.* Cincinnati Gas-Light, etc., Co., 18 Ohio St. 262. And it is thereby admitted that the corporation exists. Smith *v.* State, 21 Ark. 294; People *v.* Stanford, 77 Cal. 360; Distilling, etc., Co. *v.* People, 156 Ill. 448; North, etc., Rolling Stock Co. *v.* People, 147 Ill. 234; People *v.* Spring Valley, 129 Ill. 169; Mud Creek Draining Co. *v.* State, 43 Ind. 236; State *v.* Independent School Dist., 44 Iowa 227; Atty.-Gen. *v.* McArthur, 38 Mich. 204; State *v.* Commercial Bank, 33 Miss. 474; Noel *v.* Aron, (Miss. 1891) 8 So. Rep. 647; State *v.* Barron, 57 N. H. 498; People *v.* Rensselaer, etc., R. Co., 15 Wend. (N. Y.) 113; People *v.* Niagara Bank, 6 Cow. (N. Y.) 196; State *v.* Taylor, 25 Ohio St. 279; State *v.* Pennsylvania, etc., Canal Co., 23 Ohio St. 121; State *v.* Cincinnati Gas-Light, etc., Co., 18 Ohio St. 262. Or that it once had a legal existence. Mud Creek Draining Co. *v.* State, 43 Ind. 236; People *v.* Rensselaer, etc., R. Co., 15 Wend. (N. Y.) 113. But it is not admitted that it has legal right to exist. State *v.* Pennsylvania, etc., Canal Co., 23 Ohio St. 121.

Incorporation must be Shown. — It must be shown, by proper averment in the complaint, that defendant has been incorporated under the laws of the state, and a failure of the pleadings to disclose this essential fact must necessarily render the information fatally defective. State *v.* Citizens' Gas, etc., Min. Co., 151 Ind. 505. And where there is not one general law governing corporations, complaint or information must state under what statute the corporation was organized. Crawsfordsville, etc., Turnpike Co. *v.* Fletcher, 104 Ind. 97; Covington, etc., Plank Road Co. *v.* Van Sickle, 18 Ind. 244; Danville, etc., Plank Road Co. *v.* State, 16 Ind. 456. Where a statute provides that in pleading a private statute or a right derived therefrom it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof, an averment that defendant claims to enjoy and use said privileges, franchises and liberties under and by virtue of an act of the legislative assembly of said territory, entitled "an act to incorporate the Virginia City and Summit City Wagon Road Company," approved January 27, 1865, etc., is sufficient. The act of incorporation is made a part of the complaint by such reference, and the court must find that the defendant is a corporation. An additional averment that the defendant is a corporation is surplusage. Territory *v.* Virginia Road Co., 2 Mont. 96.

That defendant has legal existence as a corporation must be alleged specifically. People *v.* Stanford, 77 Cal. 360.

Causes of Forfeiture — *Generally.* — Causes of forfeiture need not be set out specifically. Com. *v.* Commercial Bank, 28 Pa. St. 383. And see Territory *v.* Virginia Road Co., 2 Mont. 96, where the court says that forms approved over and over again by the highest authorities do not set up the specific matter upon which the people rely for forfeiture. In some states statutes have changed this common-law rule by requiring causes of forfeiture to be set out briefly in information. Miss. Anno. Code (1892), § 3523; Atty.-Gen. *v.*

Petersburg, etc., R. Co., 6 Ired. L. (28 N. Car.) 456. It is sufficient to set forth the franchises alleged to have been illegally exercised and to call upon the defendant to show by what authority they are held. Territory *v.* Virginia Road Co., 2 Mont. 96; Com. *v.* Commercial Bank, 28 Pa. St. 383. But information may disclose the specific grounds of forfeiture. Territory *v.* Virginia Road Co., 2 Mont. 96; Com. *v.* Commercial Bank, 28 Pa. St. 383. And the effect of this is to form an issue upon the information and plea instead of the plea and replication. Territory *v.* Virginia Road Co., 2 Mont. 96.

Joining Distinct Causes of Forfeiture. — An information which sets up several distinct causes of forfeiture is not demurrable for that reason. Quo warranto being in the nature of a criminal proceeding, the attorney general may plead or reply as many distinct causes as he thinks proper. State *v.* Milwaukee, etc., R. Co., 45 Wis. 579 (*citing* People *v.* Manhattan Co., 9 Wend. (N. Y.) 351). That defendant unlawfully exercises and wrongfully claims the right to exercise a franchise, and that it claims the right to lay tracks and make switches, is not to unite two causes of action. People *v.* Sutter St. R. Co., 117 Cal. 604.

In State *v.* Milwaukee, etc., R. Co., 45 Wis. 579, the information contained a general statement of the misuse or abuse of the powers and franchises of the defendant and the violation of its charter in certain particulars. It was held that the allegations "that the defendant keeps its principal place of business, its books and records, and all its general offices, in the state of *New York*, so that the jurisdiction of the courts of the state is inadequate and ineffectual to administer the common remedies of the law in causes against the corporation, or in which the stock or property of its stockholders therein is in question," taken together, make one general charge and state but one cause of forfeiture.

Acting Under Defective Proceedings. — Where the claim is that the corporation is acting as such, but that the proceedings under which it is acting are defective, the facts showing that it is so claiming to act and the defects claimed to exist should be set out specifically. People *v.* Stanford, 77 Cal. 360.

That act was in contravention of statute need not be averred, and forfeiture of a corporate franchise may result although no statute in express terms enjoins or prohibits the acts complained of. Eel River R. Co. *v.* State, 155 Ind. 433.

Usurpation of Corporate Powers. — It is competent to bring an information against a corporation and at the same time to charge the corporation with usurping its corporate powers, where the simple question to be tried and determined is whether or not the corporation, by its acts of misuser or nonuser, has forfeited its rights, franchises and privileges. Territory *v.* Virginia Road Co., 2 Mont. 96 (*citing* the following cases in which such a charge was made: People *v.* Hillsdale, etc., Turnpike Co., 23 Wend. (N. Y.) 254; People *v.* Kingston, etc., Turnpike Road Co., 23 Wend. (N. Y.) 193; People *v.* Bristol, etc., Turnpike Road, 23 Wend. (N. Y.) 222; People *v.* Niagara Bank, 6 Cow. (N. Y.) 196; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358).

That Act or Neglect was Wilful. — In order that a corporation may be divested of its franchise, some wrong must be done arising from wilful abuse or improper neglect. Harris *v.* Mississippi Valley, etc., R. Co., 51 Miss. 602; People *v.* Kingston, etc., Turnpike Road Co., 23 Wend. (N. Y.) 193. And it must be alleged that the misfeasance, malfeasance or nonfeasance of the corporation was wilful. Harris *v.* Mississippi Valley, etc., R. Co., 51 Miss. 602; State *v.* Columbia, etc., Turnpike Co., 2 Sneed (Tenn.) 254.

Cessation of Corporate Existence. — Where the existence of the corporation is expressly averred or is admitted, it is not sufficient to allege merely that it has ceased to exist. The facts showing that its existence has terminated must be set forth. People *v.* Stanford, 77 Cal. 360.

Precedents. — In People *v.* Jackson, etc., Plank Road Co., 9 Mich. 285, is set out the following information:

"State of *Michigan*, *Supreme* Court, *Jackson* county, ss.:

Jacob M. Howard, attorney-general of the people of the state of *Michigan*, who sues for the said people in this behalf, comes here into the *Supreme* Court of this state, on the *eleventh* day of *January*, in the year one thousand eight hundred and *sixty*, and for the said people of the state of *Michigan*, at the relation of *Edward Morrill* and *Nathaniel Morrill*, of the county of *Jack-*

son aforesaid, according to the form of the statute in such case made and provided gives the said court here to understand and be informed, that the *Jackson & Michigan plank road company*, to wit, at *Jackson*, in the county of *Jackson*, for the space of *five* years now last past and upwards, have used and still do use, without any warrant, grant or charter, the following liberties, privileges, franchises, to wit: That of being a body politic and corporate in law, fact and name, by the name of *Jackson & Michigan plank road company*, by the same name to plead and be impleaded, to answer and to be answered unto; and also the following liberties, privileges and franchises, to wit: that of constructing and maintaining a plank road, beginning at a certain point in the county of *Jackson*, and terminating at a certain point in the county of *Eaton*, and of levying, collecting and receiving tolls from all persons using such roads, and also the following liberties, privileges and franchises, to wit: that of constructing and maintaining a road, partly of plank and partly of gravel, beginning at a certain point in the county of *Jackson*, and terminating at a certain other point in the county of *Eaton*, and of levying, collecting and receiving tolls from all persons using such road, all which said liberties, privileges and franchises the said *Jackson and Michigan plank road company*, during all the time aforesaid, have usurped and still do usurp upon the said people, to their great damage and prejudice.

Thereupon the said attorney-general prays the advice of the said court in the premises, and due process of law against the said *Jackson & Michigan plank road company*, in this behalf to be made to answer to the said people, by what warrant they claim to have, use and enjoy the liberties, privileges and franchises aforesaid."

To this information a plea and replications were filed, and on demurrer to the replications there was a judgment holding the replications bad.

In People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, is set out the following form of information against defendant for exercising banking privileges without authority from the legislature:

"*Albany*, ss.

Be it remembered, that heretofore, to wit, in the term of *May* last past, at the *City Hall*, of the city of *New York*, came before the justices of the *supreme* court of judicature aforesaid, *Martin Van Buren*, attorney general of the people of the state of *New York*, and for the said people gave their said court, before the justices thereof, then there to understand and be informed, in manner following, that is to say: *Martin Van Buren*, attorney general of the people of the state of *New York*, who sues for the said people in this behalf, comes here before the justices of the people of the state of *New York* of the *supreme* court of judicature of the same people, on the *16th* day of *May*, in the said term, at the *City Hall* of the city of *New York*, and for the said people gives the court here to understand and be informed, that the *Utica Insurance Company*, for the space of *six* months now last past, and more, have used, and still do use, without any warrant, charter, or grant, the following liberties, privileges, and franchises, to wit, that of becoming proprietors of a bank or fund for the purpose of issuing notes, receiving deposits, making discounts, and transacting other business which incorporated banks may and do transact by virtue of their respective acts of incorporation, and also that of actually issuing notes, receiving deposits, making discounts, and carrying on banking operations and other monied transactions which are usually performed by incorporated banks, and which they alone have a right to do, of all which liberties, privileges, and franchises, aforesaid, the said *Utica Insurance Company*, during all the time aforesaid, have usurped, and still do usurp upon the said people, to their great damage and prejudice; whereupon the said attorney of the said people prays advice of the said court in the premises, and due process of law against the said *Utica Insurance Company*, in this behalf to be made to answer to the said people by what warrant they claim to have, use and enjoy the liberties, privileges, and franchises aforesaid."

There was a judgment of ouster.

In People *v.* Niagara Bank, 6 Cow. (N. Y.) 196, is set out the following information against an incorporated bank for exercising bank privileges without warrant:

"*Albany* county, ss:

Samuel A. Talcott, attorney general of the people of the state of *New York*,

Form No. 16860.[1]

(Precedent in North, etc., Rolling Stock Co. *v.* People, 147 Ill. 236.)[2]

[(*Venue and title of court as in Form No. 10823.*)][3]

M. W. Schaefer, state's attorney in and for said county, who sues for the People of the state of *Illinois*, in this behalf comes into court on this day and for the said People, and in the name and by the authority thereof gives the court here to understand and be informed that the *North and South Rolling Stock Company*, for the space of *two* years last past, and more, in the county and city aforesaid, has used, and still does use, without any warrant, charter or grant, the following liberties, privileges and franchises, to-wit, of owning, buying, leasing, selling and operating railroad rolling stock. All of which said liberties, privileges and franchises the said company, during all the time aforesaid, upon the said People, has usurped, and still does usurp, in the county and city aforesaid, to the damage and prejudice of the said People, and against the peace and dignity of the same. Whereupon the said state's attorney, for the said People, and in the

who sues for the said people in this behalf, comes here before the justices of the people of the state of *New York*, of the *Supreme Court of Judicature*, of the same people, on the *8th* day of *March*, 1825, in the same term of *February*; and for the said people, gives the said court here to understand and be informed, that *The President, Directors and Company of the Bank of Niagara*, at *Buffalo*, to wit, at *Albany*, in the county of *Albany*, for the space of *six* months now last past, and upwards, have used, and still do use, without any warrant, grant or charter, the following liberties, privileges and franchises, to wit: that of being a body politic and corporate in law, fact and name, by the name of *The President, Directors and Company of the Bank of Niagara*, and by the same name to plead and be impleaded, answer and be answered unto; and also the following liberties, privileges and franchises, to wit, that of being, or becoming proprietors of a bank or fund for the purpose of issuing notes, receiving deposits, making discounts, and transacting other business which incorporated banks may lawfully transact by virtue of their respective acts of incorporation; and also, that of actually issuing notes, receiving deposits, making discounts, and carrying on banking operations, and other monied transactions, which are usually performed by incorporated banks, and which they alone have a right to do; all which said liberties, privileges and franchises the *President*, etc., aforesaid, during all the time aforesaid, have usurped, and still do usurp upon the said people, to their great damage and prejudice; whereupon, the said attorney general prays the advice of the said court in the premises, and due process of law against the *President, Directors and Company of the Bank of Niagara*, aforesaid, in this behalf, to be made, to answer to the said people, by what warrant they claim to have, use and enjoy the liberties, privileges and franchises aforesaid."

This information was held sufficient, and to be the same form as was used in the celebrated case of the City of London. 3 Hargr. St. Tr. 545.

Other precedents are set out in full, in part or in substance in the following cases: People *v.* Dashaway Assoc., 84 Cal. 114; Washington Bridge Co. *v.* State, 18 Conn. 53; State *v.* Norwalk, etc., Turnpike Co., 10 Conn. 157; Emerson *v.* Com., 108 Pa. St. 111; Birmingham, etc., Turnpike Road *v.* Com., 1 Penny. (Pa.) 458.

1. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 112, par. 1.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 242.

2. A judgment of forfeiture in this case was reversed. No objection was made to the form of the information.

The plea in this case is set out *infra*, Form No. 16920.

3. The matter to be supplied within [ ] will not be found in the reported case.

name and by the authority thereof, prays the consideration of the court here in the premises, and due process of law in this behalf, to make the said *North and South Rolling Stock Company* answer to the said People by what warrant it claims to have, use and enjoy the liberties, privileges and franchises aforesaid.

[*M. W. Schaefer*, State's attorney in and for the county of *St. Clair.*][1]

Form No. 16861.[2]

(Miss. Anno. Code (1892), § 3523.)

State of *Mississippi*, County of *Sunflower*. } *Circuit* Court, *October* Term, A. D. 1899.

The State of *Mississippi*, by *Jeremiah Mason*, district attorney for the *Fourth* Judicial District of the state, of his own accord (or *on the relation of John Doe*, as the case may be) gives the court here to understand and be informed that the corporation of (*Here state name of corporation*) has forfeited all right to exercise any of the franchises and privileges granted it, in this, to wit, (*set out the cause of forfeiture*).

Wherefore the state of *Mississippi*, by said district attorney, prays judgment of forfeiture and ouster against said corporation.

The State of *Mississippi*,
By *Jeremiah Mason*, District Attorney.

(2) Building and Loan Association, for Disposing of Property Held as Security for Shareholders.

Form No. 16862.[3]

(Precedent in State *v.* Equitable Loan, etc., Assoc., 142 Mo. 326.)[4]

[*The State of Missouri*, at the information of *R. F. Walker*, attorney general, against *Equitable Loan and Investment Association of Sedalia.* } In the *Supreme* Court.][1]

Now comes *R. F. Walker*, for the State of *Missouri*, and states that the defendant was created and organized as a building and loan association on the *nineteenth* day of *July*, 1887, under and in accordance with an act of the General Assembly of the State of Missouri, entitled "An act concerning mutual savings fund loan and building associations," approved March 31, 1887, and ever since and now is

1. The matter enclosed by [ ] will not be found in the reported case.

2. *Mississippi.* — Anno. Code (1892), § 3523, provides that the information, if against a corporation, may be in the form set out in the text, and in all other cases it shall be in form substantially as near as may be, conforming to the state of the case.

See also list of statutes cited *supra*, note 1, p. 217; and generally, *supra*, note 1, p. 242.

3. *Missouri.* — Rev. Stat. (1899), § 4457 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 242.

4. On demurrer, the information in this case was held sufficient in law.

exercising the franchises, rights and privileges conferred by said act of the legislature of the State of *Missouri*, and other acts amendatory and supplemental thereto, and having its chief office and place of business in the city of *Sedalia*, in the county of *Pettis*, in said state. And this relator charges that ever since its organization it has continuously within this state, and at the county of *Pettis*, aforesaid, offended against the laws of this state and has grossly abused and misused its corporate authority, franchises and privileges and unlawfully assumed and usurped franchises and privileges not granted to it by the laws of the State of *Missouri*, and especially in the following particular, to wit:

That the defendant association has issued what it terms "full paid stock" in shares of the par value of *two hundred* dollars each, and by which the defendant association, in its certificates issued for said stock, certifies that ———, the party to whom said stock was issued, was entitled to *one* or more shares of the capital stock of defendant association upon which there has been paid in the full sum of *two hundred* dollars for each share, the said sum being the dues in full on said shares of stock at the rate of *one* dollar per month on each share for the full period of *two hundred* months from its date, and that the holder and owner of said shares of stock was entitled to the redemption thereof in the full sum of *two hundred* dollars on, and not before, the expiration of *one hundred* months from the date of its issue, and also to receive thereon as the share of the earnings and profits of the business of said association belonging to the said shares of stock so issued *seven* per cent. interest per annum, payable in the sum of *seven* dollars each *six* months during the whole period of *one hundred* months, except that the last payment of interest is *two-thirds* of said sum for *four* months, said interest being payable agreeably to and only on the presentation and delivery, at the place of payment indicated therein, of the coupons attached to said certificates of stock as they respectively matured, and the said association guaranteed to secure the redemption of said shares and the payment of the sum of *two hundred* dollars on each and all the said coupons attached thereto; that there was deposited with the trustees named in said certificates certain securities for the redemption thereof, as hereinafter set forth, and the said certificates provided, that in consideration of the security thus given for the redemption for said stock, the holder thereof released all right, interest and benefit of such share in and to the earnings and profits of said association over and above the *seven* per cent. interest per annum, payable as therein provided, and in said certificates declaring that the same was not negotiable until the certificates indorsed on the back thereof had been duly signed by the said trustee, and upon the back of each of the said certificates of stock was the indorsement of the said trustee that each of said certificates was secured by the deposit of evidences of indebtedness, as stated in the face of said certificates of stock, which were held as security for the redemption of said shares. That each of said certificates of stock was issued as aforesaid by the defendant association, and it declared that to secure the redemption and payment thereof, and all the interest coupons attached thereto, as well as other

shares of stock, and coupons of the same series, there was deposited with *James C. Thompson*, as trustee, obligations for loans due said association, in an amount *ten* per cent. more than the total par value of all of the shares in said series, and secured by pledges of the stock of said association with said loans, and also by deed of trust on real estate, appraised at double the amount of said loans, and with approved titles, and which said deeds of trust and pledged stock were also deposited with the said trustee, and that the defendant association agreed and guaranteed that the securities deposited with said trustee should, during the whole of the said *one hundred* months, be maintained in the amount and character as aforesaid, to secure the redemption and payment of said shares of stock, and that the said trustee would hold the said obligations and securities aforesaid for the benefit of the lawful holder of said shares of said series, and that the said trustee was authorized to collect said obligations and indebtedness or to sell the same and to use the proceeds thereof to redeem said shares in case default should be made by the defendant association in the redemption and payment thereof or of the interest thereon.

And this relator further states that the said defendant association has continuously since the time of its organization issued a large number of shares of its full paid stock, as aforesaid, said shares being negotiated and sold upon the faith of the securities deposited with the trustee, as in the said certificates stated, and as shown by the indorsement of the said trustee placed thereon, and signed by him, and that the said defendant association withdrew and took out of its assets its bills receivable to an amount exceeding the amount of its said outstanding shares of stock at least *ten* per cent., and deposited the same with the said trustee as security for the payment of said shares of stock and for the payment of the interest thereon, and upon the faith of said certificates and of the deposit of security, as aforesaid, the defendant association has sold and has now outstanding of said shares of full paid stock *one hundred and eighty-eight thousand* dollars or more, together with the notes and obligations and assets of the defendant association as security therefor, as aforesaid.

And this relator further states that there was organized under the laws of the State of *Missouri* a certain corporation known as *The Pettis County Investment Company*, having a capital stock of *two thousand* dollars and its chief place of business in the city of *Sedalia* aforesaid, and that by virtue of certain acts of the General Assembly of the State of *Missouri* it became and was necessary for the said *Pettis County Investment Company* to deposit with the State Treasurer of the State of *Missouri one hundred thousand* dollars of good and available securities or cash, to be approved by said treasurer, for the protection of the investors in such bonds, certificates or debentures as might or should be issued by the said *Investment Company*; and thereupon the defendant association, without consideration, issued and delivered to the said State Treasurer *ninety thousand* dollars ($90,000) par value of its full paid shares of stock secured by a deposit of *one hundred thousand* dollars of its bills receivable and obligations secured by deeds of trust, as hereinbefore stated, with one *Adam Ittel* as the trustee, and the said *Ittel* signed the said indorse-

ment on the back of each of said certificates representing the said shares of stock of the tenor and effect aforesaid, and the certificates for said shares of stock to the amount of said *ninety thousand* dollars bearing the indorsement of said trustee, was by the defendant association delivered and deposited to and with the said State Treasurer as security for whatever liability might be incurred by the said *Pettis County Investment Company*, as aforesaid, and that said State Treasurer now holds said *ninety thousand* dollars of said full paid stock and the said *Adam Ittel* now holds *one hundred thousand* dollars of the said obligations and notes payable to the defendant association as security for the payment of said stock, as aforesaid.

And this relator further avers that the defendant association has continuously paid and is now paying the interest at the rate of *seven* per cent. per annum upon all of the said outstanding full paid shares of stock issued by it as aforesaid, except that held by the said State Treasurer, when it has not earned and is not now earning that amount of interest upon its stock, and that said interest is so paid upon the said full paid shares out of the capital of said association and out of the earnings belonging to the other classes of stockholders therein.

That by reason of the facts aforesaid said defendant association has rendered itself incapable and unable to prosecute the business for which it was organized and for which it received its franchise from the state, and has become and is wholly insolvent, and a continuation and perpetuation of the unlawful means and acts aforesaid is of great harm and injury to the public and a great wrong is done to all those people dealing with said association by reason of the privileges and franchises granted to it by the State of *Missouri*. And your relator avers that the said action of the defendant association, as hereinbefore alleged, is a gross perversion of the franchises granted to it by the State of *Missouri* and an usurpation of privileges not granted to it and of great injury to the public. Wherefore, the Attorney General, who prosecutes in this behalf for the State of *Missouri*, prays the consideration of the court here in the premises, and that proceedings of law may be issued against the defendant that it may be ousted of its franchises and corporate privileges.

[*R. F. Walker*, Attorney General.][1]

(3) Toll Company, for Exacting Tolls of Persons Navigating River Without Performing Conditions which Entitle It to Do So.

Form No. 16863.[2]

(*Commencing as in Form No. 10841*) gives the court here to understand and be informed, that the *James River Company*, its president and directors, by the space of *twelve* months now last past and more,

1. The matter enclosed by [ ] will not be found in the reported case.

2. *Virginia.* — Code (1887), § 3025.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 242.

This is the form of information in the case of Com. *v.* James River Co., 2 Va. Cas. 190. It was held that quo warranto was the proper remedy and leave was granted to file the information. The form is not set out in the case, but is taken from Johns. Va. Forms.

have used, and still do use, without any lawful warrant, in the county of *Henrico* aforesaid, and within the jurisdiction of this court, the following liberties and privileges, to wit:

First, to be of themselves a body corporate by the name of the *James River Company*, and secondly, for their own private gain, to levy money on the citizens of this commonwealth, bringing their produce down the river in this State called the *James River*, and down the canal commonly called the *James River Canal*, all of which said liberties and privileges the said *James River Company*, its president, and directors, upon the commonwealth, did for the space aforesaid, at the county aforesaid, and yet do usurp, to the great damage of the said commonwealth and against its peace and dignity.

And the said attorney-general of the said commonwealth, who prosecutes as aforesaid, further gives the court here to understand and be informed, that the said *James River Company*, its president, directors, and members, assuming upon themselves to be a body corporate, and respecting only their private gain and profit, have, for the space of *two* years last past, in the county of *Henrico*, and within the jurisdiction of this court, assumed an unlawful and unjust authority to demand and levy, at the county aforesaid, and within the jurisdiction aforesaid, of the citizens of this commonwealth navigating *James River* and the canal commonly called the *James River Canal*, several sums of money and tolls, according to the following rates, viz.: (*Here the rates of toll were inserted*), and if any refused to pay the tolls aforesaid, then to deny them a passage through the said river and canal; and that the said *James River Company*, its president, directors, and members, for their own private gain, for the space of *two* years last past, at the county of *Henrico* aforesaid, and within the jurisdiction of this court, received divers great sums of money, in all amounting to $*5,000* per annum, by color of the power and authority so assumed as aforesaid. And so the attorney saith, that the said company, its president, and members, the liberties and privileges of being a body corporate, and of demanding and receiving toll, for the space last aforesaid, at the county and within the jurisdiction aforesaid, did, and yet do, usurp upon the said commonwealth, against its peace and dignity, and against the acts of the General Assembly in such case made and provided.

And the said attorney general of the said commonwealth, who prosecutes as aforesaid, further gives the court here to understand and be informed, that whereas, by an act of the General Assembly of Virginia passed in the ear 1784, entitled "an act," etc., setting forth that the clearing and improving the navigation of *James River* from tide-water upwards, to the highest parts practicable on the main branch thereof, would be of great public utility, and that many persons were willing to subscribe large sums of money to effect so laudable and beneficial a work, and that it was just and proper that their heirs and assigns should be empowered to receive reasonable tolls in satisfaction for the money advanced by them in carrying the work into execution, and for the risk they run; it was, among other things, enacted, that books should and might be opened for receiving subscriptions to the amount of $*100,000* for the said undertaking, at the

places, and under the management of the persons mentioned in the said act, and in case *one-half* the said amount, or a greater sum should be subscribed, the subscribers and their heirs and assigns should be, and were thereby declared to be incorporated into a company by the name of the *James River Company*, with power to elect a president and four directors for conducting the said undertaking, and managing all the said company's business and concerns, in the manner and for the time in the said act specified, and that for and in consideration of the expenses the proprietors of the said company would be at, not only in cutting canals, erecting locks and other works for opening the different falls of the said river, and in improving and extending the navigation thereof, but in maintaining and keeping the same in repair, the said canals and works, with all their profits should be, and the same were declared by the said act to be vested in the said proprietors, their heirs and assigns forever, as tenants in common, in proportion to their respective shares, and that the same should be deemed real estate, and be forever exempt from the payment of any tax, imposition or assessment whatever, and that it should and might be lawful for the said president and directors, at all times forever thereafter, to demand and receive, at the most convenient places at or near the falls between *Westham* and tide-water, tolls according to the following table of rates, in dollars and parts of a dollar, to wit: (*Here the table of rates was inserted*). But the said tolls allowed to be demanded and received at the places above mentioned were granted, and to be paid on condition only, that the said *James River Company* should make the river aforesaid well capable of being navigated in dry seasons by vessels drawing *one* foot water at least, from the highest place practicable to the *Great Falls*, beginning at *Westham*, and should, at or near the said falls, make such cut or cuts, canal or canals, with sufficient locks, if necessary, each of *eighty* feet in length and *sixteen* feet in breadth, as would open a navigation to tide-water, in all places at least *twenty-five* feet wide (except at all such locks), and capable of conveying vessels, or rafts drawing *four* feet water at the least, into tide-water, or should render such part of the said river navigable in the natural course; and that in case the said company should not begin the said work within *one* year after the said company should be formed, or should not complete the same within *ten* years thereafter, then all the interest of the said company, and all preferences in their favor, as to the navigation and tolls aforesaid, should be forfeited and cease; provided, that in case the navigation should be opened from *Westham* to tide-water, before the opening of the river above *Lynch's Ferry*, the tolls above mentioned might be collected until the expiration of *ten* years from the time at which the said company should be formed; and whereas, by an act of the General Assembly, passed at their session in October of the year 1785, entitled "An act, etc., to amend the act" entitled "An act, etc.," it was enacted that the said company might have power to extend the shares so as not to exceed *one hundred* in addition to those already subscribed at that time, and to proportion the depth of the water in the canals to the depth of the water in the river in dry seasons, and that *Crow's Ferry*, at the mouth of *Looney's Creek*, should

be forever taken and deemed to be the highest place practicable within the meaning of the act aforesaid, entitled "An act, etc." And whereas, an act was passed by the General Assembly on the first day of October, 1790, authorizing new subscriptions for *two hundred* shares in addition to the *five hundred* shares subscribed previous to the said last mentioned act. And whereas, the said General Assembly have, from time to time, given to the said company further time to complete the work of improving and extending the navigation of the said river, to wit: By an act passed the fifteenth day of October, 1793, the further term of *six* years, and by an act passed the ninth day of October, 1799, the erection of locks, as to the time of commencement and completion, was left optional with the said company, not prohibiting any future legislature from directing the completion of the said locks whenever it should appear reasonable. And whereas, the General Assembly, by an act passed the fifth day of November, in the year 1805, setting forth the condition upon which the *James River Company* were entitled to demand tolls, and that, although they had received full tolls allowed by the act entitled "An act, etc.," since the *first* day of *May*, *1795*, they had failed, as was represented, to remove many obstructions to the navigation of the said river, and that the bed thereof was not cleared so as to be well capable of being navigated in dry seasons by vessels drawing *one* foot water, by means whereof the navigation was much impeded, and the expense of transportation considerably greater than it otherwise would have been, it was, among other things, enacted, that from and after the *first* day of *May*, 1807, the said company should not demand nor receive any of the tolls allowed by the said act, entitled "An act, etc.," unless the said company should have made the said river well capable of being navigated in dry seasons by vessels drawing *one* foot water at least, from the highest place practicable to the *Great Falls*, according to the true intent and meaning of the said act last above mentioned; and it was further enacted, that from and after the *first* day of *May*, 1810, the said *James River Company* should not demand or receive any of the tolls allowed by the said act, entitled "An act, etc.," unless, in addition to the work last above described, they should also extend the navigation to tide-water in the manner prescribed by the act last above mentioned. And whereas, this provision requiring the navigation to be extended to tide-water was, by an act passed the fourth day of January, 1806, repealed, the General Assembly, reserving the right of directing and obliging the said company to connect the navigation with tide-water, and declaring that the act last above mentioned, repealing the provision aforesaid, should not be construed to extend to alter the terms of the charter of the said company. And whereas, by an act of the General Assembly, passed the second day of March, 1806, the further time of *one* year was allowed to the said company to comply with the provisions of the above recited act of the fifth day of November, 1805. And whereas, by an act of the General Assembly, passed the third day of November, 1809, the further time of *two* years, to be computed from the time of passing the said last mentioned act, was allowed the said company to make the said river well capable of being navigated in dry seasons

by vessels drawing *one* foot water, at least, according to the terms of their charter, and the further time of *five* years, from the passing of the said act of third day of November, one thousand eight hundred and nine, was allowed, and no longer, for opening the navigation of the said river to tide-water, according to the terms of the eighteenth section of the act entitled "An act, etc.," and in case the said company should fail to complete the same in the time so limited, it was declared that it should be lawful for the General Assembly, forever thereafter, to regulate the rates of toll to be received by the said company; and, furthermore, to enforce the completion of said navigation under such terms and conditions as might be by law prescribed. Now the said attorney-general gives the court here to understand and be informed, that the said *James River Company*, its president and directors, have failed to make the said river well capable of being navigated in dry seasons by vessels drawing *one* foot water at least, from the highest place practicable, to wit: from *Crow's Ferry* to the *Great Falls*, beginning at *Westham*, in the manner prescribed, and within the time limited by the act entitled "An act, etc.," and the several acts of the General Assembly above recited, relating to the said company; and that the said company, its president and directors, contrary to the true intent and meaning of the said acts, have, for a long time last past, to wit: for the space of *three* years, suffered the navigation of the said river, and still do suffer the same to be and remain obstructed by rocks, gravel and other obstructions in the said river, which render its navigation extremely difficult and dangerous; and that the said company have failed, at or near the said *Great Falls*, to make such cut or cuts, canal or canals, with sufficient locks, and to keep the same in repair, each of *eighty* feet in length and *sixteen* feet in breadth, as would open a navigation to tide-water, in all places at least *twenty-five* feet wide (except at all such locks), and capable of conveying vessels or rafts drawing *four* feet water at the least, or, in said canals, boats drawing *four* feet water in ordinary seasons, or *one* foot water in dry seasons, into tide-water, and have failed to render such part of said river navigable in the natural course, as they were bound to do by the acts aforesaid; and further, that the said *James River Company*, its president and directors, for their own private gain, have illegally, for the space of *nine* months last past, demanded and received divers great sums of money, in all amounting to $*5,000*, from the citizens of this commonwealth, and others, navigating the said river: whereby the said *James River Company*, its president, directors, and members, the privilege, liberty, and franchise of being a body corporate, and the privilege of demanding and receiving tolls aforesaid, did forfeit, and afterwards, to wit: for the space of *nine* months now last past, did, and yet do usurp upon the said commonwealth, against the laws of the said commonwealth, its peace and dignity.

And the said attorney-general of the commonwealth aforesaid, who prosecutes as aforesaid, further giveth the said court to understand and be informed, that the said *James River Company*, its president, and directors, unlawfully assuming upon themselves to be and act as a body corporate, and respecting only their private gain and emolu-

ment, did, in the county of *Henrico* (and within the jurisdiction of this court), prior to the *first* day of *May*, in the year of our Lord one thousand eight hundred and *seventeen*, to wit, on the *first* day of *August*, in the year of our Lord one thousand eight hundred and *sixteen*, and at divers other days and times between the said *first* day of *May*, and the said *first* day of *August*, in the said county last aforesaid, and within the jurisdiction of this court as aforesaid, unlawfully assume upon themselves an unjust and unlawful authority to demand, exact, and levy, and did then and there unlawfully and unjustly demand, exact, and levy, of the following persons, citizens of the said commonwealth of *Virginia*, viz., *John Doe*, *Richard Roe*, *Samuel Short*, *William West*, *Francis Fern*, *Robert White*, *Charles Smith*, *Henry Brown*, and of divers other citizens of the said commonwealth of *Virginia*, whose names are at present unknown to the said attorney-general, divers sums of money for their bringing their produce, goods, and properties down said *James River* and the said canal commonly called the *James River Canal*, which said liberties and privileges the said *James River Company*, its president, and directors did then and there, to-wit: in the said county and jurisdiction aforesaid, unlawfully and unjustly assume and usurp, against the laws of the said commonwealth of *Virginia*, its peace and dignity; whereupon the said attorney-general of the said commonwealth, who, for the said commonwealth in this behalf prosecutes for the said commonwealth, prays the consideration of the court here in the premises, and that due process of law may be awarded against the said *James River Company*, its president, and directors in this behalf, to make them answer to the said commonwealth touching and concerning the premises aforesaid.

Daniel Webster, Commonwealth's Attorney.

2. Against Private Person or Persons.

a. Exercising Right to Appoint Commissioners of State-house and Directors of Penitentiary.

Form No. 16864.[1]

(Precedent in State *v.* Kennon, 7 Ohio St. 547.)[2]

[(*Commencing as in Form No. 6433, and continuing down to* *)][3] that *William Kennon*, and *William B. Caldwell*, and *Asahel Medbery*, for the space of *three* weeks now last past and more, have held and assumed to exercise, and yet do claim to have, hold, assume to exercise and enjoy, without any lawful grant, warrant, or right whatsoever, the liberties, authorities, privileges, and franchises, following, that is to say:

First. To appoint *three* persons who shall compose a board denomi-

1. *Ohio.* — Bates' Anno. Stat. (1897), § 6760 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 2, p. 236.

2. A general demurrer to the information in this case was overruled and, counsel for the defendants not desiring to answer, a judgment of ouster was entered.

3. The matter to be supplied within [] will not be found in the reported case.

nated "the commissioners of the state-house," and under whose direction and authority the further prosecution of the work, in the completion of the new state-house, of and belonging to the state of *Ohio*, shall be continued and carried on.

Second. To appoint *three* directors of the *Ohio* penitentiary — one for the term of *one* year, one for the term of *two* years, and one for the term of *three* years — the said office of director being a public office of great trust and responsibility, within and of the state of *Ohio*.

All which liberties, authorities, privileges, and franchises, the said *William Kennon*, the said *William B. Caldwell*, and the said *Asahel Medbery*, upon the state of *Ohio*, during all the time aforesaid, have usurped and still do usurp, to wit, at the city of *Columbus*, in the county of *Franklin*, and state aforesaid, to the damage and prejudice of the state of *Ohio*, and against its dignity.

[Whereupon the attorney-general][3] prays the consideration of the court here in the premises, and that due process of law may be awarded against the said *William Kennon*, the said *William B. Caldwell*, and the said *Asahel Medbery*, in this behalf, so that they be made to answer to the state of *Ohio* by what warrant they claim to have, hold, assume to exercise, and enjoy the several liberties, privileges, authorities and franchises herein above mentioned.

[*Christopher P. Wolcott*, Attorney-general.][1]

b. Usurping Corporate Franchises and Privileges.[2]

1. The matter enclosed by [ ] will not be found in the reported case.

2. Requisites of Complaint, Information or Petition, Generally. — See *supra*, note 2, p. 236.

Proceeding should be Against Individuals. — Proceedings against individuals unlawfully assuming to be a corporation should be against them as individuals and not in their corporate name. People *v.* Stanford, 77 Cal. 360; Distilling, etc., Co. *v.* People, 156 Ill. 448; North, etc., Rolling Stock Co. *v.* People, 147 Ill. 234; People *v.* Spring Valley, 129 Ill. 169; State *v.* Independent School Dist., 44 Iowa 227; Atty.-Gen. *v.* McArthur, 38 Mich. 204; State *v.* Commercial Bank, 33 Miss. 474; Noel *v.* Aron, (Miss. 1891) 8 So. Rep. 647; State *v.* Barron, 57 N. H. 498; State *v.* Pennsylvania, etc., Canal Co., 23 Ohio St. 121. For in the latter case the existence of the corporation is admitted. People *v.* Stanford, 77 Cal. 360; Distilling, etc., Co. *v.* People, 156 Ill. 448; North, etc., Rolling Stock Co. *v.* People, 147 Ill. 234; State *v.* Independent School Dist., 44 Iowa 227; Atty.-Gen. *v.* McArthur, 38 Mich. 204; State *v.* Commercial Bank, 33 Miss. 474; Noel *v.* Aron, (Miss. 1891) 8 So. Rep. 647; State *v.* Pennsylvania, etc., Canal Co., 23 Ohio St. 121. But in People *v.* Spring Valley, 129 Ill. 169, it was said that "Some of the authorities seem to draw a distinction between private corporations and municipal corporations, and hold that an information may be brought against a municipal corporation by its corporate name, even where its corporate existence is challenged, the proceeding in such case being against the city as a corporation *de facto*, and not as a corporation *de jure*. (*Citing* State *v.* Bradford, 32 Vt. 50; People *v.* Riverside. 66 Cal. 288.) But this exception to the general rule cannot be held to exist in the state of Illinois in the case of a municipal corporation."

In *Alabama*, by statute, the alleged corporation may be joined with the individuals as a party defendant, and such joinder does not admit its corporate existence or otherwise prejudice the case of the plaintiff. Ala. Civ. Code (1896), § 3423.

Naming governing body of alleged corporation, to wit, its chosen officers and directors, with an allegation that de-

(1) In General.

Form No. 16865.[1]

(Miss. Anno. Code (1892), § 3524.)

State of *Mississippi*, } *Circuit* Court, *October* Term, A. D. 1899.
County of *Sunflower*. }

The State of *Mississippi*, by *Jeremiah Mason*, district attorney for the *Fourth* Judicial District of the state, of his own accord (or *on the relation of John Doe*, as the case may be) gives the court here to understand and be informed that certain persons (*naming them*) have for *eight* months last past used, and still do use, the following liberties and franchises without lawful authority, to wit: (*set out the franchises,*) which said franchises and privileges the said (*Here name persons*) have usurped and still do usurp.

Wherefore the state of *Mississippi*, by said district attorney, prays that they may be debarred of such rights.

The State of *Mississippi*,
By *Jeremiah Mason*, District Attorney.

(2) Of Railroad Company.

Form No. 16866.

(Precedent in State *v.* Hancock, 2 Penn. (Del.) 252.)[2]

[In the *Superior* Court of the State of *Delaware* in and for *Kent* County.

State of *Delaware*, *ex rel. Robert C. White*, Attorney-General, against *Joseph Hancock*, *et als.*][3]

Kent County — ss.: *Robert C. White*, Attorney-General of the state of *Delaware*, who sues for the said state of *Delaware* in this behalf, comes here before the Judges of the *Superior* Court of the state of *Delaware*, in and for *Kent* county, on this *24th* day of *October*, 1899,

fendant's associates are too numerous to be brought upon the records, some are unknown, and the remainder are nonresidents, is not demurrable. The other stockholders need not be joined, since the governing body fairly represents them; but the associates are not made parties by such an allegation. State *v.* Webb, 97 Ala. 111.

Usurpation Alleged Generally. — When the state calls upon one to show cause why he claims to exercise a corporate franchise, the allegations of the attorney general may be of the most general character, and the defendant is required to set forth specifically and with the utmost certainty the grounds of his claim and the continued existence of his right. People *v.* DeMill, 15 Mich. 164; People *v.* River Raisin, etc., R. Co., 12 Mich. 389; People *v.* Mayworm, 5 Mich. 146.

Other precedents are set out in full, in part or in substance in the following cases: State *v.* Bull, 16 Conn. 179; Boston, etc., R. Corp. *v.* Midland R. Co., 1 Gray (Mass.) 340; Miners' Bank *v.* Iowa, 12 How. (U. S.) 1.

1. *Mississippi.* — Anno. Code (1892), § 3524, provides that an information filed against persons exercising corporate franchises without authority may be in the form set out in the text.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 2, p. 256.

2. In this case there was a judgment excluding the defendants from exercising the liberties and privileges alleged in the information to have been usurped.

See, generally, *supra*, note 2, p. 256.

3. The matter enclosed by [ ] will not be found in the reported case.

at the *October* term of said court, and for the said state of *Delaware* gives the said court here to understand and be informed that (*naming the defendants*) are unlawfully, and without any warrant, grant, or charter, assuming to act as a corporation under the name of "*Delaware Electric Railway Company*," and by that name are assuming perpetual succession, and by that name to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended, in any and all courts and places whatsoever, whether in this state or elsewhere, in all manner of actions, suits, complaints, pleas, causes, matters, and demands whatsoever; and, further, by that name are assuming the power to purchase, lease, take, hold and own by contract, deed, devise, bequest, gift, assignment, or otherwise, estates real, personal, or mixed, of every kind, and the same to grant, mortgage, sell, lease, alien, convey, and dispose of, and, further, to consolidate or merge with any corporation and to have a common seal, and to make and ordain by-laws, and assume to exercise and enjoy all the franchises incident to a corporation duly incorporated and organized for the purpose of locating, constructing, and operating a railway, the cars and carriages of which to be propelled by any motive power other than steam; and also unlawfully and without the authority of law, and without any warrant, grant or charter, assume to exercise the right of eminent domain and to locate, construct, maintain and operate a railway from a point on the *Delaware Bay* Shore at or near *Woodland Beach*, in *Kent* county, state of *Delaware*, to and into the town of *Milford*, in *Kent* county, aforesaid, the cars or carriages of which to be propelled by any motive power other than steam, and further unlawfully and without the authority of law and without any warrant, grant or charter assume the right to use the public roads of *Kent* county, and public bridges over said roads, and the streets of the town of *Dover* in *Kent* county and the streets of other towns in *Kent* county, for the purpose of their said railway and in fact have located a portion of their said railway within the past *two* months on the State Road immediately south of and near to the town of *Dover* aforesaid, and thereby are obstructing the free use of a portion of the said State Road, all of which said liberties, privileges and franchises the said (*naming the defendants*) have usurped, and still do usurp, to the great damage and prejudice of the state of *Delaware*.

Whereupon the said Attorney-General prays that the said court do grant a writ of quo warranto directed to the said (*naming the defendants*) commanding them and each of them that they be and appear in said court on some day to be named by said court, to show by what warrant or authority they claim to have and exercise the liberties, privileges and franchises aforesaid.

Robert C. White,
Attorney-General of the State of *Delaware*.

Form No. 16867.[1]

(Precedent in State *v.* Roosa, 11 Ohio St. 17.)[2]

1. *Ohio.* — Bates' Anno. Stat. (1897), § 6760 *et seq.*
See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 2, p. 256.

2. An answer was filed to the in-

[(*Title of court and cause as in Form No. 6433.*)

Now comes *John R. Wolcott*, the duly elected, qualified and acting attorney general of the state of *Ohio*, at the relation of *John Drake*, a citizen of *Warren* county, in said state, and gives the court to understand and be informed]¹ that *James M. Roosa*, *Jacob Egbert*, *Daniel Voorhis*, *Durbin Ward*, *James M. Fisher* and *James Boyer*, of *Warren* county, and *John Cox*, of *Hamilton* county, *Ohio*, for the space of *three* months last past, and more, have assumed to exercise, and do yet claim to exercise, under the name of the *Cincinnati*, *Lebanon and Xenia Railroad Company*, without any lawful grant, warrant or right whatever, the privileges and franchises following, to-wit: 1. The right to exercise corporate powers and franchises as a railroad company, to sue and be sued, to plead and be impleaded. 2. The right to construct a railroad from *Xenia* through *Lebanon* to *Cincinnati*; and to purchase, receive and hold all real and personal estate necessary for the proper construction and maintenance of said road. All of which authorities, privileges and franchises the said *James M. Roosa*, *Jacob Egbert*, *Daniel Voorhis*, *Durbin Ward*, *James M. Fisher*, *James Boyer* and *John Cox*, during all the time aforesaid, have usurped, and still do usurp, to-wit; at the county of *Warren* and state aforesaid, to the damage and prejudice of the state of *Ohio*, and against its dignity.

The said attorney general, therefore, prays the consideration of the court here in the premises, and that due process of law may be awarded against the said *James M. Roosa*, *Jacob Egbert*, *Daniel Voorhis*, *Durbin Ward*, *James M. Fisher*, *James Boyer* and *John Cox*, in this behalf, so that they be made to answer to the state of *Ohio*, by what warrant or authority of law they claim to have, hold, assume, exercise and enjoy the several powers, privileges, authorities, rights and franchises hereinabove mentioned.

[*John R. Wolcott*, Attorney general.]²

c. Usurping Offices in Private Corporation.³

(1) Churchwarden and Vestrymen.

Form No. 16868.⁴

formation in this case, which, on demurrer, was held sufficient. The substance of the answer is set out in the case.

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

2. The matter enclosed by [ ] will not be found in the reported case.

3. **Requisites of Complaint, Information or Petition, Generally.** — See *supra*, note 2, p. 236.

Existence of Corporation. — Where the court is called upon to remove an officer of a corporation whose election or appointment is not required by any general or special law of the state, but whose existence and right to act depends upon the acts of a corporation which the general laws of the state permit to be organized, the facts showing the creation of such corporation should be alleged, and also the facts showing that under the authority of such corporation the person sought to be ousted was in fact holding an office under such corporation. People *v.* DeMill, 15 Mich. 164 (*cited* with approval in State *v.* Dahl, 65 Wis. 510).

4. *New York.* — Code Civ. Proc., § 1948.

See also list of statutes cited *supra*,

(Precedent in St. Stephen Church Cases, (C. Pl. Tr. T.) 25 Abb. N. Cas. (N. Y.) 253.)[1]

[(*Title of court as in Form No. 5926.*)

The People of the State of New York, at the relation of *James Blackhurst*, *James Maclaury*, *Theodore E. Smith*, *William G. Gardner*, *William W. Warren*, *William J. Smith* and *Woodruff Smith*, plaintiffs, against *Stephen R. Weeks*, *Thomas F. Cock*, *Edmund K. Linen*, *Edmund Luis Mooney*, *Henry W. Mooney*, *S. Montgomery Pike* and *William G. Smith*, defendants. } Complaint.

The people of the state of *New York*, by their attorney general, at the relation of *James Blackhurst*, *James Maclaury*, *Theodore E. Smith*, *William G. Gardner*, *William W. Warren*, *William J. Smith* and *Woodruff Smith*, allege:][2]

I. That the rector, church-wardens and vestrymen of the *Protestant Episcopal Church of St. Stephen* in the city of *New York*, are a religious corporation created by and organized under section *1* of chapter *60* of the Laws of 18*13* in the state of *New York*.

II. That said corporation has its church edifice in an excellent locality in said city, to wit: on *Forty-sixth* street between *Fifth* and *Sixth* avenues.

III. That the said corporation has an annual income of upwards of $*8,000* from real estate in said city, and the total value of the property owned by the said corporation is upwards of $*150,000* over and above all incumbrances and debts.

IV. That on the *7th* day of *April*, 18*90*, at an annual election duly held by the said corporation, pursuant to the statutes of this state and the articles of incorporation, and the by-laws of said corporation, and pursuant to a peremptory writ of mandamus duly issued from the *supreme* court, for the election of *two* church-wardens and *eight* vestrymen of said corporation for the term of *one* year from said date, the relator, *James Blackhurst* and one *Charles E. Fleming*, received respectively the greatest number of votes for the said office of church-wardens, and were duly elected, and the relator *James Maclaury*, *Theodore E. Smith*, *William G. Gardner*, *William W. Warren*, *William J. Smith*, and *Woodruff Smith*, and one *William S. Watson* and one *Charles Schroeder*, received respectively the greatest number of legal votes for the said office of vestrymen and were duly elected.

V. That on the *7th* day of *April*, 18*90*, the defendant, *Stephen R. Weeks*, usurped the said office of church-warden, and has ever since unlawfully exercised the same and withheld the same from the said relator, *James Blackhurst*, and that on the said *7th* day of *April*, 18*90*, the defendants, *Thomas F. Cock*, *Edmund K. Linen*, *Edmund Luis Mooney*, *Henry W. Mooney*, *S. Montgomery Pike* and *William G.*

note 1, p. 217; and, generally, *supra*, note 3, p. 259.

1. In this case judgment of ouster was rendered.

2. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

Smith, respectively usurped the said office of vestrymen and have ever since exercised the same and withheld the same from the said relators *James Maclaury*, *Theodore E. Smith*, *William G. Gardener*, *William W. Warren*, *William J. Smith*, and *Woodruff Smith*.

Wherefore the plaintiffs demand judgment with costs:

1. That the said defendants, and each of them, have unlawfully usurped the said offices and are not entitled to the same, and that they and each of them be ousted therefrom.

2. That the relators and each of them are entitled to said offices respectively and to assume the execution of the duties of the same.

[*Jeremiah Mason*, Attorney General.
Booraem, *Hamilton & Beckett*,
Attorneys for Relators.][1]

(2) Directors of Savings Bank.[2]

1. The matter enclosed by [ ] will not be found in the reported case.

2. Another Precedent. — In People *v.* Richardson, 4 Cow. (N. Y.) 97, note, this form of information, filed in People *v.* Kip, is set out:

"*Samuel A. Talcott*, Attorney General of the People of the state of *New York*, who sues for the said people in this behalf, comes here into the *Supreme* Court *of Judicature* of the said people, before the Justices thereof, at the capitol in the city of *Albany*, on *Thursday*, the *8th* day of *August*, in the year of our Lord one thousand eight hundred and *twenty-two*, in this same term of *August*; and for the said people of the state of *New York*, at the relation of *Jacob Barker*, *Thomas Hazard*, *Jr.*, and *Thomas M. Huntington*, all of the city of *New York*, in the county of *New York*, according to the form of the statute in such case made and provided, gives the court here to understand and be informed, that in and by a certain act of the legislature of the state of New York, passed on the twenty-third day of March, in the year of our Lord one thousand eight hundred and twenty-one, all such persons as then were, or thereafter should become, stockholders of a certain company, associated under the style of the '*North River Bank of the city of New York*,' were ordained, constituted, and declared to be, from time to time, and until the *first* day of *July*, in the year of our Lord one thousand eight hundred and *forty-two*, a body corporate and politic, in fact and in name, by the name of '*The President. Directors and Company of the North River Bank of the city of New York*;' and that, in and by the said act, it was also, amongst other things, enacted, that the stock, property, affairs and concerns of the said corporation should be managed and conducted by *thirteen* directors, being stockholders and citizens of the said state, and to be elected from time to time, as in and by the said act was enacted and provided; and that the President, Directors and Company of the *North River Bank of the city of New York*, by force of the said act, now are, and for *one* year last past, and more, have been a body corporate and politic, in fact and in name, by the name of '*The President, Directors and Company of the North River Bank of the city of New York*;' that is to say, at the city of *New York*, and in the county of *New York* aforesaid; and that *L. K. merchant*, and *D. R. merchant*, *J. C. M. druggist*, etc., all late of the city of *New York*, in the county of *New York* aforesaid, for the space of *thirty* days now last past, and more, without any legal warrant, grant, or right, whatsoever, have used and exercised, and still do use and exercise, the office of directors of the said corporation, to wit, at the city of *New York*, and in the county of *New York* aforesaid; and that each of them hath used and exercised, and still doth use and exercise, the office of director of the said corporation, to wit, at the place and in the county aforesaid; and that the said *L. K.*, *D. R.*, etc., for and during all the time last above mentioned, without any legal warrant, grant or right, whatsoever, at the city of *New York*, and in the county of *New York*, have claimed, and still do claim, to be

Form No. 16869.[1]

(Precedent in Com. *v.* Gill, 3 Whart. (Pa.) 228.)[2]

In the *Supreme* Court for the *Eastern* District of *Pennsylvania*, of *December* Term, 1837.

City and County of *Philadelphia*, ss.

Be it remembered, that *Peter Fritz*, *Benjamin Duncan*, *Henry Huber*, *Jr.*, *Thomas Fletcher*, *John M. Burns*, *Thomas P. Roberts*, *Morgan Ash*, *John S. Warner*, *Charles Johnson*, *Jr.*, *Thomas T. Ash*, *Samuel Eckstein*, *Joseph L. Dutton* and *William C. Rudman*, who sue for the Commonwealth in this behalf, come here into court, and give the court here to understand and be informed, that, by an Act of Assembly, duly passed and approved the *5th* day of *April*, A. D. 1834, entitled "An Act to incorporate the *Philadelphia Savings Institution*," the relators, together with certain other persons named in the said act, and all and every other person or persons thereafter becoming members of the *Philadelphia Savings Institution*, in the manner hereinafter mentioned, were created and made a corporation and body politic, with the name and style of the *Philadelphia Savings Institution*, with the franchises, privileges, and incidents of a corporation; and it was provided, that *thirteen* directors should be annually chosen and elected from among the members of the said corporation, by the members thereof, to manage the affairs of the said corporation, all which in and by the said Act of Assembly, reference being thereunto had, will more fully and at large appear; and the relators annex hereto a copy of the said Act of Assembly, and pray that the same may be taken as a part of this suggestion and information, as if it were herein fully recited and set forth at large. And the relators further give the court here to understand and be informed, that the members of the said corporation afterwards, viz. on the *30th* day of *June*, A. D. 1834, at the county aforesaid, viz. on the *30th* day of *June*, A. D. 1834, at the county aforesaid, at a general meeting of the members thereof, duly convened and held, duly passed and enacted certain by-laws of the said corporation, one of which by-laws is the words following viz.: "Law 5. No person shall be eligible as a member, until he shall have been a depositor *one* year, or a stockholder *six* months. All elections for membership shall be by ballot, at a general meeting of the institution, at which the votes of two-thirds of the whole number of members of the institution shall be requisite for

directors of the said corporation; and each of them hath claimed, and still doth claim, to be a director of the said corporation, and to have, use and enjoy, all the liberties, privileges and franchises, to the office of directors of the said corporation belonging and appertaining; which said offices, liberties, privileges and franchises, they, the said *L. K.*, *D. R.*, etc., for and during the whole time last above mentioned, upon the said people have usurped, and still do usurp, and each hath usurped, and still doth usurp, that is to say, at the city of *New York*, and in the county of *New York* aforesaid, in contempt of the people of the state of *New York*, and to their great damage and prejudice, and also against their dignity.

(Filed August 10th, 1822.)

Samuel A. Talcott,
Attorney General."

1. *Pennsylvania*. — Bright. Pur. Dig. (1894), p. 1773, § 1 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 3, p. 259.

2. There was a judgment of ouster in this case.

admission;"— which said recited by-law remains in force and unrepealed.

And the members of the said corporation, afterwards, to wit, on the *31st* day of *January*, A. D. 18*36*, at the county aforesaid, at a general meeting of the members thereof, duly convened and held, duly passed and enacted certain other by-laws of the said corporation, one of which last mentioned by-laws is in the words following, viz: "Law 5. Any person may be eligible as a member of this institution, who may have been a stockholder *six* months, or a weekly depositor for *one* year. Candidates for membership shall be balloted for at the next general meeting after being nominated;"— which said last recited by-law remains in full force and unrepealed

And the relators further give the court here to understand and be informed, that *William Gill*, *Samuel Chew*, *George J. Pepper*, *Abraham Hart*, *James Musgrave*, *Jr.*, *John Leadbeater*, *Sr.*, *William Sharpe*, *Edward D. Wolfe*, *George Guest* and *Benjamin F. Hagner*, nor any of them, were not originally, nor have not at any time been elected or admitted members of the said corporation. And the relators further give the court here to understand and be informed, that at a meeting of the members of the said corporation, duly held on *Monday*, the *1st* day of *May*, A. D. 18*37*, (agreeably to the charter and by-laws thereof, and to the provisions of a joint resolution passed by the Senate and House of Representatives, and approved by the Governor of the Commonwealth, on the *3d* day of *April*, A. D. 18*37*, by which it was enacted, among other things, that the directors of the said corporation should be elected on the *first Monday* in *May* then next, and on the *first Monday* in every *May* thereafter annually); the relators were by the members thereof duly chosen and elected directors, to manage the affairs of the said institution for *twelve* months thereafter, and until a new election shall take place. But notwithstanding the premises, and the said election, the said *William Gill*, *Samuel Chew*, *George J. Pepper*, *Abraham Hart*, *James Musgrave*, *Jr.*, *John Leadbeater*, *Sr.*, *William Sharpe*, *Edward D. Wolfe*, *George Guest* and *Benjamin F. Hagner*, have, during all the time since the said *1st* day of *May*, A. D. 18*37*, used, and still do use, the franchises, offices, privileges and liberties of directors of the said *Philadelphia Savings Institution*, and during the said time, have usurped, and do usurp upon the Commonwealth therein, to the great damage and prejudice of the constitution and laws thereof. Whereupon the said relators for the said Commonwealth do make suggestion and complaint of the premises, and pray due process of law against the said *William Gill*, *Samuel Chew*, *George J. Pepper*, *Abraham Hart*, *James Musgrave*, *Jr.*, *John Leadbeater*, *Sr.*, *William Sharpe*, *Edward D. Wolfe*, *George Guest* and *Benjamin F. Hagner*, in this behalf, to be made to answer to the said Commonwealth, by what warrant they claim to have and enjoy the franchises, offices, liberties and privileges aforesaid.

Dec. 26, 18*37*.

[(*Signature and verification.*[1])][2]

1. **Verification.** — Suggestion must be verified by affidavit. Bright. Pur. Dig. Pa. (1894), p. 1774, § 7.
For a form of verification in a particular jurisdiction see the title VERIFICATIONS.

2. The matter to be supplied within [ ] will not be found in the reported case.

d. Usurping Public Office.[1]

1. Office must be Authorized by Law. — It is well settled that an information in the nature of a quo warranto will not lie where the right to an office is not a legally authorized public office. The reason for this rule is obvious. The state interposes only on the ground that its sovereign right is interfered with by usurpation of one of its offices; that is, of an office that at least derives its authority from the state, and seeks to clear the office from a usurping incumbent for the purpose of instating the person rightfully entitled. State *v.* North, 42 Conn. 79.

Requisites of Complaint, Information or Petition, Generally. — See *supra*, note 2, p. 236.

Name of Person Entitled to Office. — When the action involves the right to an office, the complaint should name the person rightfully entitled to it, with a statement of his right thereto.

Alabama. — Civ. Code (1896), § 3429.

Arizona. — Rev. Stat. (1901), § 3795.

California. — Code Civ. Proc. (1897), § 804.

Colorado. — Mills' Anno. Code (1896), § 290.

Idaho. — Rev. Stat. (1887), § 4613.

Indiana. — Horner's Stat. (1896), § 1134; Chambers *v.* State, 127 Ind. 365; Reynolds *v.* State, 61 Ind. 392.

Iowa. — Code (1897), § 4319.

Kansas. — Gen. Stat. (1897), c. 96, § 99.

Michigan. — Comp. Laws (1897), § 9941; Vrooman *v.* Michie, 69 Mich. 42.

Minnesota. — Stat. (1894), § 5966.

Montana. — Code Civ. Proc. (1895), § 1415.

Nebraska. — Comp. Stat. (1899), § 6298; State *v.* Stein, 13 Neb. 529.

Nevada. — Comp. Laws (1900), §§ 3416, 3789.

New York. — Code Civ. Proc., § 1949.

North Carolina. — Code Civ. Proc. (1900), § 609.

North Dakota. — Rev. Codes (1895), § 5745.

Ohio. — Bates' Anno. Stat. (1897), § 6766; State *v.* Heinmiller, 38 Ohio St. 101.

Oklahoma. — Stat. (1893), § 4561.

Oregon. — Hill's Anno. Laws (1892), § 361.

South Carolina. — Code Civ. Proc. (1893), § 431.

South Dakota. — Dak. Comp. Laws (1887), § 5350.

Tennessee. — Code (1896), § 5175.

Utah. — Rev. Stat. (1898), § 3614; People *v.* Clayton, 4 Utah 421.

Vermont. — Stat. (1894), § 1620.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 5783.

Wyoming. — Rev. Stat. (1887), § 3098. The statutory provision is, however, satisfied by an information filed by the attorney general in behalf of the people on relation of Smith Salkenbury, which charges Marcus H. Miles, defendant, with usurping the office of county clerk of the county of St. Clair; requires him to show his title thereto, and, in addition to the usual averments contained in pleadings of this nature at common law, contains the following allegation: "That said *Smith Salkenbury*, by virtue of due and regular election, is in law and right entitled to have, hold and exercise," etc. It is not necessary for relator to set forth his title to the office. The proceeding is on behalf of the people against the defendant, to try his right to the office which he is alleged to usurp, and the sole issue must be as to his right. People *v.* Miles, 2 Mich. 348.

Creation of Office Usurped — *Generally.* — In a proceeding against a person usurping a public office, no allegation is, as a general rule, necessary to show how it was created, since the court takes judicial notice of the existence of the office. People *v.* DeMill, 15 Mich. 164; State *v.* Dahl, 65 Wis. 510. In State *v.* Dahl, 65 Wis. 510, which was a proceeding against a person usurping the office of treasurer of a school district, it was held that the court must take judicial notice that there was such a public office as treasurer of the school district, and that it was unnecessary to show how the office was created. If any allegation of the existence of the school district was necessary, it was sufficient to allege it in general words. It was further held that if defendant wished to push his defense upon the ground that he had not in fact intruded into and exercised the duties of the office charged to have been usurped, and the complaint made the charge in general form, he should show that fact by affidavit and ask to have the complaint made more definite and certain in regard to that matter, so that he might be notified of the specific acts of user and the acts relied

(1) In General.

upon by the state to substantiate such charge of usurpation.

Where statute creating office is local or private, the existence of the law creating the office must be shown. Lavalle *v.* People, 68 Ill. 252; Minck *v.* People, 6 Ill. App. 127; Wasner *v.* People, 6 Ill. App. 129. And to charge defendant with usurping "the office of school trustee of the inhabitants of the village of Cahokia" is insufficient, because no such office was known to any general or public law of the state. Minck *v.* People, 6 Ill. App. 127.

In Lavalle *v.* People, 68 Ill. 252, the information charged that defendant "was unlawfully executing the duties and exercising the powers of supervisor of the village of *Cahokia*, in *St. Clair* county, and that he has, since the *first* day of *March*, 1870, unlawfully executed the duties and exercised the powers of supervisor of the village of *Cahokia*, and received and enjoyed the emoluments thereof." This was held to be too indefinite, since the office was not created by a general law, but was local and peculiar to that village, and therefore the court was not charged with judicial knowledge of the existence and duties of this office; but that even if the courts were bound to judicially take notice of these facts, the information neither charged the defendant with intruding into or usurping the office nor specified in what way he "unlawfully executed the duties and exercised the powers" of the office.

Title of Claimant — *Generally.* — The complaint or information to oust an alleged usurping incumbent of a public office must state facts showing title in the claimant or relator. State *v.* Price, 50 Ala. 568; Territory *v.* Hauxhurst, 3 Dak. 205; Buckman *v.* State, 34 Fla. 48; State *v.* Kennerly, 26 Fla. 608; Howes *v.* Perry, 92 Ky. 260; Toney *v.* Harris, 85 Ky. 453; Vrooman *v.* Michie, 69 Mich. 42; State *v.* Oftedal, 72 Minn. 498; Miss. Anno. Code (1892), § 3522; Andrews *v.* State, 69 Miss. 740; State *v.* Boal, 46 Mo. 528; State *v.* Hamilton, 29 Neb. 198; State *v.* Stein, 13 Neb. 529; Miller *v.* English, 21 N. J. L. 317; People *v.* Ryder, 12 N. Y. 433; Com. *v.* Cluley, 56 Pa. St. 270. And must show that the claimant or relator has a better title to the office than the incumbent. Crovatt *v.* Mason, 101 Ga. 246; Collins *v.* Huff, 63 Ga. 207; State *v.* Moores, 52 Neb. 634; State *v.* Boyd, 34 Neb. 435; State *v.* Hamilton, 29 Neb. 198; People *v.* Perley, 80 N. Y. 624. It has been held, however, that if the usurpation by the defendant is sufficiently stated the complaint or information must stand, whether the rights of the claimant or relator are well pleaded or not, the claim of the claimant or relator in such cases being disregarded. People *v.* Abbott, 16 Cal. 358; People *v.* McIntyre, 10 Mont. 166; State *v.* Palmer, 24 Wis. 63. Thus, in People *v.* Abbott, 16 Cal. 358, where a complaint for the usurpation of office of pilot for the port of San Francisco averred that the defendant held, used, exercised, usurped and enjoyed the office without a license, and also contained allegations as to the right of the relator to the office, it was held that the allegations as to relator's right could not be reached by general demurrer, since such allegations, if insufficient to authorize a determination of the rights of relator, might be disregarded, the object of the proceeding being to determine defendant's right to hold the office he was charged with usurping, the maintenance of which right was not involved in the denial of the rights usurped by the relator.

In People *v.* Ryder, 12 N. Y. 433, a complaint which alleged that at an election legally held in a county named, pursuant to the statute, for the election, among other officers, of a county judge for such county, for the term of four years from the first day of January, 1852, the relator, who was a party plaintiff with the people, received a majority of the votes given for the office of county judge, and was legally elected to such office for such term, was held, on demurrer, to state facts sufficient to show that relator was entitled to the office.

Where proceeding is by attorney general, it devolves upon the respondents to show that they were rightfully inducted into office; in other words, that they were elected or appointed and are acting under a constitutional law. State *v.* Moores, 52 Neb. 634; State *v.* Tillma, 32 Neb. 789; State *v.* Hamilton, 29 Neb. 198; State *v.* Heinmiller, 38 Ohio St. 101.

Eligibility of Relator — *Generally.* — The complainant or relator must aver his eligibility to the office claimed. McGee *v.* State, 103 Ind. 444; Weir *v.* State, 96 Ind. 311; State *v.* Foulkes,

94 Ind. 493; State *v.* Bieler, 87 Ind. 320; Reynolds *v.* State, 61 Ind. 392; Callopy *v.* Cloherty, 95 Ky. 330; State *v.* Boal, 46 Mo. 528; State *v.* Hœflinger, 35 Wis. 393.

The omission of an averment of eligibility does not merely render the information uncertain or indefinite, so that a motion to make it more specific in its averments is an appropriate remedy, but it is the omission of a necessary fact and is not cured by an answer which contains no averment in regard to the eligibility of relator. State *v.* Long, 91 Ind. 351.

In State *v.* Boal, 46 Mo. 528, it was held that an information which stated that relator received a majority of the votes and filed the required oath, and there stopped, so far as any attempt was made to set out his qualifications to the office, was insufficient, it being necessary, in order to show title to the office in him, that it should further appear that he was a resident qualified voter in the district; that is, that he resided in the district, that he had resided in the state one year, and that he had registered and thereby became a qualified voter.

General Averment Sufficient. — An averment of relator that he was eligible to be elected and to hold a certain office is sufficient, since eligibility is not a conclusion, but is as much a fact as ownership. Jones *v.* State, 153 Ind. 440; State *v.* Long, 91 Ind. 351. And see to the same effect State *v.* Crowe, 150 Ind. 455, where an information which alleged that relator was eligible was held sufficient against an objection that the information failed to allege that relator had been an inhabitant of the county during one year next preceding his appointment to a county office, a qualification required of all county officers by the constitution.

In State *v.* Hœflinger, 35 Wis. 393, an objection to the complaint for the reason that it contained no averment that the plaintiff was a citizen of the United States was held not well taken, where the allegation upon that point was that the "plaintiff was and is a legal and qualified elector of said county, and now is and was eligible to such office at the time of said election." This is a sufficient allegation of legal qualification for the office of county treasurer.

Facts Showing Eligibility. — However, it is not necessary that the complaint should in express terms aver that the relator is eligible. It is sufficient if such facts are stated as show him to be eligible. Weir *v.* State, 96 Ind. 311; State *v.* Long, 91 Ind. 351. Thus, where the only requisite to eligibility prescribed by the statute is that the person elected shall be a physician, an allegation that the relator was a physician and surgeon at the time of his election was held sufficient in Weir *v.* State, 96 Ind. 311.

In Collopy *v.* Cloherty, 95 Ky. 330, in an action to recover possession of a certain office created by an ordinance of the board of councilmen, and to which the plaintiff claimed to have been elected, it was held not necessary to set forth the entire ordinance creating the office in question, but to state substantially only so much thereof as was necessary to show prima facie plaintiff's title to recover, and that it was not necessary to allege in terms that plaintiff was eligible to the place, as it was not the duty of the board of councilmen to prescribe in terms any specific conditions or qualifications for such office, and consequently the election of plaintiff, which he alleged took place duly and regularly, was conclusive of his eligibility.

That relator has qualified for office need not be alleged. Territory *v.* Hauxhurst, 3 Dak. 205.

Objections to title of defendant should be specified in the complaint. State *v.* Price, 50 Ala. 568.

Number of votes cast for each candidate need not be stated. People *v.* Ryder, 12 N. Y. 433; State *v.* Brunner, 20 Wis. 62. But it is sufficient to allege generally that relator received a majority of the number of the legal votes cast. State *v.* Bulkeley, 61 Conn. 287; Territory *v.* Hauxhurst, 3 Dak. 205; Collopy *v.* Cloherty, 95 Ky. 330; People *v.* Ryder, 12 N. Y. 433; State *v.* Stinson, 98 N. Car. 591; Fowler *v.* State, 68 Tex. 30; State *v.* Brunner, 20 Wis. 62. Or that he was duly elected and chosen by the legal and qualified voters. State *v.* Brunner, 20 Wis. 62. In State *v.* Bulkeley, 61 Conn. 287, an information was filed to settle the right to the office of governor by reason of an election in which relator and defendant were the contestants. The information did not allege that the relator had the majority of all the votes, but only the

majority as it appeared by the returns of the presiding officers, while other parts of the information showed that such apparent majority was in dispute; nor did the information contain any allegation of facts which showed that the general assembly had become unable to decide upon relator's right to the office he claimed. The information was held insufficient, but the court said: "If the relator shall hereafter, by an amendment of the present information, or by a new one, allege that he received a majority of all the votes lawfully cast for governor on the *fourth* day of *November*, 1890, and it shall also appear from the facts therein stated that the general assembly is without power to make any declaration in respect to the election for governor, a case will be presented of which the superior court might take jurisdiction."

An allegation that a quorum of the board of councilmen was present when plaintiff was elected to the office, and he received a majority of the votes, is sufficient, for whether or not a majority of a quorum was a sufficient number of votes to elect was a question to be determined by reference to the charter and rules of the board not inconsistent therewith. Collopy *v.* Cloherty, 95 Ky. 330.

An allegation in a complaint that at a certain election there were cast for register of deeds "*three thousand six hundred and twenty-nine* votes, of which number *one thousand nine hundred and fifty-eight* were voted for relator, *one thousand six hundred and fifty-four* for the defendant," and seven for another party, and that the relator "was duly elected register of deeds at such election," shows sufficiently that such relator received a majority of the votes cast at the election. State *v.* Hubbs, 98 N. Car. 589.

Time of Election. — An allegation that at an election duly and legally held in a certain county pursuant to the statute in such case made and provided, for the election, among other officers, of a county judge of said county, to discharge the duties of said office of county judge from the first day of January, 1852, for the term of four years, the relator was elected, is, on demurrer, a sufficient statement of the time when the election was held, since there is a reference to the statute which fixes the precise time. People *v.* Ryder, 12 N. Y. 433.

That Votes Cast were Legal. — An allegation that relator has been elected sheriff of Craven county over the defendant "by a majority of *three hundred and twenty* votes, and by a large majority over other persons voted for," etc., is sufficient, such allegation implying a majority of the "legal votes." State *v.* Stinson, 98 N. Car. 591.

Qualifications of Voters. — Complaint or information need not set forth the facts which constitute the qualifications of voters, since the statute enumerates what facts must exist to qualify a person to vote, and an averment that a voter is qualified so to do is in fact to aver that he possesses all the qualifications. Fowler *v.* State, 68 Tex. 30. But where the claim of the relator is that ballots were not properly counted, on the ground that the persons casting them lacked some of the qualifications named in the statute, when in fact they possessed them all, and that thereby the relator lost the election, more definite allegations as to the qualifications of electors might be required. Fowler *v.* State, 68 Tex. 30.

Names of Illegal Voters. — In the absence of statute, it is not necessary to state the names of the alleged illegal voters. If the complaint alleges that a certain number of illegal votes were cast for defendant, that is enough.

Ballots Not in Form Prescribed by Statute. — Where the claim of the relator is that the ballots were not in the form prescribed by the statute, he must show in what manner they failed to conform to the statutory requirements. Conner *v.* McLaurin, 77 Miss. 373.

Ballots Not Distributed as Required by Law. — Where the claim of relator is that the ballots were not distributed as required by law, he must show in what particular the distribution of ballots was illegal. Conner *v.* McLaurin, 77 Miss. 373.

Manner of Voting Illegal. — Where the claim of relator is that the manner of voting was illegal, he must show what violations of law were committed by the managers or voters in the use of the ballot. Conner *v.* McLaurin, 77 Miss. 373.

Manner in which officers erred in rejecting returns need not be alleged specifically. State *v.* Patterson, 98 N. Car. 593. And an allegation that the relator had been duly elected treasurer of Craven county at an election held in November, 1886, and that the county officers had illegally rejected certain returns and declared the defendant

elected, is sufficient. State *v.* Patterson, 98 N. Car. 593.

Name of each voter whose vote was not counted need not be stated. It is sufficient to allege that there were mistakes in the counts of the votes actually deposited and to aver the number of votes actually received by each of the parties, relator and defendant, at each of the precinct boxes. Davis *v.* State, 75 Tex. 420.

Unconstitutionality of Statute. — Where usurpation of office consists in the the fact that defendant who was elected to the office in question was ineligible by reason of an unconstitutional statute, it is not necessary to set out the statute or allege its unconstitutionality, for the court will take judicial knowledge of its existence and provisions. State *v.* Stevens, 29 Oregon 464. But see Van Riper *v.* Parsons, 40 N. J. L. 1. This was an action against a person for usurping an office under a legislative act which was alleged to be unconstitutional in that it was local. It was shown upon trial that defendant was clothed with the office by force of popular election duly held in accordance with the act. The court held that under such circumstances the regularity and validity of the act would be strongly implied, and the facts necessary to vacate it should be set out in a direct and traversible form; further, that an allegation that the statute was special and local as to the particular place was not a statement of a fact, but a naked inference as to the law and was insufficient.

Demand of possession of office by relator need not be alleged. Territory *v.* Hauxhurst, 3 Dak. 205.

Anticipating Defense — Where defendant's title to office is questioned, relator need not anticipate that defendant will justify under an election and show in advance its invalidity. That is matter for the replication. People *v.* Cooper, 139 Ill. 461.

Precedents. — In State *v.* Minton, 49 Iowa 591, the petition, omitting formal parts, was as follows:

"That on the *28th* of *January*, 1878, he was duly appointed school treasurer of the school board of the district township of *Raglan*, in *Harrison* county, *Iowa*, to fill the vacancy caused by the resignation of *Hiram Smith*, the then duly elected and qualified incumbent of the said office; that the defendant is unlawfully exercising and has usurped said office, in this: that on the election and qualification of the said *Hiram Smith*, as provided by law, the said defendant, whose term of office as school treasurer had expired, failed and refused to deliver over to the said *Hiram Smith*, his successor in office, the books, papers, moneys and effects of his said office, though requested so to do; that after the resignation of the said *Hiram Smith*, duly made to said school board, and accepted by them, and the appointment and qualification of this plaintiff to fill the vacancy, as stated aforesaid, the said defendant still refused and failed to deliver over to said plaintiff the books, papers, moneys and effects to the said office in his hands, though requested so to do by plaintiff, but, on the contrary, defendant claims to be, and acts as, the treasurer of the said district township of *Raglan*; that, before the filing of this petition or information, the informant demanded and requested the proper district attorney of the *Fourth* Judicial District of *Iowa*, to-wit: *George B. McCarty*, to commence and institute this proceeding, and that he has neglected and refused to do so. Therefore, plaintiff demands that the defendant be ousted and altogether excluded from said office; that he be adjudged to pay the costs of this proceeding, and that an order be issued by the court requiring the defendant to deliver over to the plaintiff all books, papers and moneys in his custody or under his control belonging to said office."

The information was entitled Charles Gilmore *v.* Jacob Minton. A demurrer was filed. This was overruled, although the court directed an amendment to the petition entitling the cause "State of *Iowa*, on the relation of *Charles Gilmore* vs. *Jacob Minton*." A judgment of ouster was rendered, and this judgment was affirmed.

In People *v.* Riordan, 73 Mich. 508, the information charged that "the respondent, for the space of *one* month and upwards last past, hath held, usurped, and intruded into, and claims to exercise, a false, fictitious, and pretended office of supervisor of supervisor district number *11*, a supervisor district created by ordinance adopted by the common council of the city of *Muskegon*, and claims and pretends to be a member of the board of supervisors of said county of *Muskegon*, and without any legal election, appointment, warrant, or authority whatsoever, from any legal ward or supervisor

district of the said city; and that since the election held in *April*, 1888, said *Dennis Riordan*, claiming by virtue of said election, hath usurped and intruded into, and claims to exercise, and still doth usurp, intrude into, and unlawfully claims to hold and exercise said false, fictitious, and pretended office known as the office of supervisor of the pretended and illegal so-called supervisor district number *11*, of said city of *Muskegon*," etc.

There was a judgment of ouster.

In People *v.* Clayton, 4 Utah 421, the complaint alleged that " in the year A. D. 1879, the said defendant, *Nephi W. Clayton*, did usurp and intrude into the office of auditor of public accounts in and for the said territory of *Utah*; and ever since that time he has, and does still, hold and exercise the functions of said office without authority of law therefor." The complaint further stated that "on the *twenty-fifth* day of *January*, A. D. 1886, and during the session of the *twenty-seventh* legislative assembly of said territory, *Eli H. Murray*, governor of said territory, duly nominated *Arthur Pratt* to be auditor of public accounts for said territory, and did then and there present the name of the said *Arthur Pratt* to the legislative council of said territory while the same was in session, and requested its advice and consent to the appointment of said *Pratt* to the said office; that the said council arbitrarily, and without lawful right or excuse, failed, neglected and refused to take any action whatever upon said nomination so presented; that the said session of the said legislative assembly and council expired on the *twelfth* day of *March*, A. D. 1886, and the same finally adjourned on that day without having taken any action whatever upon said nomination, and leaving the said office without any lawful incumbent. Plaintiff further alleges that the governor of said territory, at the *twenty-fifth* and *twenty-sixth* sessions of said legislative assembly, nominated and presented to said council the name of a person to fill the said office of auditor of public accounts; but the said council, at each of said sessions, failed and refused to take any action thereon; that the refusal of the said council to take any action at its said several sessions upon said nominations was with the full knowledge and information of the said council, and each and every member thereof; that the said defendant was then unlawfully holding and exercising the functions of said office, and as plaintiff is informed and believes, and upon his information and belief alleges the fact to be, that such refusal on the part of said legislative council was for the purpose, and with the intention and design, of unlawfully aiding and abetting the said defendant in his said usurpation, intrusion into, and unlawful exercise of the duties of said office; that heretofore, to-wit, on the *thirteenth* day of *March*, 1886, and after the final expiration and adjournment of said legislative assembly and council, the said *Eli H. Murray*, as governor as aforesaid, duly appointed the said *Arthur Pratt* to be auditor of public accounts for said territory; that thereupon, to-wit, on the *sixteenth* day of *March*, 1886, the said *Arthur Pratt* duly qualified by taking the oath of office and executing an official bond, with sufficient sureties, as required by law, and thereafter, to-wit, on the *seventeenth* day of *March* aforesaid, he was duly commissioned as such officer; that after being so appointed and commissioned, and having so qualified as such officer aforesaid, the said *Arthur Pratt*, on said last-named day, duly demanded of said defendant that he surrender to him the said office, and the insignia thereof, which demand was then and there refused by the said defendant. Wherefore, the said plaintiff demands judgment that the said defendant is not entitled to the said office, and that he be ousted therefrom; that the said *Arthur Pratt* is entitled to said office, and that he be put into possession thereof, together with the books, safe, and all and singular the insignia thereto belonging; and that the defendant pay all costs herein."

There was a judgment for plaintiff.

In State *v.* Dahl, 65 Wis. 510, a complaint commenced on the part of the state on the relation of one Ackerman, to oust defendant from the office of treasurer of joint school district No. 3, composed of a part of the city of Waupun and of parts of the towns of Waupun, Alto, Trenton, and Chester, in the counties of Dodge and Fond du Lac, alleged in general terms, the existence of a joint school district composed as above stated, and that the officers of such district consisted of a director, treasurer and clerk. It then alleged that in the month of July, 1884, one F. F. Zimmerman was duly elected treasurer for said district for the term

Form No. 16870.[1]

(6 Wentw. Pl., p. 28.)

(*Title as in Form No. 10812.*)

Cambridgeshire, to wit. Be it remembered that *Jeremiah Mason*,

of three years; that he entered upon the duties of his office, and thereafter, and on the 6th of February, 1885, he resigned his office, and thereby the office of treasurer of said district became vacant; that afterwards, at the annual school district meeting held on July 6, 1885, the said John N. Ackerman, who was then a resident and elector within said district, was duly elected to said office of treasurer, by a majority of the voters thereof at said meeting, to fill said vacancy; that he did not file his bond, as required by law, within ten days after notice of his election, and so the office again became vacant, and continued to so remain vacant, no appointment having been made by the director and clerk of said district, until the 4th day of August, 1885, on which day the relator, the said John N. Ackerman, was duly appointed by the clerk of the city of Waupun, in which said city the school-house of said district is situated, as treasurer of said district to fill said vacancy; and that, within ten days after said appointment, the relator executed his bond as such treasurer with sufficient sureties, in due form, and according to the provisions of law. A copy of the bond so executed, together with the affidavits of the sureties, justifying as to their responsibility as such sureties, was set out in the petition. It then alleged that he presented said bond to the director and clerk for their approval within said ten days; that said director approved the same, but the clerk refused to approve it or file the same in his office; and alleged generally that he accepted the office and in all respects qualified himself to assume the duties thereof.

The complaint then makes the following allegations: "That the above-named defendant, *Martin K. Dahl*, claiming to have been appointed by the town clerk of said town of *Chester* to fill the aforesaid vacancy created by the resignation of the said *F. F. Zimmerman* and the neglect of the said *John N. Ackerman* to file his bond first above mentioned, as such treasurer-elect, within the time required by law, and without any other or any legal warrant, right, or grant whatever, intruded into and usurped said office, and still unlawfully holds and exercises the same. Wherefore the said *John N. Ackerman* demands judgment in this action: (1) That said *Martin K. Dahl*, the defendant in this action, is not entitled to said office, and that he be ousted therefrom; (2) that said *John N. Ackerman*, the relator and plaintiff herein, is entitled to said office, and to assume the execution of the duties of the same, on filing his bond, of which a copy is hereinbefore set forth, with the clerk of said school district; (3) that said plaintiff recover of said defendant his costs of this action."

It was held that if the defendant wished to put his defense on the ground that he had not in fact intruded into and exercised the duties of the office which he was charged with having usurped and exercised he should have shown that fact by affidavit, and should have asked to have the complaint made more definite and certain in regard to that matter, so that he might be notified of the specific acts of user of the office relied upon by the state to substantiate the charge of usurpation, but that as he did not put his defense on that ground the allegation of the complaint was amply sufficient to put the defendant upon his defense.

Other precedents are set out in full, in part or in substance in the following cases: State *v.* McGough, 118 Ala. 159; People *v.* Hecht, 105 Cal. 621; State *v.* Chatfield, 71 Conn. 104; State *v.* Fowler, 66 Conn. 294; State *v.* Bulkeley, 61 Conn. 287; State *v.* Baldwin, 45 Conn. 134; Territory *v.* Hauxhurst, 3 Dak. 205; State *v.* Philips, 30 Fla. 579; State *v.* Knowles, 16 Fla. 577; People *v.* Curtis, 1 Idaho 753; Kaufman *v.* People, 185 Ill. 113; Jones *v.* State, 153 Ind. 440; Collopy *v.* Cloherty, 95 Ky. 330; People *v.* McIntyre, 10 Mont. 166; State *v.* Moores, 52 Neb. 770; State *v.* Hunt, 54 N. H. 431; Lane *v.* Com., 103 Pa. St. 481; Com. *v.* Christopher, 3 Grant Cas. (Pa.) 375; State *v.* Brown, 5 R. I. 1; People *v.* Clayton, 4 Utah 421.

1. See, generally, *supra*, note 1, p. 264.

esquire, coroner and attorney of our present sovereign lord the now king, in the court of our said lord the king before the king himself, who for our said lord the king in this behalf prosecutes, in his own proper person came here into court of our said lord the king before the king himself, at Westminster, on, (*stating time*) last past, and for our said lord the king, at the relation of *Richard Roe*, of the borough of *Cambridge*, in the county of *Cambridge*, according to the form of the statute in such case made and provided, brought into the said court of our said lord the king, before the king himself, then and there, a certain information, in nature of a quo warranto, against *Samuel Francis*, late of the borough of *Cambridge* aforesaid, which said information followeth in these words, that is to say, *Cambridgeshire*, to wit: Be it remembered that *Jeremiah Mason*, esquire, coroner and attorney of our present sovereign lord the king, before the king himself, who for our said lord the king prosecutes in this behalf, in his own proper person, cometh here into the court of our said lord the king, before the king himself, at *Westminster*, on (*stating time*) in this same term, and for our said lord the king, at the relation of *Richard Roe*, of the borough of *Cambridge* in the county of *Cambridge*, according to the form of the statute in such case made and provided, giveth the court here to understand and be informed that the borough of *Cambridge*, in the county of *Cambridge*, now is, and for the space of *twenty* years last past and upwards, hath been an ancient borough, and that the mayor, bailiffs, and burgesses of the said borough now are, and during all the time aforesaid have been one body corporate and politic in deed, fact, and name, by the name of the mayor, bailiffs, and burgesses of the borough of *Cambridge*, in the county of *Cambridge*, that is to say, at the borough of *Cambridge* aforesaid, and that within the said borough, there and for and during all the time aforesaid, there have been and now ought to be a mayor, *twelve* aldermen, *twenty-four* of the common council, *four* bailiffs, and an indefinite number of burgesses of the said borough; and that the office of an alderman of the said borough for and during all the time aforesaid hath been and still is a public office, and an office of great trust and pre-eminence within the said borough, touching the rule and government of the said borough, and the administration of public justice within the same borough, to wit, at the borough of *Cambridge* aforesaid; and that *Samuel Francis*, late of *Cambridge*, in the county of *Cambridge* aforesaid, *gentleman*, on the *tenth* day of *May*, in the *twenty-seventh* year of the reign of our said present sovereign lord *George the Third*, etc., and from thence continually afterwards, to the time of exhibiting this information at the borough aforesaid, in the county aforesaid, hath there used and exercised, and still doth there use and exercise without any legal warrant, royal grant, or right whatsoever, the office of an alderman of the said borough, and for and during all the time last above-mentioned hath there claimed, and still doth there claim, without any legal warrant, royal grant, or right whatsoever, to be one of the aldermen of the said borough, and to have, use, and enjoy all the liberties, privileges, and franchises to the office of an alderman of the said borough belonging and appertaining, which said office, liberties, privileges, and fran-

chises, he, said *Samuel Francis*, for and during all the time last above-mentioned, upon our said lord hath usurped and still doth usurp, without any legal warrant, royal grant, or right whatsoever, that is to say, at the borough of *Cambridge* aforesaid, in the said county, in contempt of our said lord the king, to the great damage and prejudice of his royal prerogative, and also against his crown and dignity; whereupon the said coroner and attorney of our said lord the king, for our said lord the king prayeth the consideration of the court here in the premises, and that due process of law may be awarded against him the said *Samuel Francis* in this behalf, to make him answer to our said lord the king, and show by what warrant or authority he claimeth to have, use, and enjoy the office, liberties, privileges, and franchises aforesaid; wherefore the sheriff of the said county of *Cambridge* was commanded that he should not forbear by reason of any liberty in his bailiwick, but that he should cause him to come to answer to our said lord the king touching and concerning the premises aforesaid, etc.

(*Signature as in Form No. 10812.*)

(*b*) *Of Clerk of Circuit Court.*

Form No. 16871.[1]

(Precedent in People *v.* Mobley, 2 Ill. 217.)[2]

State of *Illinois*, *Sangamon* County, ss.

In the *Circuit* Court of said county, *July* term, 1835, *Stephen A. Douglas*, State's Attorney of the *First* Judicial Circuit of the state of *Illinois*, who prosecutes in behalf of the People of the state of *Illinois*, [and in the name and by the authority of the said People of the state of Illinois,][3] on the relation of *Charles R. Matheny*, of the county of *Sangamon*, aforesaid, comes here into court, and gives the court to understand and be informed, that on the *14th* day of *February*, in the year one thousand eight hundred and *twenty-seven*, the said *Charles R. Matheny*, relator as aforesaid, was regularly and legally appointed clerk of the *Circuit* Court for the county of *Sangamon*, aforesaid, by the judge of said court; that the said *Charles R. Matheny* took the several oaths required by the statute in such case made and provided and executed bond with security for the faithful discharge of the duties required of him by law, and thereupon entered into and upon the duties of the said office, and was legally possessed thereof and exercised the powers, received the emoluments, enjoyed the immunities and privileges appertaining to the same, and continued to have, hold, and enjoy the said office, and exercise the powers, perform the duties, and receive the emoluments and immunities thereof, from the time of his said appointment

1. *Illinois*. — Starr & C. Anno. Stat. (1896), c. 112, § 1.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

2. There was a judgment in this case that the relator be restored to his office of clerk of the circuit court.

3. **In Name of People of State.** — The matter enclosed by [ ] is made necessary by reason of the constitution of 1870, art. 6, § 33.

and induction therein until the *4th* day of *May*, 1835; that from and after the said appointment he never resigned, abandoned, or forfeited the said office, nor has the said *Circuit* Court of *Sangamon* county, or the office of clerk of said court, ever been abolished; nor has he, the said *Matheny*, ever been removed or displaced from said office by the judgment of any court. And on the said *4th* day of *May*, 1835, at the Circuit aforesaid, one *Mordecai Mobley*, of said county, well knowing the premises aforesaid, did unlawfully usurp the said office of clerk of the *Circuit* Court of *Sangamon* county, and enter into and upon the exercise of all the powers and duties of the office of such clerk; and by such unlawful usurpation did, then and there, become possessed of the said office, and of the emoluments, immunities, and privileges appertaining to the said office, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the state of *Illinois*.

And the said State's attorney, on the relation of the said *Charles R. Matheny*, further gives the court here to understand and be informed that the said *Mordecai Mobley*, on the *4th* day of *May*, 1835, at the Circuit aforesaid, did then and there unlawfully hold the office of clerk of the *Circuit* Court of *Sangamon* county, and from and since the said *4th* day of *May*, 1835, hath, and still doth unlawfully hold the said office of clerk of the *Circuit* Court of *Sangamon* county, and exercise the powers, and receive the emoluments of said office, the said *Charles R. Matheny*, the relator, being during all the time aforesaid the legal and lawfully appointed clerk of said court, as stated in the first count in this information, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the state of *Illinois*.

And the said State's attorney, upon the relation of the said *Charles R. Matheny*, further gives the court here to understand and be informed, that on the *10th* day of *May*, 1835, at the Circuit aforesaid the said *Mordecai Mobley* did unlawfully execute the office of clerk of the *Circuit* Court of *Sangamon* county; and from and since the said *10th* day of *May*, 1835, hath, and still doth execute the office aforesaid, without any lawful authority, one *Charles R. Matheny* being on the said *10th* day of *May*, 1835, the clerk of said court, and still continuing to be and remain such clerk, as stated and alleged in the first count of this information, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the same People of the state of *Illinois*.

And the said State's attorney, upon the relation of the said *Charles R. Matheny*, further gives the court here to understand and be informed that on the *10th* day of *May*, 1835, at the Circuit aforesaid, the said *Mordecai Mobley* did unlawfully intrude into the office of clerk of the *Circuit* Court of *Sangamon* county, and by such unlawful intrusion did, then and there, become possessed of the said office of clerk of the *Circuit* Court of *Sangamon* county, and of the emoluments and immunities of said office, and hath hitherto continued to have and to hold and exercise the powers and duties of such clerk, and to receive the emoluments of said office, the said *Charles R. Matheny* being at the time of the intrusion aforesaid, and still con-

tinuing to be, the clerk of said Court, as stated in the first count of this information, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the same People of the state of *Illinois*.

Stephen A. Douglas, State's Attorney.

(*c*) *Of Clerk of Penitentiary.*

Form No. 16872.

(Precedent in Lindsey *v.* Atty.-Gen., 33 Miss. 509.)[1]

The State of *Mississippi*, } *Circuit* Court, *March* Term, 1854.
Hinds County. }

To the Hon. *J. I. Guion*, Judge of the *Third* Judicial District:

David C. Glenn, Attorney-General of the state of *Mississippi*, and prosecuting on behalf of said state, in the behalf, on the relation of *David N. Barrows*, a citizen of said county and state, comes here into the court aforesaid, to wit, the *Circuit* Court of said county and state, for the term aforesaid, and on the *18th* day of *March*, 1854, and for the said state of *Mississippi*, on the relation aforesaid, gives the court here to understand, and be informed that *Horatio H. Lindsey*, of said county and state, for the space of *four* weeks now last past or more, hath used, and does still use, without warrant or grant of law, the following liberties and franchises, to wit: the said *Horatio H. Lindsey*, without warrant or authority of law, hath usurped the office of clerk of the penitentiary of said state, and as an incident thereto, or appendage, the office of clerk or secretary of the Board of Inspectors of said penitentiary, together with all the privileges, immunities, and emoluments pertaining thereto; and hath refused and still refuses to vacate said office, and surrender its privileges, immunities, and emoluments to the person rightfully entitled by law to have, hold, and enjoy said office, and the aforesaid incident, or appendage thereto, and the privileges, immunities, and emoluments belonging to the same; of all which liberties, privileges, and franchises, aforesaid, the said *Horatio H. Lindsey*, during all the time aforesaid hath usurped and still doth usurp upon the said state of *Mississippi*, to the great damage and prejudice of said state; whereupon the said *David C. Glenn*, attorney-general, as aforesaid, upon the relation aforesaid, for the state aforesaid, prays the advice of the court in the premises, and due process of law against the said *Horatio H. Lindsey* in this behalf, to be made to answer to said state of *Mississippi*, by what warrant he claims to have, use, and enjoy the liberties, privileges, franchises, and emoluments aforesaid, of said office of clerk of the penitentiary of said state, and clerk or secretary of said Board of Inspectors of said penitentiary.

David C. Glenn, Att'y-Gen.

1. *Mississippi*. — Anno. Code (1892), § 3520 *et seq*.
See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.
2. A motion to quash and a demurrer

(*d*) *Of Common Councilman.*

Form No. 16873.[1]

(Conn. Prac. Act, p. 144, No. 249.)

To the Honorable *Superior* Court, now in session at *New Haven*, in and for *New Haven* County, at its Term commencing on the *third Tuesday* of *December*, A. D. 1875.

Comes *Eleazer K. Foster*, Esquire, State's Attorney within and for the county of *New Haven*, who in this behalf prosecutes in his own proper person, and at the relation of *Alvin L. Willoughby*, of *New Haven*, and gives the court to understand and be informed that,

1. On the *first Monday* of *October*, 1875, said *Willoughby* was a freeman of the city of *New Haven*, and an elector of the state of *Connecticut*, and a resident of the *Fourth* Ward in said city, and had been such freeman and resident for *twenty-five* years previous thereto.

2. Said *Willoughby's* name, upon the day and year last aforesaid, was enrolled on the registry list of said *Fourth* Ward as a voter thereof, and he had all the qualifications required by law to entitle him to vote in said ward at any city election in said city, or to be voted for, for the office of the councilmen of said city from said *Fourth* Ward from the *first* day of *January*, 1876, to the *first* day of *January*, 1877.

3. On the *first Monday* of *October*, 1875, at the annual city meeting of the city of *New Haven* for the election of *three* councilmen from each ward in said city, and for the election of other officers in said city, in accordance with the provisions of law, said *Alvin L. Willoughby* received a sufficient number of the votes of the freeman resident in the *Fourth* Ward, in said city, on a ballot cast at the meeting in said ward, to elect him a councilman from said *Fourth* Ward, and was then and there, in the manner aforesaid, duly and legally elected a councilman of said ward, from the *first* day of *January*, 1876, to the *first* day of *January*, 1877, and did accept said office and claimed to be elected as aforesaid and admitted into the Common Council of said city as said councilman, and ever since has and does still claim to be admitted as said councilman in said Common Council, and to use and exercise the rights, powers, and duties pertaining to said office.

4. Notwithstanding his said election and acceptance thereof, *Benjamin W. Gates*, of said town and city of *New Haven*, on the *first* day of *January*, 1876, and from thence continuously hitherto without any legal warrant, claim, or right, has used and exercised, and still does use and exercise the office of councilman from the *Fourth* Ward in said Common Council of said city for the term aforesaid, in place of said *Alvin L. Willoughby*, and claims to be a councilman in place of said *Willoughby*, and to have, use, and enjoy all the liberty, rights, privileges, and franchises to said office pertaining, concerning which

to the information in this case were overruled.

1. *Connecticut.*—Gen. Stat. (1888), § 1300 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

said office, liberties, rights, privileges, and franchises, the said *Gates* for all the time aforesaid has usurped and does still usurp, at *New Haven*, to the damage and prejudice of the right of said city of *New Haven* and said relator, and also against the peace of the state.

Whereupon the said Attorney prays the consideration of this court in the premises, and that due process of law may be awarded against *Benjamin W. Gates*, in this behalf, to answer to this court by what warrant he claims to have, use, and enjoy the office, liberties, rights, privileges, and franchises aforesaid.

Dated at *New Haven*, *January 4th*, 1876.

E. K. Foster, State's Attorney.

Personally appeared *Alvin L. Willoughby*, and made oath to the truth of the facts stated in the aforesaid information, to the best of his knowledge and belief, before me,

Arthur D. Osborne,
Clerk of the *Superior* Court for *New Haven* County.

(*e*) *Of Deputy Adjutant General.*

Form No. 16874.[1]

(Precedent in State *v.* Utter, 14 N. J. L. 84.)[2]

[1] *New Jersey Supreme* Court of Judicature, of the term of *February*, in the year of our Lord one thousand eight hundred and *thirty-two*.

Essex county, ss.

Samuel L. Southard, Attorney General of the state of *New Jersey*, who prosecutes for the said state, comes here into the *Supreme* Court of Judicature of the said state, at the city of *Trenton*, in this same term, in his own person and for the said state, and at the relation of *James Miller*, relator,[3] desiring to sue and prosecute in this behalf, giveth to the court, here to understand and be informed, that *Samuel Utter*, late of the township of *Newark*, in the county of *Essex*, at the township aforesaid in the county aforesaid, for the space of *three* months now last past, and more, has unlawfully held and executed, and yet doth unlawfully hold and execute, and claim to have, hold, execute, use and enjoy, the office and franchise of deputy adjutant general of the *Essex* brigade of militia at *Newark*, aforesaid; and also to take upon himself, and exercise the privileges, powers, duties and immunities to the said office belonging and appertaining, which office and franchise aforesaid, the said *Samuel Utter*, for the whole term aforesaid, upon the state of *New Jersey*, has usurped, intruded into and unlawfully held and executed at *Newark*, aforesaid, within the county of *Essex* and state of *New Jersey*, and yet doth usurp, intrude into and unlawfully

1. *New Jersey.* — Gen. Stat. (1895), p. 2632, § 1 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

2. A general demurrer to the information in this case was overruled and there was a judgment of ouster. The information was held to be in due form and in conformity with the precedents in the book.

3. Relator shall be mentioned in the information. N. J. Gen. Stat. (1895), p. 2632, § 1.

hold and execute, in contempt of the said state and the laws thereof, and against the peace of this state, the government and dignity of the same. Wherefore the attorney general of the state of *New Jersey*, for the said state, at the relation of *James Miller*, desiring to sue and prosecute in this behalf, prays the advice of the court here in the premises, and due process of law against the said *Samuel Utter*, in this behalf, to be made to answer to the said state, whereupon and by what authority and warrant he claims to have, hold, execute, use and enjoy, the office and franchise aforesaid.

[*Samuel L. Southard*, Attorney General.
Jeremiah Mason, Attorney for Relator.][1]

(*f*) *Of Governor.*

Form No. 16875.[2]

(Precedent in Atty.-Gen. *v.* Barstow, 4 Wis. 569.)[3]

State of *Wisconsin*, *Dane* County, ss.

Wm. R. Smith, attorney general of the state of *Wisconsin*, who sues for the people of the state in this behalf, comes into the *supreme* court of the said state, before the justices thereof, at the capitol, in the village of *Madison*, in the county of *Dane*, in the said state, on the *15th* day of *January*, A. D. 1856, and for the said people of the state of *Wisconsin*, at the relation of *Coles Bashford*, of the city of *Oshkosh*, in the county of *Winnebago*, in the said state, according to the form of the statute in such case made and provided, gives the said court here to understand and be informed, that *Wm. A. Barstow*, of the county of *Waukesha*, in the said state of *Wisconsin*, for the space of *one* day and upwards now last past, hath held, used and exercised, and still doth hold, use and exercise the office of governor of the state of *Wisconsin*, without any legal election, appointment, warrant or authority whatsoever therefor; and the said attorney general further gives the court here to understand and be informed, that at a general election for state officers of said state, held at the several election districts of said state, in the several counties thereof, on the *6th* day of *November*, A. D. 1855, the said *Coles Bashford* was duly elected and chosen governor of the state of *Wisconsin* aforesaid, and that the said *Coles Bashford* hath ever since been and still is rightfully entitled to hold, use and exercise said office; which said office of governor of the state of *Wisconsin* aforesaid, the said *Wm. A. Barstow*, during all the time aforesaid, and since the time of said election, hath usurped, intruded into and unlawfully held and exercised, to wit: at *Madison*, in the county of *Dane* aforesaid, and still doth usurp, intrude into, and unlawfully hold and exercise, to wit: at *Madison*, in the county of *Dane* aforesaid, in contempt of the people of the state of *Wisconsin*, and to their great damage and prejudice; whereupon said attorney general prays the court now here, for due

1. The matter enclosed by [ ] will not be found in the reported case.

2. *Wisconsin.* — Stat. (1898), § 3463 *et seq.*
See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

3. There was a judgment of ouster against the respondent in this case, and also one in favor of the relator.

advice in the premises, and for due process of law against the said *Wm. A. Barstow* in this behalf to be made, to answer to the said people by what warrant he claims to hold, use, exercise and enjoy the aforesaid office of governor of *Wisconsin*.

Wm. R. Smith,
Attorney General of the State of *Wisconsin*.

(*g*) *Of Judge*.[1]

aa. CIRCUIT.

Form No. 16876.[2]

(Precedent in State *v*. Powell, 77 Miss. 544.)[3]

[State of *Mississippi*, County of *Lincoln*. } *Circuit* Court, *November* Term, A. D. 1899.][4]

The state of *Mississippi*, by *Monroe McClurg*, the attorney-general of said state, of his own accord, gives the court to understand and be informed that *Robert Powell*, a citizen of said state, and a resident of *Madison* county therein, unlawfully holds and exercises the functions of a civil public officer in said state, namely, the office of circuit judge of the *seventh* judicial district of said state; that he is now unlawfully

The summons is is set out *infra*, Form No. 16915.

1. Precedent. — In People *v*. Ryder, 12 N. Y. 433, an action prosecuted by the attorney general in the name of the people, on the relation of Azor B. Crane, against Ambrose Ryder, defendant, the complaint alleged, that at an election duly and legally held in the county of Putnam, pursuant to the statute in such case made and provided, for the election, among other officers, of a "county judge" of that county, to discharge the duties of that office from the first day of January, 1852, for the term of four years, Crane was duly and lawfully elected to the office of county judge for the said term, and that from the first day of January, 1852, till the thirty-first day of December, 1856, he was and is entitled and authorized to discharge the duties and hold and enjoy the said office and its franchises in and for the county of Putnam. That at said election, a majority of the legal votes or ballots given and received thereat was given and received for Crane for county judge of said county, and that he was then and there, pursuant to the statute, duly elected to such office for the aforesaid term, and was entitled to a certificate of election to that office from the board of county canvassers of Putnam county. Yet that the defendant, knowing the premises, wrongfully and unlawfully obtained the certificate of election to the office from the board of county canvassers of the county of Putnam, and on the first day of January, 1852, usurped and intruded himself into the office of county judge, and thence hitherto has unlawfully held, used and exercised such office and the franchises and privileges thereto belonging, to the exclusion and against the rights of Crane and the people of the state of New York. The plaintiffs demanded judgment, that the defendant was not entitled to the office, and that he be ousted therefrom, and that Crane be adjudged entitled to the office and its franchises and privileges, and to assume the execution of the duties of the same on taking the oath and filing the bond prescribed by law.

This complaint was held sufficient on demurrer.

2. *Mississippi*. — Anno. Code (1892), § 3520 *et seq*.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264

3. No objection was made to the form of this information. Judgment, however, was rendered in favor of the respondent.

4. The matter enclosed by [ ] will not be found in the reported case.

holding a regular term of the *circuit* court for *Lincoln* county in said judicial district, and is unlawfully holding and exercising the functions of the judge of said court in said county; wherefore, the state of *Mississippi*, by the said attorney-general, prays that the said *Robert Powell* may be removed from the said office and debarred from exercising the functions thereof, and be ordered to deliver over all records, books and papers in his custody, or under his control, belonging to said office, and pay the costs.

The State of *Mississippi*,
By *Monroe McClurg*, Attorney-general.

bb. DISTRICT.

Form No. 16877.[1]

(Precedent in Bawden *v.* Stewart, 14 Kan. 355.)[2]

[(*Venue and title of court as in Form No. 5917.*)

W. J. Bawden, plaintiff,[3]
against
W. T. Stewart, defendant.
} Petition.][4]

Now comes *W. J. Bawden*, plaintiff, and informs the court, and avers, that at the general election held in and for the *Sixth* judicial district, in *November*, 1871, one *M. V. Voss* was duly elected judge of the said *Sixth* judicial district for the term of *four* years from the *second Monday* of *January*, 1872; that said *M. V. Voss* duly qualified as such judge of said district, and entered upon the duties of said office, and held said office of district judge from thence until the *twenty-first* day of *October*, 1874, when he died; that to fill the vacancy in said office occasioned by reason of the death of said *M. V. Voss*, the governor of the state of *Kansas*, on the *seventh* of *November*, 1874, duly appointed and commissioned this plaintiff as judge of said *Sixth* judicial district, and on the *ninth* of said *November* the plaintiff, being so as aforesaid duly appointed and commissioned, took the oath of office as district judge of said *Sixth* judicial district, and thereupon entered upon the duties of his office, and thenceforth acted as such district judge until the *fourteenth* of *December*, 1874, when the defendant, *W. C. Stewart*, without any warrant or authority of law, usurped and intruded himself into said office of district judge of said *Sixth* judicial district, and wholly excluded plaintiff therefrom; that said *W. C. Stewart*, defendant herein, still excluding the plaintiff from his said office, and from the right and power to possess, use, and enjoy the same, doth still usurp

1. *Kansas.* — Gen. Stat. (1897), c. 96, § 97 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

2. There was an answer filed to the petition in this case, which is set out *infra*, Form No. 16932. Judgment was in favor of the defendant, and was to the effect that he was rightfully elected to the office and entitled to hold it, not because the petition did not show on its face a cause of action, but because plaintiff did not succeed in proving all of his allegations.

3. **In Name of Person Prosecuting.** — Where the action is brought by a person claiming an interest in the office, he shall prosecute it in his own name. Kan. Gen. Stat. (1897), c. 96, § 99.

4. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

and intrude into, and unlawfully hold and exercise the same, to-wit, at the county of *Bourbon*, in the *Sixth* judicial district aforesaid, in contempt of the laws of the state of *Kansas*, and to the great damage of the plaintiff, to-wit, to his damage *three thousand* dollars.

Wherefore the plaintiff demands the judgment of this court, that the said defendant has usurped and unlawfully intruded into said office of district judge of said *Sixth* judicial district, and hath unlawfully held and possessed the same from and since his usurpation thereof on said *fourteenth* of *December*, 1874; and that he be absolutely ousted and excluded from the said office, its powers, privileges, and franchises, for the future; and that the plaintiff have and recover possession of his said office; and that he be restored to its powers, duties, privileges, and franchises; and that he have and recover of and from said defendant his said damages so as aforesaid sustained, together with the costs of this action.

[(*Signature and verification as in Form No. 5917.*)][1]

cc. PROBATE.[2]

Form No. 16878.[3]

(Precedent in State *v.* Dudley, 1 Ohio St. 438.)[4]

[(*Title of court and cause as in Form No. 6433.*)][5]

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **Precedent.** — In Com. *v.* Fowler, 10 Mass. 290, is set out the following information:

"Be it remembered, that *Daniel Davis*, solicitor-general of said commonwealth, comes into court, and brings with him into court a certain order of the House of Representatives of said commonwealth, which is in these words following, that is to say:—

'In the House of Representatives, *Feb. 4*, 1813.

Ordered that the attorney or solicitor-general of the commonwealth be requested to file informations in the nature of a quo warranto, to know by what authority the Hon. *Samuel Fowler* exercises the office of judge of probate of wills, etc., in the county of *Hampden*, and also chief justice of the Court of *Sessions* in said county; and by what authority' [divers other persons exercise sundry offices in said county].

Whereupon the said solicitor-general, by virtue of the power and authority of, and in compliance with, the said order of the House of Representatives, and of the request therein contained, gives the said court to understand and be informed, that *Samuel Fowler*, of *Westfield*, in said county of *Hampden*, esquire, for the space of *six* months now last past, hath used and exercised, and still doth use and exercise, the office of judge of probate, etc., in the said county of *Hampden*, without any warrant or lawful authority therefor; which said office, and the powers, authorities, and emoluments, to that office appertaining, the said *Samuel Fowler*, during all the time aforesaid, hath usurped, and still doth usurp, upon the government of said commonwealth, to the great damage and prejudice of the lawful authority thereof. Whereupon the said solicitor-general prays the advice of the court here in the premises, and for due process of law against the said *Samuel Fowler* in this behalf to be made, to answer to the said commonwealth by what warrant he claims to have, use, exercise, and enjoy, the aforesaid office."

A motion to quash this information on the ground that it had never been duly filed in court was overruled, the court holding that the attorney general acted ex officio and not by reason of the resolution of the house of representatives, which furnished no legal ground.

3. *Ohio.* — Bates' Anno. Stat. (1897), § 6760 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

4. There was a judgment of ouster in this case.

5. The matter to be supplied within

George E. Pugh, attorney general of the state, comes here into the court, in the city of *Columbus*, this *seventeenth* day of *January*, in the year one thousand eight hundred and *fifty-three*, and gives the court to understand and be informed, on the relation of *Ezra E. Evans*, that the office of probate judge for the county of *Morgan*, is a public office of trust and profit, according to the constitution and laws of the state of *Ohio*, the duties whereof are to be exercised within the county of *Morgan* aforesaid.

And that *Gilman Dudley*, for the space of *ten* months, now last past, and more, has intruded into and usurped the said office, and does still usurp the same, at *Sarahsville*, in the county of *Morgan* aforesaid, by granting letters of administration upon the estates of deceased persons, granting letters of guardianship of the persons and estates of infants, granting licenses of marriage, granting writs of habeas corpus and injunction, and performing other the duties of a probate judge, as prescribed in the constitution and laws of the state aforesaid, without any legal warrant, grant, or right whatsoever, to the damage and prejudice of the state of *Ohio*, and against her dignity.

Whereupon the said attorney general now prays the advice of the court in the premises, and due process of law against the said *Gilman Dudley* in this behalf to be made. And that he, the said *Gilman Dudley*, may answer to the state of *Ohio*, upon the relation aforesaid, by what warrant he claims to hold the said office, or to exercise the powers, perform the duties, and receive the fees and emoluments thereof.

G. E. Pugh, Attorney General.

Form No. 16879.[1]

(Precedent in State *v.* Cogswell, 8 Ohio St. 621.)[2]

[(*Commencing as in Form No. 6433*)][3] that *Walter Thrall*, of the county of *Pickaway*, in the state of *Ohio*, is a judge of the court *of probate* in and for said county of *Pickaway*, duly elected and qualified according to law, and, as such, is duly commissioned, and is lawfully entitled to exercise the powers and duties, and to receive the fees and emoluments of said office, during the constitutional term thereof; but that one *Frederick Cogswell*, of said *Pickaway* county, unlawfully holds and exercises said office of judge of said court *of probate*, in and for said county of *Pickaway*, the same being a public office, and as such judge of said court *of probate*, assumes to do and perform all and singular the duties pertaining to said office, and to receive the

[ ] will not be found in the reported case, but has been substituted in place of the following commencement, to wit: "In the *Supreme* Court of the state of *Ohio*, *January* term, in the year one thousand eight hundred and *fifty-three*."

1. *Ohio.* — Bates' Anno. Stat. (1897), § 6760 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

2. No objection was made to the form or the sufficiency of the information, but it was dismissed and judgment entered for the defendant because no application was made to reply to answer which defendant filed to it.

3. The matter to be supplied within [ ] will not be found in the reported case.

fees and emoluments thereof, to the great injury of the citizens of the state of *Ohio*, and of said *Walter Thrall*, and contrary to the constitution and laws of the state of *Ohio*, in such case made and provided. Whereupon the said *Christopher P. Wolcott*, as attorney-general of the state of *Ohio*, as relator in this behalf, upon complaint duly made to him by the said *Walter Thrall*, prays the advice of this court in the premises, and due process of law against the said *Frederick Cogswell* in this behalf, and that the said *Frederick Cogswell* answer to the state of *Ohio* by what warrant he claims to hold, use and exercise the said office of judge of the court *of probate*, in and for said county of *Pickaway*, as hereinbefore stated.

[*Christopher P. Wolcott*, Attorney-general.][1]

(*h*) *Of Lieutenant Governor.*

Form No. 16880.[2]

(Precedent in State *v.* Gleason, 12 Fla. 193.)[3]

In the *Supreme* Court of the State of *Florida*.

[In the name and by the authority of the state of *Florida*.][4]

Almon R. Meek, Attorney-General of the people of the state of *Florida*, who sues for the said people in this behalf, comes here before the Justices of the people of the state of *Florida* of the *Supreme* Court of the same people, on the *nineteenth* day of *November*, A. D. 1868, at an extra and special term thereof, and for the said people gives the said court here to understand and be informed that *William H. Gleason*, to wit, in said state, for the space of *five* months, now last past, and upwards, has used, enjoyed, exercised, and performed, and still does use, enjoy, exercise, and perform without warrant or authority, in violation of the existing Constitution of said state, the franchise, functions, and powers of the office of Lieutenant-Governor of the people of the state of *Florida* aforesaid, and has actually presided over the deliberations of the Senate of said state, and also done other acts which are authorized and required to be done and performed by the Lieutenant-Governor of the people of said state, and

1. The matter enclosed by [ ] will not be found in the reported case.

2. *Florida.* — Rev. Stat. (1892), § 1781, *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

3. There was a judgment of ouster in this case.

4. **Amendment.** — The matter enclosed by [ ] was an amendment authorized by the court. The amendment was as follows:

"In the *Supreme* Court of the state of *Florida*, at an extra and special term. The State of *Florida*, upon the relation of *Almon R. Meek*, who prosecutes in the name and by the authority of said state, vs. *William H. Gleason*, Lieutenant-Governor of the state of *Florida* — Information in the nature of 'quo warranto.'

And now this day comes the said Attorney-General, who prosecutes in above-entitled cause in the name and by the authority of said state, and pursuant to leave of said *Supreme* Court this day given amends the information heretofore filed by him in said cause, to wit, on the *8th* day of *November*, 1868, by writing as a caption for said information the words, 'In the name and by the authority of the state of *Florida*,' so that said information shall read, 'In the name and by the authority of the state of *Florida*.'

Almon R. Meek,
Attorney-General."

which he alone has a right to do, which said office and the franchises and functions and powers thereof, the said *William H. Gleason*, during all the time aforesaid, usurped, and still does usurp upon the people aforesaid, to their great damage and prejudice.

And the said Attorney-General of the said people, who prosecutes as aforesaid, further gives the court to understand and be informed that the said *William H. Gleason* for the space of *five* months, now last past, and upwards, has used, and still does use and exercise and enjoy the office and franchise of Lieutenant-Governor of the people of the state of *Florida*, in violation of the existing Constitution of said state, for that by the fourteenth section of the fifth article of said Constitution it is ordained and required that the Lieutenant-Governor shall be elected at the same time and place, and in the same manner, as the Governor, and that his term of office and eligibility shall also be the same as the Governor, and by the third section of said fifth article of said Constitution it is ordained and required, that no person shall be eligible to the office of Governor who is not a qualified elector, and who has not been *nine* years a citizen of the United States, and *three* years a citizen of the state of *Florida*, next preceding the time of his election; and for that, by said sections and provisions of said Constitution, no person is eligible to the office of Lieutenant-Governor who has not been *nine* years a citizen of the United States, and *three* years a citizen of the state of *Florida*, next preceding the time of his election; and for that, heretofore, to wit, the said *William H. Gleason*, on the *first Monday*, *Tuesday*, and *Wednesday* of *May*, in the year of our Lord one thousand eight hundred and *sixty-eight*, was elected to the office of Lieutenant-Governor of the people aforesaid; and afterwards, to wit, on the *seventh* day of *July*, in the same year, to wit, at *Tallahassee*, in said state, then and there did take the oath prescribed by the Constitution of said state to be taken by each officer in said state, as a Lieutenant-Governor thereof; he, the said *William H. Gleason*, then and there being ineligible, under the said provisions of the said Constitution of said state, to the said office of Lieutenant-Governor, for that the said *William H. Gleason* had not then and there been a citizen of the state of *Florida* for the full period of *three* years then next preceding said election, so, as aforesaid, held on the said several days in *May* aforesaid, as in and by the provisions of said Constitution required; and so the Attorney-General aforesaid does give the court here to understand and be informed that the said *William H. Gleason* during all the time aforesaid, has usurped, and still does usurp, upon the people aforesaid, the said franchise, functions, and powers of the said office of Lieutenant-Governor of the people aforesaid, to their great damage and prejudice.

Whereupon the said Attorney-General prays the advice of this court in the premises, and due process of law against the said *William H. Gleason* in this behalf to be made, to answer to the said people by what warrant or authority he claims to use, enjoy, exercise, and perform the franchise, functions, and powers aforesaid.

Almon R. Meek,
Attorney-General of the state of *Florida*.

(*i*) *Of Mayor.*

Form No. 16881.[1]

(6 Wentw. Pl., p. 50.)

(*Title as in Form No. 10812.*)

Kent, to wit:

Be it remembered that *James Burrow*, esquire, coroner and attorney of our present sovereign lord the now king, in the court of our said lord the king, before the king himself, who prosecutes for our said lord the king, comes in his proper person here into the court of our said lord the king, before the king himself at *Westminster*, on (*stating time*), in the same term, and for our said lord the king on the relation of *Richard Roe*, of (*stating place*), *taylor*, according to the form of the statute in such case made and provided, brings here into the court of our said lord the king, before the king himself now here, a certain information in the nature of a quo warranto, against *John Doe*, of the town and port of *New Romney*, in the county of *Kent*, esquire, which said information followeth in these words, that is to say, *Kent*: Be it remembered that *James Burrow*, esquire, coroner and attorney of our present sovereign lord the king, in the court of our said lord the king, before the king himself, who prosecutes for our said lord the king in this behalf, comes in his proper person here into the court of our said lord the king, before the king himself at *Westminster*, upon *Friday next*, etc., and for our said lord the king, on the relation of *John Doe*, in the town and port of *New Romney*, in the county of *Kent*, according to the form of the statute in such case made and provided, gives the court here to understand and be informed, that the town and port of *New Romney*, in the county of *Kent*, is an ancient town and port; and that the mayor, jurats, and commonalty of the same town and port of *New Romney*, in the county of *Kent*, to wit, at the town and port aforesaid, in the county aforesaid; and the office of mayor of the town and port aforesaid is, and for all the time aforesaid hath been a public office and an office of great trust and pre-eminence within the said town and port, touching and concerning the good rule and government of the said town and port, and administration of public justice within the said town and port, to wit, at *New Romney* aforesaid; and that *John Doe*, of the said town and port, esquire, on the *tenth* day of *May*, in the *twenty-seventh* year of the reign of our said present sovereign lord *George the Third*, etc., and from thenceforth continually hitherto, at the town and port aforesaid, in the county aforesaid, hath used and exercised, and still doth there use and exercise, without any lawful warrant, royal grant, or right whatsoever, the office of mayor of the town and port aforesaid, and during all the time last above-mentioned hath there claimed and yet claims to be mayor of the said town and port aforesaid, and during all the time last above-mentioned to have, use, and enjoy all the liberties, privileges, and franchises to the said office of mayor of the said town and port belonging and appertaining; of which said office, liberties, privileges, and franchises the said *John Doe* upon

1. See, generally, *supra*, note 1, p. 264.

our said lord the king for all the time aforesaid hath usurped, and still doth usurp, to wit, at *New Romney* aforesaid, in contempt of our said lord the king, and to the great damage and prejudice of his royal prerogative, and also against his crown und dignity, etc.; whereupon the said coroner and attorney of our said lord the king prays the consideration of the court here in the premises, and that due process of law may be awarded against the said *John Doe* in this behalf, to answer to our said lord the king by what warrant he claims to have, use, and enjoy the office, privilege, liberties, and franchise aforesaid: wherefore the constable of the castle of our said lord the king of *Dover*, in the said county of *Kent*, or his deputy there, is commanded that he cause him to come to answer to our said lord the king touching and concerning the premises aforesaid.

(*Signature as in Form No. 10812.*)

(*j*) *Of Mayor, Councilman and Police Judge.*

Form No. 16882.[1]

(Precedent in Bartlett *v.* State, 13 Kan. 99.)[2]

[(*Venue and title of court as in Form No. 5917.*)

The State of Kansas, plaintiff, against *George Bartlett, Peter McCrea, Frank McNulty, S. M. Ransopher, Harry Dobbs, A. W. Campbell* and *Moses Heller*, defendants. } Petition.

Now comes *John Doe*, the duly elected and qualified attorney of *Cloud* county, in the state of *Kansas*, into the *Cloud District* Court, and gives said court to understand and be informed][3] that the city of *Clyde*, in said county and state, is a city of the *third* class, under and by virtue of the general laws of said state; that by the same laws there has been created and exists in said city, for the purpose of good government thereof, and for the purpose of promoting the general welfare of the inhabitants thereof, the offices of mayor, *five* councilmen, and police judge; that on or about the *third* of *April*, 1873, at and within said city, and within the jurisdiction of this court, the said defendant *Bartlett* did unlawfully usurp and intrude himself into the said office of mayor of said city of *Clyde*, the said defendants *McNulty*, *Ransopher*, *Dobbs*, *Campbell*, and *Heller* did then and there unlawfully usurp and intrude themselves into the said offices of councilmen, and the said *McCrea* did then and there unlawfully usurp and intrude himself into the said office of police judge; and each and every of said defendants from thence hitherto have continued unlawfully to hold and exercise the said offices respectively so as aforesaid usurped by

1. *Kansas.* — Gen. Stat. (1897). c. 96, § 97 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

2. A demurrer to the petition in this case was overruled.

3. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

them respectively, the said offices then and there being public offices under and by virtue of the laws of said state; the said defendants from the date last aforesaid to the present time having unlawfully usurped the city government of said city; and that said defendants, from the date last aforesaid to the present time, have respectively continued, and still continue, unlawfully to hold and exercise the said offices so as aforesaid respectively unlawfully intruded into by them; and the plaintiff further shows that no other person or persons is or are by law entitled to hold or exercise any of said offices. Wherefore the plaintiff demands judgment that the said defendants be ousted from said offices so by them respectively unlawfully held and occupied.

[(*Signature as in Form No. 5917.*)][1]

(*k*) *Of Member of Board of Elections.*

Form No. 16883.[2]

(Precedent in State *v.* Buckley, 60 Ohio St. 274.)[3]

[(*Title of court and cause as in Form No. 6433.*)][1]

Theodore L. Strimple, prosecuting attorney of the county of *Cuyahoga* and the state of *Ohio*, on the relation of *E. P. Wilmot* of the township of *Chagrin Falls* in the county of *Cuyahoga*, and state of *Ohio*, and of *George P. Kurtz* of the city of *Cleveland*, in the county of *Cuyahoga* and state of *Ohio*, who are both citizens and electors of the county of *Cuyahoga* and state of *Ohio*, gives the court to understand and be informed that the defendants, *Hugh Buckley*, *Charles P. Salen*, *Edward Etzensperger* and *Edward C. Kenney*, under the claim that they constitute the board of elections of the city of *Cleveland*, are usurping and intruding into the office of appointing registrars of elections, judges and clerks of election, and other clerks, officers and agents in and about elections, and of designating the ward or precinct in which such judges and clerks shall serve; and of appointing the place of registration of electors and the holding of election in each ward and precinct in *Cuyahoga* county; and of providing and furnishing ballot boxes to be used at elections, and all books, blanks and forms for the registrations and elections in said county; and of issuing notices, advertisements and publications with respect to election; and of making rules, regulations and instructions for the governing and guiding of registrars of election and judges and clerks of election, and of dividing, defining and pro-

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *Ohio.* — Bates' Anno. Stat. (1897), § 6760 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

3. The judgment of the court in this case was "that the said defendants be and they hereby are ousted and altogether excluded from the said office of board of elections, and from all the authority, franchises, privileges and emoluments thereof in so far as the exercise of such office relates to those portions of said county situate and being outside of the limits of said city, and that they be not ousted from their said office, or from any of the authority, franchises, privileges or emoluments thereof, within the said city."

claiming the election precincts in said county, and generally, under the said claim that they constitute the said board of elections of the city of *Cleveland*, of performing and exercising, throughout the county of *Cuyahoga*, the duties and powers vested by law in the deputy state supervisors in and for said county. Said defendants are so as aforesaid doing the things aforesaid and assuming the authority and powers aforesaid without legal right, in this, that there is no authority in law for said doings and assumptions.

Wherefore the relators pray that the said defendants be required to answer by what warrant they claim to have, use, exercise and enjoy said office aforesaid, and that they be adjudged to be so acting and assuming authority without authority of law, and that they be ousted and altogether excluded from said office, and that the relators recover their costs.

[*Theodore L. Strimple*, Prosecuting Attorney of the County of *Cuyahoga*.][1]

(*l*) *Of Member of School Committee.*

Form No. 16884.[2]

(Precedent in State *v.* Hine, 59 Conn. 50.)[3]

[(*Commencement as in Form No. 16873.*)][4]

1. That the town of *New Britain*, a municipal corporation in said county, on the *13th* day of *October*, 1873, at a meeting held for that purpose, abolished all the school districts and parts of school districts in said town, and assumed the maintenance and control of the public schools therein, and of their property, and became responsible for the debts of the same, and said action has never been rescinded or revoked.

2. At said town meeting the number of the members of the school committee of said town was fixed at *twelve*, and a school committee was then chosen, and has been yearly chosen since that time, as provided by law, by said town.

3. The relator is, and for more than *ten* years last past has been, a resident and freeman of said town and an elector thereof.

4. On the *11th* day of *May*, 1889, and from thence continuously hitherto, without any legal warrant, choice or right, *Charles D. Hine* of said *New Britain* has used and exercised, and still does use and exercise, the office of a member of said school committee; and to have, use and enjoy all its liberties, rights, privileges and franchises, the said *Hine* for all the time aforesaid has usurped and still does

1. The matter enclosed by [ ] will not be found in the reported case.

2. *Connecticut.*—Gen. Stat. (1888), § 1300 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

3. The defendant in his answer set up that he was secretary of the state board of education and by virtue of an act of the legislature was ex-officio a member of the school committee of the town. It was held that the answer was sufficient.

The answer in this case is set out *infra*, Form No. 16935.

4. The matter to be supplied within [ ] will not be found in the reported case.

usurp, to the damage and prejudice of said town and said relator as a resident, freeman and elector of said town, and also against the peace of the state.

Whereupon the said attorney prays the consideration of this court in the premises, and that due process of law may be awarded against said *Charles D. Hine* in this behalf, to answer to this court by what warrant he claims to have, use and enjoy the office, liberties, rights, privileges and franchises aforesaid.

[(*Signature and verification as in Form No. 16873.*)][1]

(*m*) *Of Police Commissioner.*

Form No. 16885.[2]

(Precedent in Hinze *v.* People, 92 Ill. 407.)[3]

State of *Illinois*, }
St. Clair County. }

Of the *September* term, 1878, of the *circuit* court of *St. Clair* county.

And now comes *James K. Edsall*, Attorney General of the state of *Illinois*, on relation of *R. A. Halbert*, a tax-payer of the city of *East St. Louis*, and in the name and by the authority of the people of the state of *Illinois* gives the court to understand and be informed that on the *14th* day of *January*, 1878, at the city of *East St. Louis* and county of *St. Clair* aforesaid, *Frederick Hinze* and *Michael Murphy* respectively did unlawfully usurp and hitherto have continued and now do unlawfully usurp the office of a police commissioner of the city of *East St. Louis* in said county and state, there being no law authorizing such office, — contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the state of *Illinois*.

And the said Attorney General, on the relationship aforesaid, in the name and by the authority aforesaid, gives the court further to understand and be informed that on the *14th* day of *January*, 1878, at the said city of *East St. Louis* and county of *St. Clair* aforesaid, the said *Frederick Hinze* and *Michael Murphy* did respectively unlawfully hold and exercise the powers and duties of police commissioners of said city of *East St. Louis*, and from thence hitherto and still do respectively unlawfully hold and exercise the powers and duties of said office, there being no law authorizing such office, — contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Illinois*.

Jas. K. Edsall, Attorney General of *Illinois*.
A. S. Wilderman.
R. A. Halbert.
James M. Hay, for relator.

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *Illinois*. — Starr & C. Anno. Stat. (1896), c. 112, par. 1.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

3. There was a judgment of ouster in this case.

(*n*) *Of Recorder of City.*

Form No. 16886.[1]

(Precedent in Com. *v.* Denworth, 145 Pa. St. 172.)[2]

[(*Title of court and cause as in Form No. 16894.*)

Now this *seventeenth* day of *October*, A. D. one thousand eight hundred and *ninety*, comes *William S. Kirkpatrick*, Attorney general of the commonwealth of *Pennsylvania*, and gives the court to understand and be informed,][3] that one *James B. Denworth*, of the city of *Williamsport*, in the couuty of *Lycoming*, hath, since the *first* day of *January*, 1889, used and exercised, and still doth use and exercise, the office of recorder in and for the said city of *Williamsport*, under color of an act of assembly of *March 24*, 1877, (P. L. 47,) entitled (*setting out title of act*); and a supplement thereto of *May 1*, 1879, (P. L. 44,) entitled (*setting out title of act*); and another supplement thereto of *February 14*, 1881, (P. L. 6,) entitled (*setting out title of act*), without any warrant or lawful authority therefor; which colorable office, and the powers, authorities, emoluments and franchises thereto so belonging and appertaining, the said *James B. Denworth*, during all the time aforesaid, hath usurped, and still doth usurp upon the government of said commonwealth, to the great damage and prejudice of the lawful authorities of the same.

Whereupon, the said attorney general makes a suggestion and complaint herein, and for due process of law against the said *James B. Denworth* in this behalf, to be made to answer by what warrant he claims to have, exercise, use, and enjoy the said office.

[*William S. Kirkpatrick*, Attorney general.

(*Verification.*)[4]][3]

(*o*) *Of Sheriff.*[5]

1. *Pennsylvania.* — Bright. Pur. Dig. (1894), p. 1773, § 1 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

2. There was a judgment of ouster in this case.

3. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

4. **Verification.** — Suggestion must be verified by affidavit. Bright. Pur. Dig. Pa. (1894), p. 1774, § 7.

For a form of verification in a particular jurisdiction consult the title VERIFICATIONS.

5. **Precedent.** — In People *v.* Van Slyck, 4 Cow. (N. Y.) 297, the following information is set out:

"*Schenectady* county, to wit: *Samuel A. Talcott*, Attorney General of the People of the state of *New York*, who sues for the said People in this behalf, comes here into the *Supreme* Court *of Judicature* of the state of *New York*, before the Justices of the People of the state of *New York*, of the *Supreme* Court *of Judicature* of the same People, at the Capitol in the city of *Albany*, on *Saturday*, the *18th* day of *January*, 1823, in *January* term, and for the said People of the state of *New York*, at the relation of *Gershom Van Voast*, of the city of *Schenectady*, according to the form of the statute in such case made and provided, gives the court here to understand and be informed, that the office of sheriff of the county of *Schenectady* hath been, and for a long time heretofore, to wit, for the space of *ten* years last past, and upwards, and still is a public office, and an office of great trust and preeminence within the state of *New York*, to wit, at the city and in the county of *Schenectady* aforesaid; and that *Harmanus A. Van Slyck*, of the county of *Schenectady* aforesaid, without any legal warrant, grant or right whatsoever, hath, for the space of *fourteen* days now last past, and

Form No. 16887.[1]

(Precedent in State *v.* Shank, 36 W. Va. 226.)[2]

[State of *West Virginia*, } ss. In the *Circuit* Court thereof, *July* term,
County of *Preston*. } 1889.][3]

James E. Heatherly, under and by virtue of the statute in such cases made and provided, now, in the name of the state of *West Virginia*, here in open court comes, and prosecutes herein, and gives this honorable court to understand and be informed as follows, to wit: That whereas, at a general election on behalf of and by the people of the state, in and through the several counties, on the *6th* day of *November*, A. D. 1888, he, the said *James E. Heatherly*, was duly elected sheriff of the said county of *Barbour* for and during the term of *four* years, to commence and be held on and from the *1st* day of *January*, A. D. 1889, for the said term, to be from thence fully completed and ended; and that after such election, and the same having been properly certified to him according to law, he, the said *James E. Heatherly*, afterwards, to wit, on the *11th* day of *November*, A. D. 1888, went in proper person before the court of the said county of *Barbour*, at the court-house thereof, then in session, and entered into the proper official bonds required by law, with surety sufficient therefor, and then and there duly approved by the said court; whereupon the said *James E. Heatherly* also took the oath of office before the said court, and then and there in all respects qualified according to law, and took upon and completed in himself a vested right and title to and in the said office of sheriff of the said county of *Barbour*; and upon and after the said *1st* day of *January*, A. D. 1889, he, the said *James E. Heatherly*, then and there entered upon the said office, and by himself, and those properly deputed under

more, held, used and executed the said office of sheriff of the county of *Schenectady*, without any legal warrant, grant or right, and still doth hold, use and execute the said office, to wit, at the city and in the county aforesaid; and that the said *Harmanus A. Van Slyck*, for and during all the time last above mentioned, without any legal warrant, grant or right whatsoever, at the city and in the county of *Schenectady*, has claimed and still does claim, to be Sheriff of the county of *Schenectady* aforesaid, and to have, use and enjoy all the liberties, privileges and franchises to the office of sheriff of the county of *Schenectady* aforesaid, belonging and appertaining, which said office, liberties, privileges and franchises, he, the said *Harmanus A. Van Slyck*, for and during the whole time last above mentioned, upon the said People hath usurped, intruded into and unlawfully held, and still doth usurp, intrude into and unlawfully hold, that is to say, at the city and in the county of *Schenectady* aforesaid, in contempt of the People of the state of *New York*, and to their great damage and prejudice, and also against their dignity."

The court held that defendant was not duly elected sheriff, but unlawfully held the office, and a judgment of ouster was entered.

1. *West Virginia.* — Code (1899), c. 109, § 9.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

2. The information in this case was dismissed in the circuit court, but on writ of error to the supreme court it was held that the circuit court should have heard the case upon its merits, and if the plaintiff sustained his allegations the court should have rendered judgment of ouster against the defendant.

Petition for leave to file the information is set out in substance in this case.

3. The matter enclosed by [ ] will not be found in the reported case.

him, did perform and discharge the duties thereof and appertaining in any wise thereunto, until the *5th* day of *April* next thereafter, to wit, *April 5*, A. D. 1*889*, at which time *John W. Shank*, who is now exercising the duties of the said office, as he assumes now in the said county to do, then and there did, without lawful or sufficient authority in the premises, and with force and arms, intrude into, and from him (the said *James E. Heatherly*) usurp the said office of sheriff of the said county of *Barbour*, and ousted him (the said *James E. Heatherly*) therefrom, and wholly thence deprived him thereof, and since withholds the same from him, against the peace and dignity of the state; whereupon the said *James E. Heatherly* and pursuant to the statute aforesaid, now craves here the consideration of the said court in the premises, and that due process of law may be awarded in the name of the state against the said *John W. Shank* herein, to cause him to answer the said information, and disclose to this honorable court by what warrant he has so intruded upon and usurped the said office, and still withholds the same from the said *James E. Heatherly*. [*Jeremiah Mason*, p. q.][1]

(2) After Abandonment of Office.

Form No. 16888.[2]

(Precedent in State *v.* Allen, 21 Ind. 517.)[3]

[(*Venue and title of court as in Form No. 5915.*)

The State of *Indiana* on the relation of *Burwell H. Cornwell*, against *Edward B. Allen*. } Complaint.][4]

The relator informs the court that the defendant, *Edward B. Allen*, was duly elected Auditor of *Vigo* county, *Indiana*, in *October*, 1*859*; and that, after said election, he duly qualified, and entered upon the duties of the office, and continued to discharge the same till the *1st* of *August*, 1*862*, when he vacated said office by abandoning the same, in this, to-wit: on said day he volunteered as a private, in company *B*, of the *11th* regiment of *Indiana* volunteers, and, on the *14th* of said month, with said regiment, was duly mustered into the military service of the United States for *three* years, or during the war; that on the *16th* of *August*, 1*862*, he was, by the members of said company, elected their captain, and from that time entered upon the duties of captain, and held himself out to the public, and the officers and privates of said regiment, as captain, and was, by the public and military

1. The matter enclosed by [ ] will not be found in the reported case.

2. *Indiana.* — Horner's Stat. (1896), § 1131 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

3. A judgment sustaining a demurrer to the complaint or information in this case was reversed in the supreme court.

4. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

authorities, recognized and accepted as such; that said company *B* was recruited in said *Vigo* county, and went into the service as one of the companies from said county; that both the Governor and Adjutant General of the state knew of the defendant acting and being recognized as captain, as aforesaid, and consented and permitted him so to act; that the defendant never received from the Governor a commission as captain; that on the *17th* day of *August*, 1862, said regiment was ordered to *Kentucky*, and was in the battle of *Richmond*, on the *30th* of *August*, in which all the field officers were killed, and said defendant, as senior captain, made an official report of the battle to *W. H. Fairbanks*, A. A. Adjutant General of the brigade to which said regiment was attached, and said report was accepted by him, and said *Allen* had said report, over his own signature, as commanding captain, published, on the *8th* of *September*, in the *Terre Haute Express*, a paper of general circulation in said county, published at *Terre Haute*; that defendant, from the time of his enlistment, as aforesaid, totally absented himself from said office of Auditor, and appointed no deputy to discharge its duties, and remained absent in the army, as aforesaid, until the general election, held in said county on the *14th* of *October*, 1862, all of which facts were well known to the voters of said county; but that, on the *28th* of *October*, 1862, he returned and wrongfully intruded himself into said office, and continues to discharge the duties thereof, claiming to be the legal officer; that at that general election, in *October*, 1862, the clerk had made no certificate to the sheriff, and the latter had given no notice, as required by law, that there would be an election for county Auditor, but at said election a poll was opened in all the precincts, for the election of Auditor in said county, and the relator, *Burwell H. Cornwell*, a resident of said county, and eligible to said office, was a candidate therefor, and the only one voted for at said election for said office, and received therefor *1,700* votes; that the board of commissioners of said county refused to declare the relator elected Auditor; that he, on the *20th* day of *October*, 1862, procured the clerk of the *Circuit* Court to make out a duly certified transcript of the certificate of the board of judges of the several precincts of said county, containing the votes of said relator, for said office, and had the said clerk mail the same to the Secretary of State, and on the *8th* day of *November*, 1862, he demanded, from the Governor of the state, a commission as Auditor, as aforesaid, which he refused in writing to issue, a copy of which refusal is as follows: "I refuse to issue this commission on the ground, it is alleged, there was no vacancy in said office. *O. P. Morton*, Governor;" that on the *13th* of *November*, 1862, at a special session of the board of commissioners of said county, he tendered his official bond, and it was accepted by the board; that on the *3d* of *November*, 1862, he duly took the oath of office before the clerk of the *Vigo Circuit* Court, and, on the same day, demanded of the defendant the books, etc., and possession of said office of Auditor of *Vigo* county, which defendant refused to surrender; wherefore the relator sues for said office and *1,000* damages.

Risley, Smith and Mack, for Relator.

(3) After Abolition of Office by Statute.

Form No. 16889.[1]

(Precedent in State *v.* Govern, 47 N. J. L. 368.)[2]

[(*Title of court as in Form No. 16874.*)][3]
Hudson county, ss.

John P. Stockton, esquire, attorney-general of the state of *New Jersey*, who sues for the said state in this behalf, comes in his own proper person here into the *Supreme* Court *of Judicature* of the said state, before the justices thereof, at the state-house, in the city of *Trenton*, on the *8th* day of *June*, in the year of our Lord 1885, for the said state of *New Jersey*, at the relation of *Robert Bumsted*, of *Jersey City*, in the county of *Hudson* in said state, desiring to sue and prosecute in this behalf, according to the form of the statute in such case made and provided, gives the said court here to be informed and understand that he is a citizen of the United States and of this state, and a resident, freeholder and tax-payer of that part of the city of *Jersey City* within the *first* assembly district of said county of *Hudson*, and has been such for *five* years last past, and upwards, and that on the *14th* day of *April* last past, he was duly elected a member of the board of chosen freeholders for said county, for said district, for *one* year from the *first Tuesday* in *May* then next, and that he duly qualified for said office, and gave the bond required by law; that it is by law the duty of said board to hold its annual stated meeting on the *Tuesday* next after the *first Monday* in *May* of each year; that on the said *Tuesday* in *May* last the freeholders elect from the various assembly districts of said county, being *two* from each district, or *twenty* in all, having all duly qualified and given bond, assembled at the usual place of meeting of said board for the purpose of organization; that at that time and place one *Patrick Govern* assumed the chair, and called the roll of members elect, and proceeded to the transaction of business, with himself as presiding officer, and has ever since professed to act as a member and director of said board.

And the said attorney-general, on the relation aforesaid, further gives the court here to be informed and understand that, although true it is that by virtue of an act of the legislature of the state of New Jersey entitled "An act to re-organize the board of chosen freeholders of the county of Hudson," approved March 23d, 1875, the said *Patrick Govern* was on the *first Tuesday* of *November*, A. D. 1883, duly elected director of the board of chosen freeholders of the county of *Hudson* by the vote of the electors of said county at large, for a term of *two* years from the *third Tuesday* of *November* then next, and accepted said office, and took the official oath, and gave the bond required by said act, and on *third Tuesday* of *November*, A. D. 1883, entered upon the duties of his said office, and continued to exercise the same

1. *New Jersey.* — Gen. Stat. (1895), p. 2632, § 1 *et seq.*
See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

2 On demurrer, the information in this case was held sufficient.

3. The matter to be supplied within [ ] will not be found in the reported case.

until the passage of the act of the legislature hereinafter mentioned, and thence hitherto claims and alleges that said last-named act is unconstitutional and void, and that he is acting as member and director of said board under authority of said act approved March 23d, 1875, yet the said attorney-general, on relation aforesaid, gives the court here further to be informed and understand that, by an act of the legislature of the state of New Jersey, passed March 25th, A. D. 1885, entitled "An act concerning the constitution of the boards of chosen freeholders of this state, and to make uniform the selection and duties of directors of such boards," it was enacted as follows, viz.:

1. Be it enacted by the Senate and General Assembly of the state of *New Jersey*, That hereafter only those persons elected by the various townships, or other political divisions from which chosen freeholders are authorized to be elected by the laws of this state shall constitute the boards of chosen freeholders of the respective counties of this state; and no member or director of any board of chosen freeholders shall be elected by the vote of the electors of a county at large, any law to the contrary hereof notwithstanding.

2. And be it enacted, That the boards of chosen freeholders in the several counties of this state shall elect their own director from among their own number, in accordance with the provisions of the act entitled "An act to incorporate the chosen freeholders in the respective counties of the state," approved March 16th, 1846; and such director shall have the powers and perform the duties prescribed by said act, and no other powers and duties.

3. And be it enacted, That any office of director of a board of chosen freeholders created by any law of this state other than said act shall be and the same is hereby abolished, and in any county where there has hitherto been such an office the board of chosen freeholders shall immediately elect a director from their own number.

4. And be it enacted, That all acts and parts of acts, general or special, public or private, inconsistent with the provisions of this act, be and the same hereby are repealed.

5. And be it enacted, That this act shall be deemed a public act and take effect immediately.

Wherefore the said attorney-general, on the relation aforesaid, says that the said *Patrick Govern*, since the *fifth* day of *May* last, hath usurped, intruded into and unlawfully held, used and exercised, and yet doth use, intrude into and unlawfully hold, use and exercise the office of member and director of the board of chosen freeholders of the county of *Hudson*, to the great disadvantage of the said relator as a member of said board, and as a citizen and tax-payer of said county, to wit, at *Jersey City*, *Hudson* county aforesaid, in contempt of the state of *New Jersey*, and to its great damage and prejudice, against its dignity and sovereignty.

Whereupon the said attorney-general of the said state, at the relation of the said *Robert Bumsted*, desiring to sue and prosecute in this behalf, prays the advice of the court here in the premises, and for due process of law against the said *Patrick Govern*, in this behalf, to be made to answer to the said state by what warrant he claims to hold, use, execute and enjoy the aforesaid office of member and

director of said board of chosen freeholders of the county of *Hudson*, and the liberties, privileges and franchises thereof.

John P. Stockton, Attorney-General.

R. B. Seymour, Attorney of Relator.

(4) Fraudulently Elected.

Form No. 16890.[1]

(Precedent in Com. *v.* Meeser, 44 Pa. St. 341.)[2]

[(*Title of court and cause as in Form No. 16894.*)][3]

Henry E. Wallace and *Edmund S. Yard*, citizens and qualified voters of the *Fifth* Ward of the city of *Philadelphia*, who sue in this behalf, as well for the Commonwealth of *Pennsylvania*, this *21st* day of *February*, 1863, came into court here, and for the said Commonwealth, give the court here to understand and be informed, that *William Meeser*, since the *5th* day of *January* last, has exercised, and still does exercise, the office, franchises, rights, and privileges of a member of the Common Council of the city of *Philadelphia*, for the *Fifth* Ward of said city, under the circumstances and in the manner following, viz.: —

By an Act of Assembly passed March 21st, 1861, it was enacted, "That each ward of the city of *Philadelphia* shall have a member of Common Council for each *two thousand* of taxable inhabitants that it shall contain, according to the list of taxables for the preceding year," etc.

According to the lawful list of taxables for the year preceding the last election, on the *14th* day of *October*, 1862, said *Fifth* Ward had less than *four thousand* taxable inhabitants, and of course said ward was only entitled to *one* member of Common Council; and as one *William M. Baird*, who was elected member of said council from said ward, on the *second Tuesday* of *October*, 1861, held for *two* years, and was of course still sitting as member for said *Fifth* Ward, said ward was entitled to elect no other member of said council at said election, on the *14th* day of *October*, 1862; and the sheriff's proclamation, published according to law, prior to the said election, indicated that no election for a member of Common Council was to take place in said ward. Accordingly, both parties withdrew their candidates, or none were put forward or voted for in the usual manner by either party, there being a common understanding in accordance with said proclamation. On counting the votes, however, after the polls had closed, it was found that *five* votes had been cast by some persons for said *William Meeser*; said votes were returned as cast or voted, and a certificate was fraudulently given by a majority of the judges of the said ward, certifying that said *Meeser* was duly elected a member of Common

1. *Pennsylvania.* — Bright. Pur. Dig. (1894), p. 1773, § 1 *et seq.*
See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

2. The writ was awarded in this case, it being held that the relator had shown good cause for it.

3. The matter to be supplied within [] will not be found in the reported case.

Council from said ward, having received all the votes cast for that office, which certificate, he, the said *Meeser*, fraudulently received and used at the organization of councils, and the same was, by the officers organizing said councils, fraudulently received, and he, the said *Meeser*, was by said officers fraudulently permitted to take his seat in said councils, by virtue of said certificate; and he, the said *Meeser*, has, for the time aforesaid, held and used, and still does hold and use, the said office, franchises, rights, and privileges aforesaid of member of Common Council for said city, from said *Fifth* Ward, and has usurped and does usurp on the Commonwealth therein, to the great damage and prejudice of the constitution and laws thereof.

Whereupon the said relators for the said Commonwealth make suggestion and complaint of the premises, and pray due process of law against the said *William Meeser* in this behalf, to be made to answer to the said Commonwealth by what warrant he claims to have, use, and occupy the franchises, rights and privileges aforesaid.

[(*Signature and verification.*[1])][2]

Form No. 16891.[3]

(Precedent in State *v.* Kearn, 17 R. I. 392.)[4]

To the Honorable *Supreme* Court for the county of *Providence*:—

Robert W. Burbank, of the city and county of *Providence*, Attorney General of the state of *Rhode Island and Providence Plantations*, who prosecutes for said state, in this behalf and comes into this Honorable court, and for said state, at the relation of *James H. Andrew*, *Hector Schiller*, *Thomas Jordan*, *Edwin F. Hawkins*, *Frank X. Roberts*, *George W. Harris*, and *William E. Manchester*, all of the town of *Lincoln*, in the county of *Providence* and said state, and all legally qualified electors of said town of *Lincoln*, and gives the court to understand and be informed that said town of *Lincoln* aforesaid is a municipal corporation in said county of *Providence*, and that with said town, pursuant to the provisions of the statutes of said state and of a legal vote of said town, there of right ought to be *seven* town councilmen of said town, to be elected in the manner in the statutes of said state specified, and in accordance with law; that the said several places and offices of town councilmen of said town are public offices and places of great trust and preeminence within said town, touching the rule and government of said town and the administration of public justice in said town; and that *Robert H. Kearn*, *Adam Bunting*, *Frank E. Fitzsimmons*, *Benjamin F. Harris*, *Gilbert Carty*, *Louis Girouard*, and

1. **Verification.** — Suggestion for writ of quo warranto must be verified by affidavit. Bright. Pur. Dig. Pa. (1894), p. 1774, § 6.

For a form of verification in a particular jurisdiction see the title VERIFICATIONS.

2. The matter to be supplied within [] will not be found in the reported case.

3. *Rhode Island.* — Gen. Laws (1896), c. 222, § 4.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

4. A demurrer to the information in this case was overruled, and on answer and replication there was a judgment of ouster against respondents.

John B. Dolan, all of said town of *Lincoln*, in said county of *Providence*, heretofore, to wit, on the *third* day of *June*, A. D. 1891, at said *Lincoln*, in said county, did use and exercise, and from thence continually afterwards to the time of exhibiting this information have there used and exercised, and still do there use and exercise without any legal warrant, grant, or right whatsoever, said offices of town councilmen of said town of *Lincoln*, and for and during all the time last above mentioned have there claimed, and still do there claim, to be town councilmen of said town of *Lincoln*, and to have, use, and enjoy all the liberties, privileges, powers, authorities, and franchises to the offices of town councilmen of said town belonging and appertaining, which said offices, liberties, privileges, powers, authorities, and franchises they, the said *Robert H. Kearn*, *Adam Bunting*, *Frank E. Fitzsimmons*, *Benjamin F. Harris*, *Gilbert Carty*, *Louis Girouard*, and *John B. Dolan*, for and during all the time last above mentioned, without any legal warrant, grant, or right whatever, have usurped and do usurp, to wit, at said *Lincoln*, against the form of the statutes in such case made and provided, and against the peace and dignity of the state.

And said Attorney General, who prosecutes as aforesaid at the relation aforesaid, gives the court further to understand and be informed that said town of *Lincoln* is a municipal corporation in said county of *Providence*, and that within said town, pursuant to the statutes of said state and of a legal vote of said town, there of right ought to be *seven* town councilmen of said town, to be elected in the manner in the statutes of said state specified, and in accordance with law; that the several places and offices of town councilmen of said town are public offices and places of great trust and preeminence within said town, touching the rule and government of said town and the administration of public justice within the same, to wit, of said town of *Lincoln*; and said Attorney General gives the court further to understand and be informed, that in accordance with law the annual meeting for the election of town officers of said town of *Lincoln*, including town councilmen of said town for the years 1891–92, was legally holden in said town on the *first* day of *June*, A. D. 1891; that at said meeting the electors of said town gave in their votes by ballot in accordance with law for town councilmen of said town for the then next ensuing year; that said *James H. Andrew*, *Hector Schiller*, *Thomas Jordan*, *Edwin F. Hawkins*, *Frank X. Roberts*, *George W. Harris*, and *William E. Manchester*, all being legally qualified electors of said town and legally qualified to be town councilmen of said town, received a majority of all the votes legally cast and given in for town councilmen of said town at said meeting in said town, on said *first* day of *June*, A. D. 1891, as aforesaid, and according to law are respectively entitled to have, hold, and enjoy the offices, liberties, privileges, powers, authorities, and franchises of town councilmen of said town for the year next ensuing from and after the date of said town meeting.

And said Attorney General gives the court further to understand and be informed, that among the ballots legally cast and given in, in said town, at said annual election, holden in said town on the *first* day

of *June*, A. D. 1891, as aforesaid, there were found a large number of ballots fraudulently and unlawfully cast and given in; that said ballots so fraudulently and unlawfully cast and given in were of thin or tissue paper, folded and rolled together in such manner that they could not have been legally cast and given in by different electors; that said fraudulent and unlawful ballots cast and given in as aforesaid were all for said *Robert H. Kearn*, *Adam Bunting*, *Frank E. Fitzsimmons*, *Benjamin F. Harris*, *Gilbert Carty*, *Louis Girouard*, and *John B. Dolan*, for town councilmen of said town of *Lincoln*; that said fraudulent ballots so cast and given in as aforesaid were, by the town council of said town of *Lincoln*, said town council being the legally constituted and appointed officers to examine and count said ballots, counted as legally cast and lawful ballots, and the number of the same added to the number of ballots legally cast and given in by the electors of said town of *Lincoln* for town councilmen, at said annual election in said town, on, to wit, said *first* day of *June*, A. D. 1891; that said *Robert H. Kearn*, *Adam Bunting*, *Frank E. Fitzsimmons*, *Benjamin F. Harris*, *Gilbert Carty*, *Louis Girouard*, and *John B. Dolan*, upon the counting of said fraudulent and unlawful votes, and the announcement of said town council of the result of said counting, thereupon, on, to wit, the *third* day of *June*, A. D. 1891, took the oath required by law to be taken by all persons elected town councilmen, and thereupon did use and exercise, and from thence continually afterward, to the time of exhibiting this information, have there used and exercises, and still do use and exercise, the offices of town councilmen of said town of *Lincoln*, and for and during all the time last above mentioned have there claimed, and still do there claim, to be town councilmen of said town, and to have, use, and enjoy all the liberties, privileges, powers, authorities, and franchises to the offices of town councilmen of said town of *Lincoln* belonging and appertaining, against the form of the statutes in such case made and provided, and against the peace and dignity of the state.

Wherefore, the said Attorney General of said state, for said state in behalf of said *James H. Andrew*, *Hector Schiller*, *Thomas Jordan*, *Edwin F. Hawkins*, *Frank X. Roberts*, *George W. Harris*, and *William F. Manchester*, prays the consideration of the court here in the premises, and that due process of law may be awarded against the said *Robert H. Kearn*, *Adam Bunting*, *Frank E. Fitzsimmons*, *Benjamin F. Harris*, *Gilbert Carty*, *Louis Girouard*, and *John B. Dolan*, in this behalf, severally to make answer to said state, and show by what authority they and each of them claim to have, hold, use, and enjoy the offices, liberties, privileges, powers, authorities, and franchises of town councilmen of said town of *Lincoln*, and that the said *Robert H. Kearn*, *Adam Bunting*, *Frank E. Fitzsimmons*, *Benjamin F. Harris*, *Gilbert Carty*, *Louis Girouard*, and *John B. Dolan* be excluded and ousted from said offices of town councilmen of said town of *Lincoln* and from further holding and exercising the same, and that said *James H. Andrew*, *Hector Schiller*, *Thomas Jordan*, *Edwin F. Hawkins*, *Frank X. Roberts*, *George W. Harris*, and *William E. Manchester* be adjudged entitled to the same.

Robert W. Burbank, Attorney General.

(5) Illegally Appointed.

(*a*) *Director of School District.*

Form No. 16892.[1]

(Precedent in Com. *v.* Meanor, 167 Pa. St. 292.)[2]

[(*Commencement as in Form No. 16894.*)][3]

First. That at a public election held in *Turtle Creek* borough, *John T. C. Bowman* and your relator each received *seventy-nine* votes for the same term of office of school director.

That said *Bowman* and your relator appeared at the next regular meeting to have the board "determine their rights to seats therein" as provided by act of assembly, April 11, 1862.

That *John T. C. Bowman* refused to participate in the drawing, whereupon the board adjourned without determining the rights of said opposing candidates, and have since neglected to determine their rights to said office.

Second. That at the organization of said school district for the current year, on *June* ———, 1894, your relator was present and demanded that his rights to a seat in said board be determined.

Whereupon *T. C. Robinson*, *E. W. Boyd*, *P. W. Boli*, *J. E. Hunter* and *J. C. Mates*, acting as the school board of said district, contrary to and without warrant of law, proceeded to declare a vacancy in said board of directors and appointed the respondent, *A. M. Meanor*, to the office for the unexpired term.

Third. That by reason of the premises, the said respondent, *A. M. Meanor*, is now exercising and pretending to exercise the office of school director in and for said school district contrary to and without warrant of law.

[The relator prays (*concluding as in Form No. 16894.*)][4]

(*b*) *Director of State School for Deaf and Dumb.*

Form No. 16893.[5]

(Precedent in State *v.* Bristol, 122 N. Car. 246.)[6]

[(*Venue and title of court as in Form No. 5927.*)

The State of *North Carolina*, on the relation of *M. H. Holt*, plaintiff, against *M. A. Bristol*, defendant.][4]

The plaintiff complaining of the defendant, alleges:

1. That the *North Carolina School for the Deaf and Dumb* is a quasi

1. *Pennsylvania.* — Bright. Pur. Dig. (1894), p. 1773, § 1 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

2. There was a judgment of ouster in this case, which judgment was affirmed.

3. The matter to be supplied within [ ] will not be found in the reported case.

4. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

5. *North Carolina.* — Code Civ. Proc. (1900), § 607.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

6. A judgment sustaining a demurrer to the complaint in this case was, on

corporation duly organized and existing under the laws of this state, to wit, under Chapter 399 of the Laws of 1891.

2. That on the ——— day of *March*, 1891, the relator, *M. H. Holt*, was duly elected a director of said corporation for the term of *six* years, beginning on the ——— day of *March*, 1891, and until his successor should be elected and qualified, and he was duly admitted as a member of the Board of Directors and entered upon the discharge of his duties and continued to act as such director until the time hereinafter stated.

3. That the General Assembly at its session of 1897 failed to elect any successor to the relator; but after the adjournment of the General Assembly the Governor undertook to appoint the defendant, *L. A. Bristol*, to fill the office filled by the relator, and this on the theory that there was a vacancy in said office, and he was in law entitled to fill the same.

4. That the defendant, *L. A. Bristol*, accepted the said appointment, and was recognized by the Board of Directors of said corporation as a director thereof, and has continued since to act as such.

5. That the defendant, *L. A. Bristol*, has wrongfully usurped and entered into such office, and has unlawfully and wrongfully excluded the relator of the plaintiff therefrom, and upon demand has refused to surrender said office to said relator.

Wherefore, the plaintiff demands judgment that said defendant be ousted from said office and he be adjudged entitled to the possession thereof; for such other and further relief as may be just, and for costs.

[(*Signature and verification as in Form No. 5927.*)][1]

(*c*) *Street Commissioner.*

Form No. 16894.[2]

(Precedent in Com. *v.* Crogan, 155 Pa. St. 449.)[3]

[(*Title of court as in Form No. 6947.*)

Commonwealth of Pennsylvania, ex rel.
J. M. Garman,
against
Michael Crogan.
} *November* Term, 1892.][4]

Now, *Nov. 1*, 1892, comes *John M. Garman*, district attorney of said county, into court, and gives the court here to understand that by paragraph 22 of section 27 of the "act to incorporate the city of Wilkes-Barre," power is vested in the mayor and city council by their concurrent but not separate action to appoint such officers, not

appeal, held erroneous, the plaintiff being entitled to the relief demanded.

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *Pennsylvania.* — Bright. Pur. Dig. (1894), p. 1773, § 1 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

3. There was a judgment for defendant over a general demurrer to the information in this case, which judgment was, on appeal, reversed and a judgment of ouster entered.

4. The matter enclosed by and to be

specially designated by law, as they may deem necessary to secure the peace, order and well-being of the city, and that the street commissioner is such an officer; that the defendant, *Michael Crogan*, since the *4th* day of *April*, A. D. 1892, has exercised the office and functions of street commissioner aforesaid without any warrant of law, for the reason that he was appointed to the said office on the day last mentioned, by the separate and exclusive action of the council of said city and pursuant to the second section of an ordinance entitled "Officers," approved March 22, 1878, and not by the concurrent action of the mayor and council.

The relator prays, therefore, that a writ of quo warranto may be issued against the defendant to show by what authority he claims to exercise the office aforesaid.

[(*Signature of district attorney.*)

(*Verification.*)[1]][2]

(6) Illegally Elected.

(*a*) *City Controller.*

Form No. 16895.[3]

(Precedent in Taggart *v.* Com., 102 Pa. St. 354.)[4]

[(*Commencing as in Form No. 16894*)][2] that by an Act of the General Assembly of this Commonwealth entitled "A further supplement to an Act entitled an Act to incorporate the city of Philadelphia," approved the second day of February, 1854, to which act reference is craved as if the same were fully and at large herein set forth, there were created the offices in the said act enumerated, and among others the office of City Controller.

That by the first section of the fourteenth article of the constitution of Pennsylvania, it was provided as follows: —

"Section 1. County officers shall consist of sheriffs, coroners, prothonotaries, registers of wills, recorders of deeds, commissioners, treasurers, surveyors, auditors or controllers, clerks of the courts, district attorneys, and such others as from time to time may be established by law."

That at the general election held under the constitution and laws of this Commonwealth on the *Tuesday* next following the *first Monday* of *November*, 1874, *Samuel P. Hancock* was elected by the qualified voters residing within the territorial limits of the said city and county of *Philadelphia*, to fill the office designated by the said voters as City Controller, and that the said *Samuel P. Hancock* assumed and

supplied within [ ] will not be found in the reported case.

1. **Verification.** — Suggestion for writ of quo warranto must be verified by affidavit. Bright. Pur. Dig. Pa. (1894), p. 1774, § 6.

For a form of verification in a particular jurisdiction see the title Verifications.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. *Pennsylvania.* — Bright. Pur. Dig. (1894), p. 1773, § 1 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

4. There was a judgment of ouster in this case, which was affirmed in the supreme court.

entered upon the duties of the office to which he had been thus elected, and continued to hold the said office until the *first* day of *January*, A. D. 1878.

That at the general election held under the constitution and laws of this Commonwealth on the *Tuesday* next following the *first Monday* of *November*, 1877, *Robert E. Pattison* was elected by the qualified voters residing within the territorial limits of the said city and county of *Philadelphia*, to fill the office by them designated as City Controller, from the *first* day of *January*, 1878, to the *first* day of *January*, 1881, and that the said *Robert E. Pattison* entered upon and assumed the duties of the office to which he had been thus elected for the term of *three* years from the *first* day of *January*, 1878.

That the said *Robert E. Pattison* was re-elected at the general election held on the *Tuesday* next following the *first Monday* of *November*, 1880, by the qualified voters residing within the territorial limits of the city and county of *Philadelphia*, to the office designated by them as City Controller for the term of *three* years from the *first* day of *January*, 1881, and that the said *Robert E. Pattison* entered upon and assumed the duties of the office to which he had thus been elected.

That on the *sixteenth* day of *January*, 1883, the said office became vacant in consequence of the said *Robert E. Pattison* entering upon and assuming the duties of the office of Governor of the Commonwealth of *Pennsylvania*, to which he had been duly elected, and that thereby a vacancy was created in the said office to which the said *Robert E. Pattison* had been elected on the *Tuesday* next following the *first Monday* of *November*, A. D. 1880.

That thereupon the councils of the city of *Philadelphia* elected *William M. Taggart* to fill the vacancy thus created, and the said *William M. Taggart* subsequently gave security for the faithful performance of the duties of said office, which security was approved by the City Councils and Mayor of said city, and the said *William M. Taggart* has taken and subscribed an oath faithfully to discharge the duties of said office, and has openly and publicly proclaimed himself as the incumbent of said office; and the Attorney-General admits that assuming that the said Councils had authority to fill the said vacancy said *William M. Taggart* was duly elected, and he further admits, assuming as aforesaid, that the said *William M. Taggart* thereafter became duly qualified to enter upon and assume the duties of the said office.

But the Attorney-General further gives the court to understand and be informed that the councils of the city of *Philadelphia* had no authority in law to fill said vacancy, the said authority being by the constitution and laws of this Commonwealth vested in the governor of the said Commonwealth; but, notwithstanding the premises, the said *William M. Taggart* unlawfully intrudes himself into the said office and usurps the same contrary to law, whereupon the Attorney-General suggests that the court award a writ directed to the sheriff of the said county of *Philadelphia*, commanding him to summon the said *William M. Taggart* to be and appear before the said court here

on a day certain, to show by what warrant he claims to hold and exercise the said office.

[(*Signature of attorney general and verification.*)[1]][2]

(*b*) *County Treasurer.*

Form No. 16896.[3]

(Precedent in Com. *v.* Read, 2 Ashm. (Pa.) 261.)[4]

[(*Title of court and cause as in Form No. 16894.*)][2]

County of *Philadelphia*, to wit:

Be it remembered, that *Hugh Clark*, of the county of *Philadelphia*, a citizen of the commonwealth of *Pennsylvania*, and a resident of the county of *Philadelphia*, and, as such, interested in the just and due administration of laws therein, and who sues for the commonwealth in this behalf, comes here into court, and gives the court here to understand and be informed, that by an act of assembly, duly passed and approved upon the 15th day of April, in the year of our Lord one thousand eight hundred and thirty-four, entitled, "An act relating to counties and townships, and county and township officers," it is, among other things, provided, that the commissioners of each county shall, annually, in the *first* week of the month of *January*, appoint a respectable citizen as county treasurer; and, in the event of the death, removal from the county, or misdemeanor in office of such treasurer, it shall be the duty of the commissioners to appoint a fit person to fill the vacancy until the end of the year.

And the said relator further gives the court here to understand and be informed, that by an act of assembly, duly passed and approved upon the 16th day of June, in the year of our Lord one thousand eight hundred and thirty-six, entitled, "An act regulating election district and for other purposes," it is, among other things, provided, that the county board for the city and county of *Philadelphia*, for the time being, shall meet at the county commissioner's office in the city of *Philadelphia*, on the *first Monday* of *June*, one thousand eight hundred and *thirty-seven*, and on the *first Monday* of *June*, in every second year thereafter, between the hours of *two* and *six* in the afternoon, and then and there elect by ballot, a county treasurer to serve for *two* years from said election, who shall perform the duties and incur the liabilities now prescribed by law for such treasurer; no person being eligible as county treasurer for *two* consecutive terms of *two* years each; and the present county treasurer shall continue in office until an election shall be held under the provisions of this act; and, in case, at any time, there should be a vacancy by death, resignation or

1. **Verification.** — Suggestion for writ of quo warranto must be verified by affidavit. Bright. Pur. Dig. Pa. (1894), p. 1774, § 6.

For a form of verification in a particular jurisdiction see the title VERIFICATIONS.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. *Pennsylvania.* — Bright. Pur. Dig. (1894), p. 1773, § 1 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

4. This case having been submitted to a jury, a verdict was rendered for defendant.

The plea in this case is set out *infra*, Form No. 16931.

otherwise, in the said office, it shall be the duty of the county board for the time being, at a special meeting to be held for that purpose, on not less than *six* days' notice, to supply the same.

And the relators further give the court here to understand and be informed, that the county board for the time being, did not, upon the *first Monday* of *June*, in the year of our Lord one thousand eight hundred and *thirty-nine*, meet at the office of the county commissioners in the city of *Philadelphia*; nor did the said county board then or there, or at any other time or place, elect by ballot a county treasurer to serve for *two* years, in manner and form as by the said last recited act is specified.

But the said relators give the court here further to understand, and be informed, that, at a meeting of the county board, held at the office of the county commissioners in the city of *Philadelphia*, upon the *10th* day of *April*, in the year last aforesaid, at *three* o'clock in the afternoon of the said day, they the said county board did proceed, or pretended to proceed, to an election for county treasurer, and did then and there unlawfully proceed therein, and receive the votes of the members of the said board by word of mouth, and not by ballot, as by said act is required; and did unlawfully refuse to accept and receive the vote of one of the members of said board, tendered by ballot; and that, although no majority of votes of the members of the said board then present, and given in manner aforesaid, were rendered for any one of the candidates for said office, yet one *George Read*, of the said county, doth pretend that he was duly elected to the said office of county treasurer for the space of *two* years then next ensuing; and, so pretending, hath proceeded to discharge the duties thereof: all of which, your relator is advised is contrary to law.

And notwithstanding the premises, the said *George Read* hath since the *first Monday* of *June*, in the year last aforesaid, used, and still doth use, the franchise, office, liberty and privileges of county treasurer, for the said county of *Philadelphia*; and, during said time, hath usurped, and still doth usurp upon the commonwealth therein, to the great damage and prejudice of the constitution and laws thereof. Therefore, the said relator, for the said commonwealth, doth make suggestion and complaint of the premises; and also, that the said officer doth discharge his duties in the said county of *Philadelphia*, and prays due process of law against the said *George Read*, in this behalf to answer to the said commonwealth, by what warrant he claims to have and enjoy the franchises, office, liberty and privilege of county treasurer aforesaid.

[(*Signature and verification as in Form No. 6430.*)][1]

(*c*) *President of Common Council.*

Form No. 16897.[2]

The replication in this case is set out *infra*, Form No. 16939.

1. The matter to be supplied within [] will not be found in the reported case.

2. *Massachusetts.* — Pub. Stat. (1882), c. 186, § 17 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

This form is a copy of the information filed in the case of Atty.-Gen. *v.* Sullivan, 163 Mass. 446.

Commonwealth of Massachusetts.
Supreme Judicial Court.

Middlesex, ss. 1895.

Attorney General
vs.
John E. Sullivan.
"A"
Commonwealth of Massachusetts.

Middlesex, ss.

To the Honorable the Justices of the *Supreme Judicial* Court:

Informing *Hosea M. Knowlton*, Esquire, Attorney General of the *Commonwealth of Massachusetts*, who in this behalf prosecutes in his own proper person in behalf of said Commonwealth and gives the court to understand and be informed that at a duly called meeting of the common council of the city of *Lowell*, holden on the *fifth* day of *February* last past, a motion was duly made and carried that a ballot be taken for the election of president for said council (previous efforts to elect said official having been unavailing); that in pursuance of said motion the acting chairman of said council appointed a committee to receive, sort and count the ballots; that said committee in pursuance of its duty proceeded to sort and count the ballots cast, or purported to have been cast, in said election, and thereafter reported to the said council that the whole number of votes cast were *twenty-four*; necessary for a choice, *thirteen*; that *Francis P. Rivet* had *two*, *Edward T. Goward one*, *Herbert E. Webster eight*, and *John E. Sullivan* had *thirteen*, a majority of the votes cast and was elected; that said acting chairman received the said report together with the ballots cast at said election and declared said *John E. Sullivan* elected president of the council:

That immediately thereafter one of the members of said council arose and announced that he had cast a ballot for one *John Oliver*, and that the committee had not made report thereof, and desired the same immediately inquired into, and that a correct report be made.

Upon this announcement and other information obtained a motion was made to proceed to verify the report of said committee by a reëxamination of said ballots; but the acting chairman refused to put the said motion and refused to permit said ballots to be reëxamined, and has since held said ballots in his possession and keeping and has refused to allow the same to be canvassed or examined although requested so to do.

And it is further represented that said *John E. Sullivan* did not rightfully and lawfully receive *thirteen* of the votes cast for the president of the council, or represented to have been cast for the president of the council as aforesaid, and was not legally elected thereto.

One of the ballots cast had upon it the name of *John Oliver*, and in substitution therefor a ballot containing the name of *John E. Sullivan* was made, or included among the ballots counted for said *John E. Sullivan*, and it is believed and represented that an inspection of the ballots now in the custody and keeping of said acting chairman would disclose with other evidence the foregoing allegations to be true.

And it is further represented that the president of the common council of the city of *Lowell* by the charter of said city is *ex officio* a member of the school committee of said city; that said *John E. Sullivan*, by virtue of said election, claims to be the president of the common council of said city of *Lowell* and *ex officio* a member of the school committee of said city; and in such capacity intrudes himself into said offices and exercises and claims a right to exercise and perform the duties pertaining thereto without any lawful right or authority so to do for reasons herein set forth.

Wherefore said attorney general prays the consideration of this court in the premises and that due process of law may be awarded against the said *John E. Sullivan* in this behalf to answer to this court by what warrant he claims to have, use and enjoy the offices, labors and privileges aforesaid.

Hosea M. Knowlton, Attorney General.

(7) In Illegally Constituted Municipality.

(*a*) *Of Mayor and Council of City.*

Form No. 16898.[1]

(Precedent in State *v*, Dimond, 44 Neb. 155.)[2]

[*State of Nebraska*, at the relation of *Charles Hammond*, against *F. N. Dimond, et al.* } In the *District* Court of *Lancaster* County, *Nebraska*.][3]

1. The relator is the owner of the northwest quarter of the southeast quarter of section *six* (*6*), township *nine* (*9*) north, of range *seven* (*7*) east, in *Lancaster* county, *Nebraska*, and has been the owner of said land ever since the *15th* day of *February*, 1*887*, which has ever since said time been farm land and used as such.

2. The defendants, *F. N. Dimond*, *C. W. Nicola*, *Joseph Sutherland*, *J. A. Childs*, *L. G. Soucey*, *F. A. De Wolf* and *Josephus Hobbs*, representing and acting as mayor and council for the defendant, the city of *College View*, are without authority of law exercising and usurping the rights and duties of mayor and council of the city of *College View*, county of *Lancaster* and state of *Nebraska*, and are passing ordinances and levying taxes without legal authority therefor.

3. Your relator alleges the fact to be that there is no such incorporated city or municipality as the city of *College View*.

4. Your relator alleges that the following tract or parcel of land in section *5*, township *9* north, of range *7* east, to-wit, the southwest quarter and the south half of the southeast quarter and the north half of the southeast quarter of section *5*, township *9*, range *7* east, *Lancaster* county, *Nebraska*, was platted as *College View*; that afterwards, to-wit,

1. *Nebraska*. — Comp. Stat. (1899), § 6292 *et seq*.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

2. Judgment sustaining a demurrer to the petition in this case was reversed in the supreme court.

3. The matter enclosed by [ ] will not be found in the reported case.

on the *25th* day of *April*, 1892, two-thirds of the residents of the platted tract of *College View* and the other land hereinafter described, presented to the county commissioners of *Lancaster* county, *Nebraska*, a petition for the incorporation of the village of *College View*, but said petition described the territory intended to be incorporated in said village, which was as follows: the west one-half of sections *4* and *9*, all of sections *5* and *8*, and the east one-half of sections *6* and *7* in township *9* north, of range *7* east, of the *6th* principal meridian, *Lancaster* county, *Nebraska*, containing *four* sections of land, which include the land above described owned by your relator, together with about *2,240* acres of other land, which was used for farming purposes and was not platted as an addition or subdivision, nor were there any residents upon the land above described owned by your relator, nor was there land platted or occupied for *one-half* mile or more between the above described land of your relator and the platted land or tract named *College View*. And the said commissioners of *Lancaster* county, *Nebraska*, acting without authority of law, did, on the *28th* day of *April*, 1892, pretend to incorporate the village of *College View*, including within the metes and bounds in said pretended incorporation the land of your relator above described, as well as about *2,240* acres of land not platted or subdivided, but being farm land. Such action of the county commissioners was without authority of law and illegal, and was without any notice to your relator, nor did he have any knowledge of the said pretended incorporation and the alleged corporation of the municipality of *College View* until about the month of *April*, 1894, when your relator applied to pay his taxes on the above described land to the county treasurer of *Lancaster* county, *Nebraska*, when he was informed by said county treasurer that there was the sum of $*15* corporation tax against said land levied by the alleged corporation or municipality of the city of *College View*.

[Wherefore plaintiff demands judgment as to the validity of the said act of incorporation and the right of defendants to levy said tax.

(*Signature and verification as in Form No. 5923.*)][1]

(*b*) *Of School Director.*

Form No. 16899.[2]

(Precedent in Chesshire *v.* People, 116 Ill. 494.)[3]

State of *Illinois*, } ss.
County of *Shelby*. }

In the *Circuit* Court, *October* term, A. D. 1883.

William C. Kelley, State's attorney in and for said county of *Shelby*, who sues for the People of the said state of *Illinois* in this behalf, comes into the said court here, on this day, and for the said People, and in

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

2. *Illinois*. — Starr & C. Anno. Stat. (1896), c. 112, par. 1.
See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

3. A general demurrer to the information in this case was overruled, and upon refusal by defendants to answer a judgment of ouster was rendered,

the name and by the authority of the said People of the state of *Illinois*, at the relation of *Robert Harper*, according to the form of the statute in such case made and provided, gives the court to understand and be informed that *Joseph Chesshire*, *William H. Barr* and *Isaac Smith*, for the space of *ninety* days last past, and more, in the county aforesaid, have held and executed, and still do hold and execute, without any warrant, title or right whatsoever, the offices of school directors of district number *9*, township number *12* north, range *2* east, of the *third* principal meridian, in the county aforesaid, which said offices said *Joseph Chesshire*, *William H. Barr* and *Isaac Smith*, during all the time aforesaid, in the county aforesaid, upon the People of the state of *Illinois* aforesaid, have usurped, and still do usurp, to the damage of said People, and against the peace and dignity of the same People of the state of *Illinois*, and contrary to the form of the statute in such case made and provided.

And said State's attorney, for the People aforesaid, in the name and by the authority of the said People of the state of *Illinois*, at the relation aforesaid, according to the form of the statute aforesaid, further gives the court to understand and be informed that said relator, *Robert Harper*,[1] is a resident of school district number *3*, in township *12* north, range *2* east, of the *third* principal meridian, in said county of *Shelby*, and the owner of real and personal estate therein, and a tax-payer of said district, and is also the owner of real estate and a tax-payer in school district number *9* aforesaid, in town *12* north, range *2* east, aforesaid, in said county of *Shelby*; and the said State's attorney further gives the court to understand and be informed that the school law, in force *July 1*, A. D. 1*881*, authorized trustees of schools to make new school districts, but required that the territory formed into a new district should contain not less *ten* families, and that when changes should be made in school districts, and no appeal be taken to the county superintendent, the clerk of the trustees of schools should make a complete copy of the record of the action of the trustees, which copy shall be certified by the president of said trustees of schools, and the clerk, who shall file the same, together with a map of the township showing the districts, and an accurate list of the tax-payers of the newly arranged districts, with the county clerk; and that if an appeal be taken to the county superintendent, and he should affirm the action of the trustees, the county superintendent shall notify the clerk, by whom the papers were transmitted, of his action, "and the clerk shall thereupon make a record of the same, and shall, within ten days thereafter, make a copy of the same, and the map and list of tax-payers, and deliver them to the county clerk, for filing and record by him."

And the said State's attorney gives the court further to understand

which was affirmed on writ of error to the supreme court.

1. **Showing Interest of Relator.** — It was held not only of no consequence that the relator showed no interest in school district No. 9, but that his name might have been omitted without prejudice to the prosecution, since the information did not relate to a matter of private right, but concerned, in a legal point of view, the public alone, and in such cases the state's attorney might proceed by reason of the statute "either of his own accord or at the instance of any individual relator."

and be informed, that prior to the formation of said pretended district *9*, said township *12* north, range *2* east, had for a number of years been laid off into *eight* school districts; that at the regular *April* meeting, A. D. 1*883*, of the trustees of schools of said township, a petition was presented to said trustees, asking that school district number *3* be divided, and that a new school district be made out of the territory described in said petition, and which petition averred that said territory contained not less than *ten* families, which petition is filed herewith, marked "Exhibit *A*," and made a part hereof; that said trustees, at said meeting, granted the prayer of said petition, and attempted to form *two* school districts out of said district number *3*, and numbered the new district *9*, as will more fully appear from the order of said trustees and the map of the school districts of said township herewith filed, marked "Exhibits *C* and *D*," and made a part hereof.

And said State's attorney gives the court further to understand and be informed, that at the time of such action of said trustees, and now, said district *9* contained *fifteen* families, while said district *3* contained only *eight* families, and after such order of said trustees, the relator aforesaid, and other legal voters of said district *3* who had opposed said petition, appealed from said decision of said trustees to the county superintendent of said county, who, on the *12th* day of *May*, A. D. 1*883*, affirmed the decision of said trustees, a copy of which order of said superintendent is filed herewith, marked "Exhibit *D*," and made a part hereof.

And said State's attorney further gives the court to understand and be informed, that the clerk of said trustees did not make a complete copy of the record of the action of said trustees, certified by the president of said trustees and clerk, and a list of the tax-payers in either said district *3* or *9*, and file the same with the county clerk of said county, and that said clerk, though notified in writing of his action by said superintendent, did not make a copy of the record made by said superintendent and a list of tax-payers in either of said districts, and deliver the same to the county clerk of said county, as required by the statute.

And said State's attorney further gives the court to understand and be informed, that said *Joseph Chesshire*, *William H. Barr* and *Isaac Smith* claim to be directors of school district number *9*, in said town, and have made a certificate of levy, signed by two of them, and filed the same with the clerk of the county court of said county, on the *17th* day of *August*, A. D. 1*883*, asking that the amount of $*400* be levied as a special tax on the taxable property of said district number *9*, for the year 1*883*, a copy whereof is herewith filed, marked "Exhibit *E*," and made a part hereof.

And said State's attorney, for said People, at the relation aforesaid, and in the name and by the authority of the People aforesaid, therefore gives the court to understand and be informed, that said school district number *9* was attempted to be formed by a division of said school district number *3*, and that said school district number *3*, after such attempted division, did not have the number of families required by the statute, and that said district number *9* was not legally

formed, and was and is not a school district under and in accordance with the statute, and therefore said State's attorney says that *Joseph Chesshire*, *William H. Barr* and *Isaac Smith*, for the space of *ninety* days last past, and more, in said county, have held and executed, and still do execute and hold, without any warrant, title or right whatsoever, the offices of school directors of said pretended school district number *9*, in township *12* north, range *2* east, in said county, which said offices they, during all the time aforesaid, in the county aforesaid, upon said People of the state of *Illinois*, have usurped, and still do usurp, to the damage of said People, and against the peace and dignity of the same People of the state of *Illinois*, and contrary to the form of the statute in such case made and provided.

William C. Kelley,
State's Attorney in and for said *Shelby* County.

[(*Verification.*)[1]][2]

(8) After Removal or Suspension from Office.

(*a*) *County Treasurer.*

Form No. 16900.[3]

(Precedent in State *v.* Kelly, 2 Kan. App. 179.)[4]

[In the Court *of Appeals* of the state of *Kansas*, *Southern* Department, *Western* Division.

(*Title of cause as in Form No. 16882.*)][5]

Now comes *A. W. Lamkin*, the duly elected and qualified county attorney of *Stevens* county, in the state of *Kansas*, into the *Kansas* court *of appeals*, *southern* department, *western* division, and gives said court to understand and be informed, that *Stevens* county is one of the duly organized counties of the state of *Kansas*, and has been since prior to *January 1*, 1*889*, and that he is the duly elected, qualified and acting county attorney of said county; and that on the *7th* day of *November*, 1*893*, defendant, *John A. Kelly*, was duly elected county treasurer of said county, and duly qualified as such treasurer and entered upon the duties of said office, and collected the revenues of said county and received all the public funds payable to said defendant, *John A. Kelly*, as treasurer of said county until the *6th* day of *July*, 1*895*; and prior to said *6th* day of *July*, 1*895*, the defendant, *John A. Kelly*, as such county treasurer, had received large amounts of money as the public funds belonging in said county

1. **Verification.** — The information was sworn to.

For a form of verification in a particular jurisdiction consult the title Verifications.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. *Kansas.* — Gen. Stat. (1897), c. 96, § 97 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

4. There was a demurrer to the petition in this case, which was overruled. The court said: "We think the petition states such facts, if true, as authorize the board of county commissioners to remove Kelly from the office of county treasurer, and appoint a successor to fill out the unexpired term."

5. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

treasury; and that upon said *5th* day of *July*, 1895, the books of said defendant, *John A. Kelly*, as such county treasurer, showed that there was in the hands of the defendant as such county treasurer, of the public funds belonging in the county treasury of said county, the sum of $1,000; and that the board of commissioners of said *Stevens* county, *Kansas*, on the *3d* day of *July*, 1895, appointed *R. C. Crawford* and *Monroe Traver*, who were each citizens and taxpayers of said *Stevens* county, *Kansas*, to assist the probate judge of said county in examining and counting the funds in the hands of the county treasurer of said county during the quarter ending *September 30*, 1895; and that on the *5th* day of *July*, 1895, *W. T. Stotts*, the probate judge of said *Stevens* county, assisted by *R. C. Crawford* and *Monroe Traver*, examined and counted the funds in the hands of the defendant, *John A. Kelly*, as county treasurer of said *Stevens* county; and the said probate judge and examiners, upon such examination and count, found a deficiency in the funds of said county treasury in the sum of $985.56, and immediately reported the fact of said deficiency in writing to the county clerk of said *Stevens* county, a copy of which report is hereto attached, marked "Exhibit *A*," and made a part hereof; and that *Daniel Forker*, the county clerk of said *Stevens* county, *Kansas*, immediately notified *Roland Tull*, *A. J. Hughes*, and *J. C. Gerrond*, the county commissioners of said *Stevens* county, of the filing of said report, a copy of which notice is hereto attached, marked "Exhibit *B*," and made a part hereof; and the said commissioners forthwith met to take such action as was necessary to protect and preserve the funds of said county; and the said county commissioners, having duly met as the board of county commissioners of said *Stevens* county, notified the defendant, *John A. Kelly*, that an order of the board of county commissioners had been made requiring him to forthwith appear before the commissioners and show cause why said deficiency existed; and the said defendant, *John A. Kelly*, having been notified of the said order and failing to appear or to account for said deficiency, the said board of county commissioners found that in their judgment it was necessary and proper to protect the public interest that the said *John A. Kelly* be removed from the office of county treasurer of *Stevens* county, *Kansas*, and therefore ordered that the said *John A. Kelly* be removed from the office of county treasurer of *Stevens* county, *Kansas*, and that *C. H. Wright* be appointed as county treasurer of said *Stevens* county, *Kansas*, to fill the unexpired term of office of said *John A. Kelly* ending on the *second Tuesday* in *October*, 1896; and that the said *C. H. Wright* executed to the state of *Kansas* a bond with *three* or more sufficient securities in the sum of $10,000, to be approved by the board of county commissioners of said county or the chairman thereof, conditioned as required by the statutes in such cases made and provided; and that the said *C. H. Wright* was at the time and long prior thereto a legal elector in said *Stevens* county, *Kansas*, and eligible to the office of county treasurer of said county; and that on the *6th* day of *July*, 1895, the said *C. H. Wright* executed his bond as treasurer of said *Stevens* county, *Kansas*, in due form, in the sum of $10,000, which bond was duly and legally approved, and the said

C. H. Wright duly and legally qualified as the county treasurer of said *Stevens* county, *Kansas*; and that on the *11th* day of *July*, 1*895*, the defendant, *John A. Kelly*, was duly notified of his removal from said office of county treasurer of *Stevens* county, *Kansas*; and that on the *11th* day of *July*, 1*895*, the said *C. H. Wright* demanded of the said *John A. Kelly* that he turn over to him, as his successor in the office of county treasurer of *Stevens* county, *Kansas*, all the money, papers, books and records belonging to the said office of county treasurer of *Stevens* county, *Kansas*, and which came into the possession of the said defendant, *John A. Kelly*, as treasurer of *Stevens* county, *Kansas*, and defendant, *John A. Kelly*, refused to deliver to the said *C. H. Wright* the money, books, papers and records of said office or any part thereof, and the defendant, *John A. Kelly*, refused to surrender to said *C. H. Wright* the office of county treasurer of *Stevens* county, *Kansas*, and is unlawfully holding and exercising the office of county treasurer of *Stevens* county, *Kansas*, after he has, by an order of the board of county commissioners of said *Stevens* county, *Kansas*, been removed from said office and his successor in said office duly appointed and qualified, and after the said *C. H. Wright* is lawfully entitled to said office and to exercise the functions thereof, and to receive the emoluments thereof, contrary to the statutes of the state of *Kansas* in such cases made and provided. The plaintiff therefore prays judgment ousting the defendant, *John A. Kelly*, from the office of county treasurer of *Stevens* county, *Kansas*, and for all proper relief.

[(*Signature as in Form No. 5917.*)][1]

(*b*) *Railroad Commissioner.*

Form No. 16901.[2]

(Precedent in Caldwell *v.* Wilson, 121 N. Car. 427.)[3]

[(*Venue and title of court as in Form No. 5927.*)

The State of North Carolina, on the relation of *L. C. Caldwell*, plaintiff,
against
James W. Wilson, defendant.
]4

The plaintiff complains and alleges —

1st. That the relator, *L. C. Caldwell*, is a citizen and tax-payer of *Iredell* county, *North Carolina*.

2nd. That the defendant was duly elected Railroad Commissioner by the Legislature of 1*893* for the term of *six* years from the time of his election until expiration of his term.

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *North Carolina.* — Code Civ. Proc. (1900), § 607.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

3. The defendant made answer to the complaint in this case and judgment was rendered for the plaintiff upon the pleadings.

The judgment in this case is set out *infra*, Form No. 16950.

4. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

3rd. That, as the relator is informed and believes, on the *24th* day of *August*, 1897, his Excellency *Daniel L. Russell*, Governor of *North Carolina*, addressed and sent to the defendant, *James W. Wilson*, a communication in the following words and figures, to-wit:

(*Here was set out a communication from Daniel L. Russell to James W. Wilson.*)

To which said *James W. Wilson*, in obedience to said order, made reply as follows:

(*Here was set out the reply from Wilson to Russell.*)

4th. And therefore the relator avers, and so charges on information and belief, that on the said *23rd* day of *September*, 1897, his Excellency, *Daniel L. Russell*, Governor of the state of *North Carolina*, in pursuance of the power and authority vested in him by section 1, chapter 320, of the laws of the state of North Carolina, passed by the General Assembly at its session of 1891, ratified the 5th day of March, 1891, and in execution of duty devolved upon him by the said Act, suspended the said *James W. Wilson* from the said office of Railroad Commissioner and as Chairman of said Commission. That on the said *23rd* day of *September*, 1897, the said *D. L. Russell*, Governor of *North Carolina* as aforesaid, appointed the relator *L. C. Caldwell*, a Railroad Commissioner and Chairman of the Railroad Commission to fill the vacancy caused by the suspension of the said *James W. Wilson* from said office of Commissioner and Chairman of said Commission from the said *23rd* day of *September*, 1897, to continue until the next General Assembly shall determine the removal of said *James W. Wilson* or until your successor is elected and qualified according to law.

5th. That the plaintiff relator duly qualified as Railroad Commissioner and Chairman of said Commission by taking the oath prescribed by law before *David M. Furches*, one of the Justices of the *Supreme* Court of *North Carolina*, which oaths were duly deposited in the office of the Secretary of State.

6th. That the plaintiff relator since his appointment and qualification as aforesaid, and before the institution of this action, demanded of the said *James W. Wilson* that he, the said *James W. Wilson*, should vacate the said office of Railroad Commissioner and surrender the same to the relator, and the same *James W. Wilson* refused to vacate and surrender the said office to the relator in words and figures, to-wit: "*September 28th*, 1897.

Hon. *L. C. Caldwell*, *Statesville*, *N. C.*

Dear Sir: — Your favor of the *25th* making your demand for the office of Railroad Commissioner, together with all the papers, records, rights and privileges thereto belonging, was duly served upon me by the Sheriff of *Burke* County. In reply will say that I most respectfully decline to accede to your request. Yours very truly,

James W. Wilson,
Chairman Railroad Commission."

7th. That the defendant *James W. Wilson*, notwithstanding the suspension from the office of Railroad Commissioner and Chairman of said Commission by the Governor of *North Carolina*, as hereinbefore set forth, refused to vacate the same, and does now unlawfully

usurp, intrude into, hold and exercise the said office of Railroad Commissioner and Chairman of said Commission, and does now prevent and hinder the relator from performing the duties of said office.

8th. The said office of Railroad Commissioner is an office of trust and profit under the laws of *North Carolina.*

9th. That leave to bring this action has been given by the Attorney-General of said state, which leave is attached hereto.

Wherefore the plaintiff demands judgment:

1st. That the defendant has been suspended from his office of Railroad Commissioner and Chairman of said Commission according to law.

2nd. That the defendant be adjudged guilty of unlawfully holding and exercising said office, and that he be fined $*2,000* in pursuance of the Statute.

3rd. That the relator has been duly appointed to fill the vacancy caused by the suspension of the defendant, and is entitled to hold and exercise the said office.

4th. That the defendant be ousted from and the relator inducted into said office.

5th. For such other and further relief as may be just and right and for costs of this action.

[(*Signature and verification as in Form No. 5927.*)][1]

(*c*) *Town Marshal.*

Form No. 16902.[2]

(Precedent in State *v.* McQuade, 12 Wash. 556.)[3]

[(*Title of court as in Form No. 5936.*)

The State of Washington, on the relation of *Edward Tremblay*, plaintiff,
against
John McQuade, defendant.

The relator above named, complaining of the defendant above named, for cause of action alleges that][4] the town of *Gilman*, during all of the time and times herein, was and is a municipal corporation of the *fourth* class, organized and existing under the laws of the state of *Washington*; that on the *9th* day of *January*, 1*894*, one *John McQuade* was appointed marshal of said town of *Gilman* by the common council of said town, to hold said office at the pleasure of said council, and said *McQuade* immediately thereafter entered upon the duties of said office and continued therein until his removal as herein alleged; that on the *6th* day of *July*, 1*894*, said respondent *McQuade* was duly removed from said office by said council for cause deemed sufficient, by resolution entered upon the records of said council; that immedi-

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *Washington.* — Ballinger's Anno. Codes & Stat. (1897), § 5781.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

3. On demurrer, the complaint or information in this case was held to state clearly a cause of action against the defendant.

4. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

ately after the removal of the respondent as aforesaid, said *Tremblay* was duly appointed town marshal by the council of said town to fill the vacancy caused by the removal of said respondent as aforesaid; that said *Tremblay* accepted the said office and in the form and within the time required by law and the ordinances of said town, took and subscribed the constitutional oath of office and filed the same with the clerk of said town, and executed the official bond required by law and the ordinances of said town, which bond was duly approved by the council of said town and the same filed with the clerk of said town, and the said relator thereby became entitled to hold said office of marshal; that said *Tremblay*, after qualifying for said office and filing said bond, demanded of said respondent the possession of said office, together with all books, papers and records thereof, and of the keys of the town jail and *one* certain revolver, all of said property belonging to said town and pertaining to said office of marshal, and said respondent has at all times refused and does now refuse to comply with said demand; that said respondent still continues to hold, exercise and usurp said office of marshal to the exclusion of said *Tremblay*; that by reason of the usurpation of said office by said *McQuade* unlawfully exercising the rights of said office, this relator has been damaged in the sum of $*50*.

[Wherefore the relator demands judgment that the defendant be ousted from and the relator be inducted into said office, that relator recover said sum of *fifty* dollars damages, and his costs of this action, and for other proper relief.

Jeremiah Mason, Attorney for Relator.][1]

(9) After Removal from His Jurisdiction.

Form No. 16903.[2]

(Precedent in State *v.* Green, 1 Penn. (Del.) 63.)[3]

[In the *Superior* Court of the state of *Delaware* in and for *Sussex* County.

State of *Delaware*, upon the information of *Robert C. White*, Attorney-General, against *John W. Green*. } On Quo Warranto. Information.

Sussex County, ss.][1] The information of *Robert C. White*, Attorney-

1. The matter enclosed by [] will not be found in the reported case.

2. *Delaware.* — Rev. Stat. (1893), p. 78, c. 8, § 3, provides that no person shall be a commissioner for the hundred, unless he reside and is a freeholder therein. If the commissioner remove from a hundred or cease to be a freeholder therein, his office shall thereupon become vacant.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

3. In this case, a rule to show cause why a writ of quo warranto should not issue was granted by the superior court sitting in Kent county, returnable October 27, 1897, and the attorney general filed the information set out in the text. The rule was discharged on the return day, on the ground that the superior court of Kent county had no jurisdiction, the cause of action being local to Sussex county. To meet this objection to the information the venue has been changed.

General of the state of *Delaware*, respectfully showeth and gives the court here to understand and be informed, that one *John W. Green*, late of *North West Fork* Hundred, in the county and state aforesaid, was, on the *Tuesday next*, after the *first Monday* in *November*, A. D. 1894, duly elected a Levy Court Commissioner for the Hundred of *Seaford* in and for *Sussex* county for the term of *four* years commencing on the *first* day of *February*, A. D. 1895, and ending on the *thirty-first* day of *March*, A. D. 1899; that on the *first* day of *April*, A. D. 1897, the said *John W. Green* removed from the Hundred of *Seaford*, and ceased to be a freeholder and resident of *Seaford* Hundred from thence thereafter, and the said office of Levy Court Commissioner for *Seaford* Hundred, then and thereby became vacant and remained vacated until the *fifth* day of *August*, A. D. 1897; that on the said *fifth* day of *August*, A. D. 1897, *Ebe W. Tunnell*, Esq., Governor of said state, duly appointed and commissioned *Willard H. Handy* to be Levy Court Commissioner for said *Seaford* Hundred for and during the term from thence to the *thirty-first* day of *March*, A. D. 1899, next ensuing. That the said *John W. Green* does unlawfully and wrongfully and without color of right continue to usurp and hold the said office of Levy Court Commissioner for *Seaford* Hundred, in the county aforesaid, contrary to the provisions of the statute in such case made and provided, and against the rights of the said *Willard H. Handy*. Wherefore your relator prays that a rule issue out of this Honorable Court requiring the said *John W. Green* to appear on some convenient day before this Honorable Court and show cause, if any he hath, why he hath as aforesaid usurped and assumes to act as a Levy Court Commissioner, for *Seaford* Hundred aforesaid, and as in duty bound your relator will ever pray, etc.

[*Robert C. White*,
Attorney-General of the State of *Delaware*.][1]

(10) Where Incumbent was Ineligible by Reason of Already Holding One Public Office.

(*a*) *Of County Commissioner.*

Form No. 16904.[2]

(Precedent in State *v.* Plymell, 46 Kan. 294.)[3]

[(*Title of court and cause as in Form No. 11781.*)][4]

Now comes *L. B. Kellogg*, attorney general of the state of *Kansas*, and gives the court to understand and be informed that, at the general election held *November 6*, 1889, in the *third* commissioner's district in and for the county of *Meade*, the defendant, *C. M. Plymell*, was a candidate for the office of county commissioner for said dis-

1. The matter enclosed by [ ] will not be found in the reported case.

2. *Kansas.* — Gen. Stat. (1897), c. 96, § 97 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

3. The defendant filed an answer to the petition in this case, and on trial the prayer of the petition was granted.

4. The matter to be supplied within [ ] will not be found in the reported case.

trict, and received a majority of the votes cast in said district for said office, and upon the canvass of the returns of said election by the board of county commissioners of said county, sitting as a canvassing board, the defendant, *Plymell*, was declared to have been elected to said office, and in the month of *January*, 1890, the defendant entered upon the discharge of the duties of said office, and has ever since continued to exercise the duties pertaining to said office, and is still exercising the powers, duties and privileges appertaining thereto.

The attorney general further gives the court to understand and be informed that, at the time said election was held, at the time said canvass was made, and at the time the defendant entered upon the discharge of the duties of said office, the defendant was ineligible to be elected to said office, and is ineligible to hold the same, for the reason that at the time said election was held, and at the time the defendant pretended to qualify as such county commissioner, and at the time he pretended to enter upon the discharge of the duties of said office, the defendant was the duly-appointed and qualified city clerk of the city of *West Plains*, and was holding said office and performing the duties thereof, the said city then and there being duly incorporated as a city of the *third* class, and by virtue of the laws of the state of *Kansas*.

Wherefore, the said attorney general demands judgment against the defendant, *C. M. Plymell*, that he be ousted from said office, and that the plaintiff have and recover of and from the defendant its costs in this behalf expended.

[(*Signature and verification as in Form No. 5917.*)][3]

(*b*) *Of Member of School Board.*

Form No. 16905.[1]

(Precedent in State *v.* McMillan, 8 Ohio Cir. Dec. 380.)[2]

[(*Title of court and cause as in Form No. 6433.*)][3]

Frank S. Monnett, attorney general of the state of *Ohio*, comes here into court, and gives the court to understand and be informed that the defendant, *James C. McMillan*, is a resident and elector of the incorporated village of *South Charleston*, in *Clark* county, *Ohio*, and has been such resident and elector thereof for more than *six* years last past; that the said incorporated village of *South Charleston* is duly organized under the laws of the state of *Ohio*, and as such village is duly authorized by law to elect members of the village council, who are duly authorized and empowered by law to pass such ordinances and do all other things within their statutory power for the regulation, management and control and government of such village.

1. *Ohio.* — Bates' Anno. Stat. (1897), § 6760 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

2. A demurrer to the petition in this case, on the ground that the facts therein stated did not constitute a cause of action against defendant, was overruled. The court was of opinion that the defendant was ineligible to election as member of the board of education by reason of his membership of the council of the incorporation of South Charleston at the time of such election, and rendered judgment of ouster.

3. The matter to be supplied within [ ] will not be found in the reported case.

That said village of *South Charleston* is located within the limits of the special school district of *South Charleston*, and is part of the same, and said special school district includes all the territory of the incorporated village of *South Charleston* aforesaid.

That in pursuance of law and in accordance with the statutes, the said incorporated village of *South Charleston*, on the *first Monday* of *April*, 1895, duly elected said defendant, *James C. McMillan*, as a member of the council of said incorporated village of *South Charleston*, for the period of *two* years next ensuing, and thereupon the said *James C. McMillan* duly qualified and entered upon his duties as such member of council and continued to hold such office for said term of *two* years; that on the *first Monday* of *April*, 1896, while the said *James C. McMillan* was then acting as a duly qualified member of the incorporated village council of *South Charleston* as aforesaid, he was by the qualified electors of said special school district of *South Charleston*, elected to the office of member of the school board of such special school district of the incorporated village of *South Charleston*, for the term of *three* years next ensuing, and thereupon the said *James C. McMillan* assumed to qualify and act in the capacity of such member of the school board. That afterwards, to wit, on the *first Monday* of *April*, 1897, and at the expiration of his term as councilman for said incorporated village of *South Charleston*, he, said *James C. McMillan*, was by the qualified electors of said incorporated village of *South Charleston* aforesaid, elected to the said office of member of the village council for the full term of *two* years next ensuing, and he thereupon duly qualified and entered upon the duties of said office and is now acting in such capacity.

The relator herein says that *James C. McMillan* is now the duly elected, qualified and acting member of council of the incorporated village of *South Charleston*, but that said defendant, *James C. McMillan*, has usurped and unlawfully holds and exercises said office of member of school board of said special school district of *South Charleston*, and as such officer assumes to do and perform all and singular the duties pertaining to such office as member of school board as aforesaid under the claim that he is eligible to hold said office of member of school board while acting in the capacity of councilman of the incorporated village of *South Charleston*, duly elected and qualified as aforesaid.

Relator further says that said *James C. McMillan* was at the time of his alleged election to the office of member of school board, ineligible to hold such office, and is still ineligible to act in such capacity.

Whereupon relator prays that the defendant, *James C. McMillan*, be required to answer by what warrant he claims to have used, to exercise and enjoy said office of member of school board of special school district of *South Charleston* and that he be adjudged, not entitled thereto, and that judgment of ouster therefrom may be pronounced against him and for all proper relief in the premises.

[*Frank S. Monnett*, Attorney general.][1]

1. The matter enclosed by [ ] will not be found in the reported case.

(*c*) *Of Trustee of State Library.*

Form No. 16906.[1]

(*Title of court as in Form No. 5910.*)

The People of the State of California, plaintiffs, against *John Doe*, defendant. } Complaint for Usurpation of Office.

Now comes *Andrew Jackson*, attorney general of said state, for the People of the state of *California* in this behalf complaining, and gives this court here to understand and be informed that under and by virtue of a pretended act of the legislature, entitled "An act prescribing rules for the government of the state library," approved March 8th, A. D. 1861, a board of trustees of the state library was created, to consist of *five* members; of those *five* members it was enacted that the chief justice of the *Supreme* Court of the state of *California*, ex officio, should constitute one.

That afterwards, to wit, on the *twenty-first* day of *March*, 1864, the legislature of said state of *California* amended said act by an act entitled "An act to amend an act entitled 'An act prescribing rules for the government of the state library, approved March 8th, 1861,'" by virtue of which last act a board of trustees of the state library was created, to consist of *five* members; of these *five* members it was enacted that the chief justice of the *Supreme* Court of the state of *California* should ex officio constitute one.

That the said position and place of trustee of the state library is an office of trust and preeminence touching the rule and government of said library, at the county of *Sacramento* aforesaid.

That said board of trustees should of right consist of *five* members, pursuant to the provisions of said act, and especially of said last mentioned act.

That prior to the *first* day of *January*, 1865, the defendant, *John Doe*, was duly elected, commissioned and qualified a justice of the *Supreme* Court of said state of *California*; that afterwards, to wit, on the *second* day of *January*, 1865, he became and ever since has been and now is chief justice of said *Supreme* Court, and during all said time has exercised and is now exercising the right to perform and is now performing the duties, and has received and is now receiving the emoluments of said judicial position of chief justice.

And the said attorney general further informs this court that after-

1. *California*. — Code Civ. Proc. (1897), § 803.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

This form is based upon the information in People *v.* Sanderson, 30 Cal. 160. That information was filed upon the relation of a private individual claiming title to the office of trustee of the state library by virtue of an appointment by the governor. A judgment was rendered in the district court excluding the defendant from the office and declaring the relator rightfully entitled thereto. Upon appeal, the supreme court affirmed that part of the judgment excluding the defendant from the office and reversed that part adjudging the relator to be entitled to the office, on the ground that there could be no vacancy of the place intended by the act of the legislature to be filled by the chief justice so long as

wards, to wit, on said *second* day of *January*, 1865, the said defendant did use and exercise, and from thence continually afterwards up to the exhibition of this information has used and exercised, and still does use and exercise, without any legal warrant or right whatsoever, the office of trustee of said library, and during said time has claimed and still doth claim to be one of said trustees and to have and enjoy the liberties, privileges and franchises to said last mentioned office appertaining.

And the said attorney general further gives the court to be informed and charges, that the said position of trustee of said library is an office within the true meaning and intent of section 16 of article 6 of the Constitution of California, and that the same is not a judicial office, and that the defendant is inhibited to hold or exercise the functions of said office of trustee and that said acts of the legislature so far as they did or do now purport to confer said powers on said defendant are void, and that said defendant unlawfully holds said office.

Further informing this court the attorney general avers that notwithstanding the invalidity of said acts, and especially of said last mentioned act so far as the same purports to make the defendant a trustee as aforesaid, the said defendant, well-knowing the same, for and during all the time since the *second* day of *January*, 1865, without any legal warrant or right whatsoever, has usurped and still doth usurp, intrude into and unlawfully hold the said office of trustee at the said county of *Sacramento*, and for all said time has exercised and still does exercise the liberties, privileges and franchises thereof, against the dignity of the state of *California*.

Wherefore the attorney general on behalf of the People of the state of *California* aforesaid, prays that the process of this court may be awarded against said defendant to make him answer and show by what authority he claims to hold said office of trustee, and to enjoy its franchises, and prays the judgment of this court excluding forever the defendant from said office of trustee, and for other relief.

Andrew Jackson, Attorney General.

(11) Where Incumbent was Ineligible by Reason of Nonresidence.

Form No. 16907.[1]

New Jersey Supreme Court.

The State of New Jersey, ex rel. John Doe, against *Richard Roe.* } On Quo Warranto. Information.

Andrew Jackson, Esquire, Attorney general of the state of *New Jersey*, who sues for the said state in this behalf, comes in his own proper person here into the *Supreme* Court *of Judicature* of the said

there was a chief justice, and that the appointment by the governor was invalid.

1. *New Jersey.* — Gen. Stat. (1895), p. 2632, § 1 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 264.

This form is the information filed in the case of State *v.* Van Horn, decided at the June term, 1875, of the New Jersey supreme court.

state, before the justices thereof, at the state-house in the city of *Trenton*, on the *eighth* day of *June*, in the year one thousand eight hundred and *seventy-five*, for the said state of *New Jersey*, at the relation of *John Doe*, of the *sixth* aldermanic district of *Jersey City*, county of *Hudson*, and state of *New Jersey*, desiring to sue and prosecute in this behalf, according to the form of the statute in such case made and provided, gives the said court here to be informed and understand, that under and by virtue of an act of the legislature of the state of *New Jersey*, entitled "An act to reorganize the board of chosen freeholders of the county of Hudson," approved March 23d, 1875, at the spring charter and township elections held in the county of *Hudson*, on the *13th* day of *April*, 1875, there was chosen by the electors of the *sixth* assembly district of said county, *two* chosen freeholdors to be members of the board of chosen freeholders of the county of *Hudson*; that said election was in all things conducted according to law, and at said election *Samuel Short* received *1204* votes; *Richard Roe*, *1155* votes; *John Doe*, *1138* votes; *Charles Smith*, *1077* votes; and all other parties only *five* votes; that the board of county canvassers, provided for in said act, duly met and organized as provided in said act, and canvassed the votes, declaring the result of said canvass to be that *Richard Roe* and *Samuel Short*, having received the highest number of votes for chosen freeholders in the *sixth* assembly district of the county of *Hudson*, were duly elected chosen freeholders for said county from said district.

That true it is that said *Samuel Short* received the highest number of votes in said *sixth* assembly district, at the election held in said district *April 13th*, 1875, for the office of chosen freeholder of the county of *Hudson*; that *Richard Roe* received the next highest number of votes in said *sixth* assembly district, at said election held in said district *April 13th*, 1875, for the office of chosen freeholder of the county of *Hudson*; that *John Doe* received the next highest number of votes in said assembly district, at said election held in said district, for the office of chosen freeholder of the county of *Hudson*; that *Charles Smith* received the next highest; that said *Samuel Short* and *Richard Roe*, upon said determination of said board of chosen freeholders, were sworn into office, and gave bonds as required by said act, and entered upon the duties of said office of chosen freeholder, and have ever since continued to exercise the rights, franchises and privileges of said office; that said persons were citizens of the United States and of the state of *New Jersey*, and residents of said district for over *two* years before said election, and were over *twenty-one* years of age.

That by the *ninth* section of said act it is provided that in the *sixth* assembly district one of the said *two* members from said district shall be a resident of the city of *Bayonne*, in said district, and the other one of said *two* members from said district shall be a resident of the remaining portion of said *sixth* assembly district; that by the *seventh* section of said act it is provided that the person in each assembly district receiving the highest number of votes in that district for the office of chosen freeholder shall be the chosen freeholder from that assembly district; that by the *ninth* section of said act it is provided

that in all cases both of the members from any district shall be voted for in said district at large, but shall be a resident of the portion of the district from which he is chosen *one* year at least prior to his election; that said *Samuel Short*, who received the highest number of votes in said *sixth* assembly district, at said election for the office of chosen freeholder of the county of *Hudson*, was, at the time of said election, a resident of the city of *Bayonne*, and had been a resident of said city continuously up to said election for over *two* years prior thereto, and has continued and still continues to be a resident of said city of *Bayonne*; that *Richard Roe*, who received the next highest number of votes in said *sixth* assembly district, at said election for the office of chosen freeholder of the county of *Hudson*, was not at the time of said election, and never had been, either prior or subsequent thereto, a resident of the remaining portion of said *sixth* assembly district, but he was at the time of said election a resident of the city of *Bayonne*, and had been for over *twenty* years, and is now and ever since the said election continued to be a resident of said city of *Bayonne*, and cannot therefore legally be a member of the said board of freeholders, as he resides in the same portion of the *sixth* assembly district as *Samuel Short*, who received the highest number of votes cast at said election for said office as aforesaid; that *John Doe*, who received the next highest number of votes in said *sixth* assembly district, at said election for the office of chosen freeholder of the county of *Hudson*, did at the time of said election reside in the *sixth* aldermanic district of *Jersey City*, which was the remaining portion of the said *sixth* assembly district outside of the city of *Bayonne*; that he had resided there continuously over *five* years prior to the said election, and ever since that time has and still does continue to be a resident of the remaining portion of said *sixth* assembly district outside of the city of *Bayonne*; that he is a citizen of the United States and of the state of *New Jersey*, over the age of *twenty-one* years, and has been a resident of said district for over *five* years before said election.

That as the person who received the highest number of votes was a resident of the said city of *Bayonne*, the other member from the said *sixth* assembly district must be the person who resided in the remaining portion of said district, to wit, in the *sixth* aldermanic district of *Jersey City*, and as said *Richard Roe* did not reside in said remaining portion of said district, and never has resided there, he could not legally be a member of said board of chosen freeholders, and the party legally entitled to a seat in said board from said *sixth* assembly district, in addition to *Samuel Short*, was and is *John Doe*, who received the highest number of votes cast at said election, for said office of chosen freeholder, of all those who resided in the remaining portion of said district.

That said *Richard Roe*, for the space of more than *one* month last past, hath, by virtue of the premises, unlawfully held, used and executed, and still doth unlawfully hold, use and execute, the office of chosen freeholder of the county of *Hudson*, and its liberties, privileges and franchises, and claims to be one of the chosen freeholders of the county of *Hudson*, and to have, hold, use,

exercise and enjoy the said office, and the liberties, privileges and franchises thereof, without any legal election, appointment, warrant or authority whatever, other than hereinbefore set forth, which are insufficient in law to enable him to hold the same.

The said *John Doe*, by virtue of said election, and being a resident of the remaining portion of said *sixth* assembly district outside the city of *Bayonne*, was, under the act hereinbefore referred to, duly elected and chosen one of the chosen freeholders of the county of *Hudson* from said *sixth* assembly district, and that the said *John Doe* hath ever since been and still is rightfully entitled to hold, use and exercise the said office of chosen freeholder as aforesaid, at *Hudson* County as aforesaid, which said office the said *Richard Roe* during all the time aforesaid, upon the state of *New Jersey*, hath usurped, intruded into, and unlawfully held, used, exercised, and yet doth usurp, intrude into and unlawfully hold and exercise, to the exclusion of said *John Doe*, to wit, at *Hudson* county aforesaid, in contempt of the state of *New Jersey*, and to its great damage and prejudice against its sovereignty and dignity.

Whereupon the said attorney general for the state, at the relation of said *John Doe*, desiring to sue and prosecute in this behalf, prays the advice of the court here in the premises and for due process of law against the said *Richard Roe* in this behalf, to be made to answer to the said state by what warrant he claims to hold, use, execute and enjoy the aforesaid office of chosen freeholder of the county of *Hudson* from the *sixth* assembly district therein, and the liberties, privileges and franchises thereof.

Andrew Jackson, Attorney General.

Jeremiah Mason, Attorney for Relator.

3. Against Public Officer, to Secure Forfeiture of Office.[1]

1. Requisites of Complaint, Information or Petition, Generally. — See *supra*, note 1, p. 264.

Facts sufficient to show clearly the forfeiture of the office in controversy must be set forth. Bishop *v.* State, 149 Ind. 223; Chambers *v.* State, 127 Ind. 365; Indianapolis Cable St. R. Co. *v.* Citizens St. R. Co., 127 Ind. 369. Thus, where an information was filed against a county judge for failure to file a new official bond, under a statute which provided that under certain circumstances a new bond might be required, it was held that the information must state facts showing that all steps required by the statute relied on to work a forfeiture of the office had been taken. People *v.* Brown, 23 Colo. 425.

Name of person rightfully entitled to office need not be stated. Stating facts sufficient to show a forfeiture is all that is required. Indianapolis Cable St. R. Co. *v.* Citizens St. R. Co., 127 Ind. 369.

Negativing Exceptions. — Where an information was filed against a town trustee for forfeiture of office, for that while such trustee he accepted a second lucrative office, to wit, the office of postmaster, contrary to the provisions of the state constitution, it was held that the plaintiff must negative the constitutional exceptions made in favor of postmasters whose compensation did not exceed ninety dollars. Bishop *v.* State, 149 Ind. 223.

Precedent — County Clerk Refusing to Perform Duties. — In State *v.* Allen, 5 Kan. 213, the material allegations of the petition were as follows:

"That on the *fourteenth* day of *January*, 1869, the board of county commissioners of *Jefferson* county, in the state of *Kansas*, directed *Henry Keeler*, the county attorney of said county, to

a. Councilman, for having Become Bondsman.

prosecute this action against *W. N. Allen*, defendant.

That on the —— day of *November*, A. D. 1867, said defendant, *Walter N. Allen*, was duly elected county clerk of said county, and that on the —— day of *January*, A. D. 1868, he entered upon the discharge of the duties of county clerk, and that ever since said —— day of *January*, A. D. 1868, said *Walter N. Allen*, defendant, has been acting as county clerk of said county.

That at a regular meeting and session of the board of county commissioners of said county, begun and held in the court-house at the village of *Oskaloosa*, the county seat of said county, on the *first Monday* in *January*, A. D. 1869, there were present *John C. W. Davis*, chairman of said board; *John A. Coffey* and *William Gragg*, members of said board; *Walter N. Allen*, county clerk of said county; and *Henry Keeler*, county attorney; and afterwards, on the *sixth* day of *January*, at the same meeting and session of said board, all the above-named members and officers being present, a proceeding was had by said board, of which a true copy of a journal entry thereof as agreed upon by said board is hereto attached, marked Exhibit *A*, and made a part of this petition, which said board ordered said defendant, *Walter N. Allen*, as county clerk, to record upon the journal of said board, which said journal was provided for the purpose of recording therein all proceedings of said board, as a part of the proceedings of said board, yet the said *Walter N. Allen*, defendant, neglected and refused, and still does neglect and refuse, to record the same as aforesaid, although it was and is his official duty as such county clerk so to do.

That paragraph one and paragraph two of the first cause of action stated herein are true, and are hereby made a part of the statement of this cause of action.

That at the same meeting and session of the county board of said county mentioned in paragraph three of the first cause of action alleged herein, on the *fourteenth* day of *January*, A. D. 1869, all the members and officers mentioned in said paragraph three being present, a proceeding was had by said board, of which a true copy of the journal entry thereof, as agreed upon by said board, is hereto attached, marked Exhibit *B*, and made a part of this petition; which proceeding and journal entry said board ordered said *Walter N. Allen*, clerk, to record upon the journal of said board, which said journal was and is the book provided for the purpose of recording therein all proceedings of said board, as a part of the proceedings of said board, yet the said *Walter N. Allen*, defendant, neglected and refused, and still does neglect and refuse, to record the same as aforesaid, although it was and is his official duty as such county clerk so to do.

That paragraph one and paragraph two of the first cause of action stated herein are true, and are hereby made a part of the statement of this cause of action.

That at and during a regular meeting and session of the board of county commissioners of *Jefferson* county, in the state of *Kansas*, on the *fourteenth* day of *January*, A. D. 1869, there being then present *John C. W. Davis*, chairman of said board; *John A. Coffey* and *William Gragg*, members of said board; *Walter N. Allen*, county clerk of said county; and *Henry Keeler*, county attorney of said county; and while said board were engaged in the transaction of official business as such board, the said *Walter N. Allen*, defendant, as county clerk, refused to attend the session of said board, and was guilty of contemptuous and disorderly conduct and language in the presence of and towards said board, as follows, to-wit: That said *Walter N. Allen* took the seal of said board from its usual place in said county clerk's office and put the same in the vault and then locked the vault containing said seal, and containing also the records and other official papers of said office, put the key of said vault in his pocket, and said to the said board in substance, and as nearly as plaintiff can ascertain, the following words, to-wit: 'I give you notice that you are now transacting business without a clerk. I will not act as clerk for a board that is foisting such a fraud upon Jefferson county where the people are not heard. I will not act as your clerk any more to-day.' And at the time of using said language said defendant did strike his fist down upon the table in front of said board in a violent, defiant, and contemptuous

Form No. 16908.[1]

(Precedent in Com. *v.* Allen, 70 Pa. St. 466.)[2]

[(*Commencement as in Form No. 16894.*)][3] That *Joseph F. Marcer* was elected treasurer of the city of *Philadelphia* on the *second Tuesday* of *October*, A. D. 1869, and accepted the same, was duly qualified, and entered upon the duties of the said office on the *first* day of *January*, A. D. 1870. Prior to that date, to wit, upon the *16th* day of *December*, A. D. 1869, he filed, in the office of the solicitor of the city of *Philadelphia*, a bond in the sum of $*100,000*, conditioned for the faithful performance of his duties as such treasurer, said bond having been executed by all whose names are therein, and the warrant of attorney attached thereto. That said warrant is of record in the *District* Court of the said city, in *D. S. B.* Docket *D*, *69*, No. *103*; and it appears by said record that the sureties for the said city treasurer, among others, are *William S. Allen*, and *Henry Huhn*, who entered upon the duties of the office of councilmen of the said city on the *first Monday* of *January*, A. D. 1871; and *Nicholas Shane*, who entered upon the duties of councilman on the *first Monday* of *January*, 1870; and that by a certain Act of Assembly, approved March 31st, 1860, § 66, Pamph. L. 400, it is enacted that "It shall not be lawful for any councilman, burgess, trustee, manager or director of any corporation, municipality or public institution, to be at the same time a treasurer, secretary or other officer, subordinate to the president and directors, who shall receive a salary therefrom, or be the surety of such officer; nor shall any member of any corporation or public institution, or any officer or agent thereof, be in any wise interested in any contract for the sale or furnishing of any supplies or materials

manner, whereby the transaction of the business of said county by said board was impeded, to the great damage of said county and its citizens, notwithstanding it is and was the official duty of said defendant, as such county clerk, to attend the session of said board, to render to said board his aid and assistance in facilitating the transaction of the business of said county, and to conduct himself as such county clerk in a respectful and orderly manner in the presence of and toward said board.

And plaintiff further says that as a part of the same transaction, and of the conduct of the defendant therein, after the seal of said board had been locked up in the vault as aforesaid, said board ordered and directed the defendant, as county clerk, to produce said seal, that the impression might be affixed to a paper containing an official act of the said board; yet the said defendant, as county clerk, refused to produce said seal, and refused to make or allow the impression thereof to be affixed to said paper.

Whereupon the said plaintiff prays judgment that said *Walter N. Allen*, defendant, be ousted and removed from the said office of county clerk, and that said plaintiff have and recover of and from said defendant the costs of this action. *Henry Keeler*,
County Attorney of *Jefferson* county, in the state of *Kansas*, for Plaintiff."

It was held that this petition stated facts sufficient to constitute a cause of action, and there was judgment removing the defendant from office.

1. *Pennsylvania.* — Bright. Pur. Dig. (1894), p. 1773, § 1 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 323.

2. There was a judgment of ouster against defendants in this case.

3. The matter to be supplied within [ ] will not be found in the reported case.

to be furnished to, or for the use of, any corporation, municipality or public institution of which he shall be a member or officer, or for which he shall be an agent, nor directly nor indirectly interested therein, nor receive any reward or gratuity from any person interested in such contract or sale; and any person violating these provisions, or either of them, shall forfeit his membership in such corporation, municipality or institution, and its office or appointment thereunder, and shall be held guilty of a misdemeanor, and, on conviction thereof, be sentenced to pay a fine not exceeding $500." And the said councilmen, since the dates respectively aforesaid, have exercised, and do still exercise, the office, rights and powers of councilmen of the city of *Philadelphia*, without any lawful warrant or authority; wherefore, the said attorney-general suggests that the court do award a writ, directed to the sheriff of *Philadelphia* county, commanding him to summon the said *William S. Allen*, *Henry Huhn* and *Nicholas Shane*, so that they be and appear before the said court, on a day certain, to show by what warrant they claim to have, use and exercise the office, right and powers aforesaid.

[(*Signature of attorney general and verification.*[1])][2]

b. County Attorney, for Misconduct in Not Prosecuting Liquor Cases.

Form No. 16909.[3]

(Precedent in State *v.* Foster, 32 Kan. 15.)[4]

[(*Title of court and cause as in Form No. 11781.*)][2]

1. The state of *Kansas*, on the relation of *W. A. Johnston*, attorney general, and by virtue of the authority vested in him by law, gives the court here to understand and be informed, that at the general election of the year 1882, and on the *7th* day of *November*, 1882, said defendant, *John Foster*, was duly elected to the office of county attorney of *Saline* county, *Kansas*, for the term of *two* years, and having duly qualified, did, on the *8th* day of *January*, 1883, enter upon the discharge of the duties of said office of county attorney; and that ever since said *8th* day of *January*, 1883, said *John Foster* has been acting as county attorney of said county; that during the time said *John Foster* was so as aforesaid acting as county attorney of said county, and from the month of *January*, 1883, continuously to the present time, certain persons, to wit, *Charles Holenquist*, *T. M Ludes*, *Gustav Behr*, *William Sweeney* and others have been engaged in said county and city of *Salina*, the county seat thereof, in the willful, open and

1. **Verification.** — Suggestion for writ of quo warranto must be verified by affidavit. Bright. Pur. Dig. Pa. (1894), p. 1774, § 6.

For a form of verification in a particular jurisdiction see the title VERIFICATIONS.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. *Kansas.* — Gen. Stat. (1897), c. 96, § 97 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 323.

4. A demurrer to the petition in this case was overruled. On trial had, judgment was entered that defendant be removed from his office as county attorney.

notorious sale of intoxicating liquors in violation of law, and especially of the act known as the prohibitory liquor law; that each and all of said persons have kept in said city of *Salina* and maintained open and public liquor saloons, in which were sold various kinds of intoxicating liquors, neither of said persons having or pretending to have any right, permit, or authority to deal in or sell such liquors; that the fact of such violation of law by said above-named persons was well known by said *John Foster* from information received by him from others, as well as from his own personal observation and experience, he being a frequenter and patron of such illegal saloons during said time; yet the said *John Foster*, though well knowing that said persons were guilty of violating the provisions of said law known as the prohibitory liquor law, and that it was his duty as such county attorney to prosecute them for such violation, "neglected and refused so to do," and by frequenting and patronizing their places of such illegal business, "did encourage" them to continue to violate the law.

2. That on the *8th* day of *May*, 1883, the sheriff of said *Saline* county, having knowledge of the aforesaid violations of said prohibitory liquor law, gave notice in writing to said defendant, as required by § 12 of said law, that said persons above named were selling intoxicating liquors in violation of law, and furnished him the names of numerous witnesses, all being credible and good citizens of said city of *Salina*, by whom such illegal sales could be proven; and the said *John Foster* having inquired into the facts of such alleged violation of said law, knew that the same were true, and well knew from such inquiries, "as well as from his own personal knowledge and experience," that there was reasonable ground for instituting a prosecution against each of said persons for such violation of law; that said *John Foster* thereupon, and on the ——— day of *May*, 1883, filed complaints before a justice of the peace against said persons, charging them upon his oath as county attorney with such violation of law, but did the same corruptly, and not in good faith for the purpose of prosecuting and convicting said guilty persons; and after repeated voluntary and inexcusable delays and continuances of all of the cases in which complaints were so filed, from the ——— day of *May*, 1883, to the *31st* day of *August*, 1883, said *John Foster* not being permitted by the justice of the peace to still further delay and continue said cases without cause, did dismiss each and all of said cases without any just cause or excuse therefor, and well knowing that each of said persons was guilty as charged by him in said complaints, and that such guilt could be proven upon a trial; that the said *John Foster* in delaying the prosecution of said cases and dismissing the same as aforesaid was corruptly influenced in his duty as county attorney by a desire to shield and protect said guilty persons from the consequences and penalties of their crimes, to the utter disregard of the duties of his office and to the scandal of the administration of justice.

Wherefore, said attorney general, on behalf and in the name of the state of *Kansas*, prays judgment that the said *John Foster*, by reason of his aforesaid acts, refusal to act, and misconduct, may be adjudged

and declared to have forfeited his said office of county attorney of *Saline* county, *Kansas*, and that he be ousted and removed therefrom.

W. A. Johnston,
Attorney General of the State of *Kansas*.

T. F. Garver, of Counsel.

IX. Order or Rule to Show Cause.[1]

Form No. 16910.[2]

(Conn. Prac. Act, p. 146, No. 250.)

State ex rel. Alvin L. Willoughby vs. *Benjamin W. Gates.* } *Superior* Court, *New Haven* County, ss. *December* Term, *January 4th*, 1876.

Upon the foregoing information being filed in court, it is ordered that a rule be entered that said *Benjamin W. Gates* show cause, if any he have, why he usurps, and by what warrant he claims to have, use, and enjoy the office, rights, privileges, and franchises of a member of the Common Council of the city of *New Haven*, at *10* o'clock *A.* M., on the *11th* day of *January*, 1876, and that notice be given to him of the filing of said information and of this rule, by some proper officer, by leaving a true and attested copy, certified by the clerk of this court, of said information and of this order, with said *Benjamin W. Gates*, or at his usual place of abode, in the town of *New Haven*, on or before the *5th* day of *January*, 1876.

By order of Court, *January 4th*, 1876.

Jonathan Ingersoll, Assistant Clerk.

Form No. 16911.[3]

(Precedent in State *v.* Gleason, 12 Fla. 195.)

In the *Supreme* Court, State of *Florida*.

In the Matter of Information by the Attorney-General vs. *William H. Gleason.*

The Attorney-General having moved the court for leave to file an information, in the nature of a quo warranto, against *William H. Gleason*, Lieutenant-Governor of the state of *Florida*, it is ordered that leave be, and is hereby, granted to said Attorney-General to file said information, and on further motion in this behalf it is also ordered that a rule be, and is hereby, granted against the said *William H. Gleason* requiring him to show cause before this court on

1. **For the formal parts** of an order or rule to show cause in a particular jurisdiction see the title Orders, vol. 13, p. 356.

2. *Connecticut.* — Gen. Stat. (1888), § 1300.

See also list of statutes cited *supra*, note 1, p. 217.

3. *Florida.* — Rev. Stat. (1892), § 1781.

See also list of statutes cited *supra*, note 1, p. 217.

Indorsement. — Upon the order in this case was the following indorsement:

"Executed by serving a certified copy of this order and of the information upon *William H. Gleason*, this *19th* day of *November*, A. D. 1868.

C. J. Porter,
Deputy Sheriff *Supreme* Court, *Florida*."

Tuesday morning next, at *ten* o'clock, *A.* M., why the said writ of quo warranto prayed for in said information should not issue, and that a copy of this order and of the information aforesaid, duly certified by the clerk, be served on said *William H. Gleason*, and that the service of said copy of said order and of said information on said *William H. Gleason*, shall be sufficient service of the rule aforesaid.

X. SUMMONS OR WRIT.[1]

1. Practice at Common Law. — The practice at common law, upon information in the nature of writs of quo warranto, was to bring in the defendant by process; subpœna and attachment, when the defendant could be personally served, and was liable to arrest; venire facias and distringas, in other cases, as against peers, corporations, etc. If an appearance was not thus procured, proceeding to outlawry were had against defendants subject to it, and a judgment that the office or franchise said to be usurped should be seized was rendered; whether this judgment would mature into a final adjudication of the right or was merely by way of distress to force the defendant to come within the jurisdiction of the court may be doubtful. Vanatta *v.* Delaware, etc., R. Co., 38 N. J. L. 282 (*citing* Rex *v.* Amery, 2 T. R. 515., 4 T. R. 122; People *v.* Richardson, 4 Cow. (N. Y.) 97, note). And see further, to the same effect, State *v.* Hunton, 28 Vt. 594; State Bank *v.* State, 1 Blackf. (Ind.) 267.

For statutory provisions as to summons upon filing complaint or information see list of statutes cited *supra*, note 1, p. 217.

In *Maine*, the writ of quo warranto is still under the statute a legal process. Reed *v.* Cumberland, etc., Canal Corp., 65 Me. 53. And the writ has undergone no material change; and when it is the proper remedy for wrongful act or neglect, in order to secure the relief sought, all the peculiar characteristics and averments of the ancient writ must be retained. *Ex p.* Davis, 41 Me. 38.

In *Pennsylvania*, the statute provides for a writ of quo warranto, which in many respects resembles the ancient writ. Bright. Pur. Dig. Pa. (1894), p. 1774, § 4; Com. *v.* Burrell, 7 Pa. St. 34 (*cited* in State *v.* West Wisconsin R. Co., 34 Wis. 197).

For the formal parts of a summons or writ in a particular jurisdiction consult the titles SUMMONS; WRITS.

Precedents. — In State *v.* Ashley, 1 Ark. 513, is set out the following form of writ, which was not objected to; it was held to be simply a citation, however.

" State of *Arkansas*, Sct.

The State of *Arkansas*, to the Sheriff of *Pulaski* County, Greeting:

You are hereby commanded to summon *Chester Ashley* to appear personally bofore the *Supreme* Court of said state of *Arkansas*, at the court house in the city of *Little Rock*, in the county of *Pulaski* aforesaid, on the *21st* day of *February*, in the year of Christ eighteen hundred and *thirty-nine*, then and there to answer unto the state of *Arkansas* aforesaid, and to show by what warrant he exercises the franchise of a director of the principal bank of the *Real Estate Bank* of the state of *Arkansas*, at *Little Rock*, and has entered into and upon, and uses the powers, rights, and privileges, thereto appertaining; it being alleged that no legal or valid grant of said franchise, to said *Chester Ashley*, has ever been made by and under the authority of the said state of *Arkansas*, under the penalty prescribed by law, and that you certify to our said *Supreme* Court how you execute this precept, and at your peril have you then and there this writ.

In testimony whereof," etc.

In Lindsey *v.* Atty.-Gen., 33 Miss. 508, the following writ is set out:

" The State of *Mississippi*, *Hinds* county.

To the Sheriff of *Hinds* county:

David C. Glenn, Attorney-General of the State of *Mississippi*, on the relation of *David N. Barrows* v. *Horatio H. Lindsey*.

Whereas, *David C. Glenn*, Attorney-General of the state of *Mississippi*, on the relation of *David N. Barrows*, hath filed in the office of our *Circuit* Court for the county and state aforesaid, his petition, complaining that *Horatio H. Lindsey*, of said county, hath usurped from said state the privileges, franchises, and emoluments of the office of clerk of the penitentiary of said state,

Form No. 16912.[1]

(*Commencement as in Form No. 8895.*)

You are hereby commanded to summon the president, directors and company of the *Stanton Electric Company*, in your county, to be and appear before the *Circuit* Court in and for said county of *Montcalm*, to be held at the court-room in the city of *Stanton*, in said county, on the *tenth* day of *November*, A. D. 1898, then and there to answer to an information filed therein by *Andrew Jackson*, attorney general of the state of *Michigan*, in behalf of the people of said state of *Michigan*, against the aforesaid president, directors and company

and as an incident thereto, the privileges, franchises, and emolument of clerk or secretary of the Board of Inspectors of said penitentiary, contrary to, and without any warrant of law, and continues to hold the same, refusing to surrender them to the party legally elected, and rightfully entitled to enjoy the same; and whereas, by an order of said court, made upon the application of said attorney-general on the petition aforesaid, a writ of quo warranto was directed to be issued, returnable into our said court, on *Friday*, the *17th* day of *March*, A. D. 1854, directed to said *Horatio H. Lindsey*, citing him to be and appear before our said court on the day last aforesaid, and then and there show by what warrant of law it is that he holds the said office. These are, therefore, to command you, the said sheriff of *Hinds* county, that you take the said *Horatio H. Lindsey*, if to be found in your county, and him safely keep, so that you have him before our said *Circuit* Court for the said county, at the court-house thereof, in the town of *Raymond*, on *Friday*, the *17th* day of *March*, A. D. 1854, then and there to answer the said petition of the said *David C. Glenn*, Attorney-General of the state of *Mississippi*, on the relation of said *David N. Barrows*, and show by what warrant of law it is that he holds the privileges, franchises, and emoluments of the office of clerk of the penitentiary of said state, and as an incident to, or appurtenant thereof, the privileges, franchises, and emoluments of clerk or secretary of the Board of Inspectors of said penitentiary. And have you then there this writ," etc.

Motion for Process. — In State *v.* Gleason, 12 Fla. 190, the following motion was filed:

"In the *Supreme* Court of the state of *Florida*.

And now comes *Almon R. Meek*, Attorney-General of the state of *Florida*, in the matter of an information in the nature of a quo warranto, filed by the said Attorney-General in said *Supreme* Court against *William H. Gleason*, and moves the said court to make the rule nisi heretofore made in this court absolute, the remaining causes or grounds shown against said rule being insufficient; and that said rule being made absolute, proper process do issue requiring said *Gleason* to answer to said information. *Almon R. Meek*,

Attorney-General of the state of *Florida*.

Tuesday, *3* o'clock, *p.* m., *Dec. 2d*, 1868."

Order on Motion for Writ. — In Lindsey *v.* Atty.-Gen., 33 Miss. 508, the court made the following order, which was not objected to:

"*David C. Glenn*, Att'y-Gen. v. *Horatio H. Lindsey*.

On motion of *David C. Glenn*, Attorney-General of the state of *Mississippi*, and on the petition filed by him, on the relation of *David N. Barrows*, it is ordered that a writ of quo warranto be issued and executed on *Horatio H. Lindsey*, and be made returnable into this court, on *Friday*, the *17th* day of *March*, 1854, commanding him to be and appear before this court on that day, and answer the petition aforesaid, and show by what warrant of law it is that he holds and claims to exercise, the privileges and franchises, and to demand the emoluments of the office of *clerk of the penitentiary* of said state; and also the office of *clerk of the Board of Inspectors* of said penitentiary, which is incident or appurtenant to the office of clerk of said penitentiary."

1. *Michigan.* — Comp. Laws (1897), § 9952.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 329.

of the *Stanton Electric Company*, for usurping upon the people of said state certain liberties, privileges and franchises in said information specified, and have you then and there (*concluding as in Form No. 8895*).

Form No. 16913.

(Precedent in Territory *v.* Ashenfelter, 4 N. Mex. 87.)[1]

The Territory of *New Mexico* to *Singleton M. Ashenfelter*, Greeting:

Whereas, *Wm. Breeden*, attorney general for the territory of *New Mexico*, on the relation of *Edward C. Wade*, hath filed in the *district* court for the *Third* judicial district of the territory of *New Mexico*, sitting within and for the county of *Sierra*, by leave of the court, an information in the nature of a quo warranto alleging and charging that you, the said *Singleton M. Ashenfelter*, have unlawfully usurped, intruded into, and held the office of district attorney for the *Third* judicial district of the territory of *New Mexico*, and unlawfully exercised the powers and functions thereof, and that you, the said *Singleton M. Ashenfelter*, still unlawfully hold said office, and exercise the powers and functions thereof, without any authority of law, and to the exclusion of the said *Edward C. Wade*, who, it is alleged, is the legally appointed district attorney for said district, and lawfully entitled to the possession of said office, and to hold and enjoy and to exercise the powers and functions thereof, therefore you, the said *Singleton M. Ashenfelter*, are hereby commanded that, laying all other matters and things aside, you do appear, at *10* o'clock A. M., on *Wednesday*, *November 18*, 1885, before the said *district* court, now sitting in said county of *Sierra*, at the court-house of said county, then and there to answer unto said information concerning the matters therein alleged and charged against you, and observe what the said court shall direct in this behalf. And this you do under penalty of the law, and on pain of such judgment and other process as said court shall award.

Witness the Hon. *Wm. F. Henderson*, associate judge of the *supreme* court of the territory of *New Mexico*, and judge of the *Third* judicial *district* court thereof, and the seal of said court, this *seventeenth* day of *November*, A. D. 1885.

(SEAL) *George R. Bowman*, Clerk.

Form No. 16914.[2]

(Bright. Pur. Dig. Pa. (1894), p. 1774, § 4.)

Erie County, ss.

Commonwealth of *Pennsylvania*: To the Sheriff of said county, greeting:

We command you that you summon *John Doe*, so that he be and appear before our Court *of Common Pleas*, for the county of *Erie*, at

1. It was held that the process in this case was properly issued, on motion of attorney general, by order of the court, and that it was rightfully made returnable at a day during the same term.

See, generally, *supra*, note 1, p. 329.

2. *Pennsylvania.* — Bright. Pur. Dig. (1894), p. 1774, § 4, provides that writs of quo warranto shall be in the form set out in the text.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 329.

a court to be holden at *Erie*, in and for the county aforesaid, on the *first Monday* of *September next*, and then and there to show by what authority he claims to exercise the office of high sheriff, in the said county of *Erie* (or *to show by what authority he exercises within the said county the liberties and franchises following, to wit:* setting them forth), and have you then there this writ.

Witness, the Hon. *John Marshall*, president judge of our said court, at *Erie*, the *fifteenth* day of *August*, A. D. one thousand *nine hundred*.

(SEAL) *Calvin Clark*, Prothonotary.

Form No. 16915.[1]

(Precedent in Atty.-Gen. *v.* Barstow, 4 Wis. 569.)

State of *Wisconsin* — *Supreme* Court — ss.

The state of *Wisconsin* to the sheriff of *Dane* county, greeting: — You are hereby commanded to summon *William A. Barstow* to appear before the *supreme* court of the state of *Wisconsin*, at the capitol in *Madison*, the seat of government in said state, on *Tuesday*, the *5th* day of *February*, 1856, at *10* o'clock *A.* M. of said day, then and there to answer unto the state of *Wisconsin*, and to an information upon the relation of *Coles Bashford*, filed by the attorney general of said state, in the nature of a quo warranto, by what warrant he, the said *William A. Barstow*, claims to hold, use, enjoy and exercise the office of governor of the said state of *Wisconsin*, and to stand to and abide by the order, judgment or decree of the said *supreme* court in the premises, upon what shall then and there be made to appear. Hereof fail not, and have you then and there this writ.

Witness, the Hon. *E.V. Whiton*, Chief Justice of our said court, at *Madison*, this *17th* day of *January*, A. D. 1856.

(SEAL) *Lafayette Kellogg*, Clerk.

William R. Smith, Attorney General.

XI. DEMURRER.[2]

Form No. 16916.[3]

(Precedent in Miller *v.* Palermo, 12 Kan. 14.)[4]

[(*Commencement as in Form No. 7098.*)][5]

(1.) That said plaintiffs have not legal capacity to sue in this action, it appearing from said petition that in said action the county

1. *Wisconsin.* — Stat. (1898), § 3463 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 329.

The information is set out *supra*, Form No. 16875.

2. **For the formal parts** of a demurrer in a particular jurisdiction consult the title DEMURRERS, vol. 6, p. 294.

Other Precedents. — For other forms of demurrers in quo warranto proceedings see the title DEMURRERS, Forms Nos. 7098 7119.

Joinder in Demurrer. — For form of joinder in demurrer see the title DEMURRERS, vol. 6, Form No. 7188.

3. *Kansas.* — Gen. Stat. (1897), c. 96, § 97 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 2, this page.

4. The demurrer in this case was sustained.

5. The matter to be supplied within [ ] will not be found in the reported case.

attorney of said county or the attorney general of the state of *Kansas* are the only persons authorized to sue;

(2.) That there is a defect of parties plaintiff in this: that said action should have been brought by the county attorney of said county or the attorney general of the state of *Kansas*;

(3.) The petition of the said plaintiffs does not state facts sufficient to constitute a cause of action.

[*Jeremiah Mason*, Attorney for defendant.][1]

Form No. 16917.[2]

(Precedent in State *v.* Parker, 121 N. Car. 202.)[3]

[(*Venue and title of court as in Form No. 5927.*)

The State of North Carolina, on relation of *L. P. Cromartie*, plaintiff, against *C. P. Parker*, *Z. G. Thompson*, *W. K. Anders* and *C. W. Lyon*, defendants.

The defendant in the above entitled cause demurs to the complaint in the above entitled cause, and for cause of demurrer alleges:][4]

1. That the complaint does not state facts sufficient to constitute a cause of action; in that, according to the facts as stated, the defendants are rightfully holding the offices of County Commissioners of *Bladen* county, and properly exercising the duties thereof.

2. That there is an improper joinder of actions, as each of the defendants holds an office as a member of the Board of Commissioners, independent and separate from the office of other members of said Board, and an action cannot be brought against several persons to try the right to different offices.

3. That it appears from the complaint that the defendants, *C. W. Lyon*, *W. K. Anders* and *Z. T. Thompson*, accepted the places of members of the Board of Education of *Bladen* county after they had been duly elected and qualified as members of the Board of Commissioners of said county, and while they were holding said offices.

4. That the office of Board of Education is not an office in contemplation of Article *14*, Section 7, of the Constitution of *North Carolina*, but is one of the offices designated in the proviso to said Section, viz: a Commissioner for special purposes.

5 That it appears from the complaint, and the Article of the Constitution therein cited, that if the office of Board of Education is incompatible with the office of County Commissioner, the office of County Commissioner is not forfeited by accepting the office of Board of Education, but that holding the office of County Commissioner they could not accept or hold any other office.

[(*Signature and verification as in Form No. 5927.*)][5]

1. The matter enclosed by [ ] will not be found in the reported case.

2. *North Carolina.* — Code Civ. Proc. (1900), § 603 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 2, p. 332.

3. The demurrer in this case was sustained.

4. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

5. The matter to be supplied within [ ] will not be found in the reported case.

XII. ANSWER OR PLEA.[1]

1. At common law, the proper practice upon the filing of an information in the nature of a quo warranto was for defendant to plead instead of answering. State *v.* Kennedy, 69 Conn. 220; People *v.* Percells, 8 Ill. 59. And where the defendant pleads in the form of an answer to a complaint, instead of a proper plea to the information, the relator should move to have the pleading expunged. State *v.* Kennedy, 69 Conn. 220.

By statute, in some states, the proceeding has been so changed that an answer is the proper pleading on the part of defendant. See list of statutes cited *supra*, note 1, p. 217.

One Plea Only Permitted. — The statute of Anne allowing the defendant to plead more than one plea with leave of the court does not extend to informations in the nature of a quo warranto at common law, on account of their criminal character. State *v.* Roe, 26 N. J. L. 215; People *v.* Richardson, 4 Cow. (N. Y.) 97, note; People *v.* Jones, 18 Wend. (N. Y.) 601; People *v.* Manhattan Co., 9 Wend. (N. Y.) 351. And in *Missouri*, where the proceeding is governed by statute, it is held that but one answer is allowable. State *v.* Vallins, 140 Mo. 523. In some jurisdictions, however, where informations in the nature of quo warranto are treated by statute merely in the nature of a civil proceeding, statutes containing substantially the same provisions in regard to double pleading as the statute of Anne have been held to apply. State *v.* McDaniel, 22 Ohio St. 354.

Requisites of Answer or Plea, Generally. — For the formal parts of an answer or plea in a particular jurisdiction see the titles ANSWERS IN CODE PLEADINGS, vol. 1, p. 799; PLEAS, vol. 13, p. 918.

Must Disclaim or Justify. — In quo warranto proceedings, the defendant must disclaim or justify, for the object of the proceeding is to ascertain by what warrant or authority the defendant holds the office or franchise alleged to be usurped. State *v.* Harris, 3 Ark. 570; State *v.* Philips, 30 Fla. 579; McPhail *v.* People, 160 Ill. 77; Distilling, etc., Co. *v.* People, 156 Ill. 448; Catlett *v.* People, 151 Ill. 16; Kamp *v.* People, 141 Ill. 9; Carrico *v.* People, 123 Ill. 198; Swarth *v.* People, 109 Ill. 621; Holden *v.* People, 90 Ill. 434; Illinois Midland R. Co. *v.* People, 84 Ill. 426; Clark *v.* People, 15 Ill. 213; Place *v.* People, 83 Ill. App. 84; People *v.* Crawford, 28 Mich. 88; People *v.* River Raisin, etc., R. Co., 12 Mich. 389; State *v.* McCann, 88 Mo. 386; State *v.* Barron, 57 N. H. 498; State *v.* Olcott, 6 N. H. 74; Miller *v.* Utter, 14 N. J. L. 84; People *v.* Clayton, 4 Utah 421; State *v.* Foote, 11 Wis. 14. And failure so to do will entitle plaintiff to a judgment of ouster. Place *v.* People, 83 Ill. App. 84.

Repugnancy. — A plea which contains some matters tending to show justification and others tending to show disclaimer is bad on demurrer, as the defenses set up are repugnant and inconsistent with one another. Distilling, etc., Co. *v.* People, 156 Ill. 448.

Several Defenses. — More than one defense may be set forth in defendant's answer. People *v.* Stratton, 28 Cal. 382. And in State *v.* Vallins, 140 Mo. 523, it is held that all the defenses the party has, no matter what their nature, whether in abatement or in bar, must be contained in the answer, since but one answer is allowable.

Information and Belief.—As to whether or not a denial of the material allegation of the complaint upon information and belief is a sufficient denial, or whether or not such denial should be positive and specific, the authorities are clear that if the facts set forth in the answer are within the personal knowledge of the defendant, then the denial should be specific and positive, but if the facts upon which the denial in an answer is based must be ascertained by inquiry from other persons or by examination of or computation from books and records which may be within the custody and control of the defendant, then a denial upon information and belief is sufficient. People *v.* Curtis, 1 Idaho 753.

Surplusage. — If plea sets out one complete defense, other matters set up therein as a defense may be disregarded. People *v.* Ricker, 142 Ill. 650

Verification — *Generally.* — A plea to an information in quo warranto at common law need not be verified. Atty.-Gen. *v.* McIvor, 58 Mich. 516.

For statutory requisites as to verification of answer or plea see list of statutes cited *supra*, note 1, p. 217.

1. Of Disclaimer.[1]

Form No. 16918.[2]

(*Venue and title of court and cause as in Form No. 15223.*)

The defendants, by their attorney, *Jeremiah Mason*, say that they disclaim any right to use, exercise or enjoy the franchises in the information mentioned and set forth.

Jeremiah Mason, Attorney for Defendants.

2. Of Not Guilty.[3]

Form No. 16919.[4]

(*Venue and title of court and cause as in Form No. 15223.*)

The defendants, by their attorney, *Jeremiah Mason*, say that they

1. Effect of Disclaimer. — If defendant disclaims title, the people are at once entitled to judgment. State *v.* Ashley, 1 Ark. 513; People *v.* Bruennemer, 168 Ill. 482; Distilling, etc., Co. *v.* People, 156 Ill. 448; Catlett *v.* People, 151 Ill. 16; Kamp *v.* People, 141 Ill. 9; Carrico *v.* People, 123 Ill. 198; Holden *v.* People, 90 Ill. 434; Clark *v.* People, 15 Ill. 213; Place *v.* People, 83 Ill. App. 84.

In People *v.* Crawford, 28 Mich. 88, it was held that where the information charges the respondent with intrusion into an office, and calls upon him to show by what right he has assumed to hold it, the respondent may deny that he holds or claims to hold it, and such a plea is a disclaimer and no controversy of fact can arise upon it beyond the simple question of his exercise of the office.

And see, generally, the title DISCLAIMER, vol. 6, p. 838.

Precedent. — In State *v.* North, 42 Conn. 79, the first plea to the information was as follows:

"1. That protesting against the vagueness and uncertainty of the averments of said declaration, which leave them in doubt as to its real meaning, but understanding said information to charge the defendant with having usurped and attempted to exercise the office of school district committee of a school district described in said information by its boundaries and therein called 'The Second School District' of said town of *Avon*, the said exercise of which office is charged to have been attempted within the area of said school district, they plead and say that they have not usurped, or attempted to exercise, and they make no claim to, the office of school district committee of the school district so described."

On demurrer, it was held that this first plea was sufficient and that it was unnecessary to consider the other pleas.

2. *Mississippi.* — Anno. Code (1892), § 3525.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 334.

This is substantially the form of plea set out in State *v.* Brown, 34 Miss. 688.

3. Not Guilty or Non Usurpavit — *Generally.*—As a general rule, it is not sufficient to enter a plea of not guilty. Swarth *v.* People, 109 Ill. 621; Com. *v.* M'Williams, 11 Pa. St. 61; State *v.* Foote, 11 Wis. 14. Or of non usurpavit. Buckman *v.* State, 34 Fla. 48; State *v.* Anderson, 26 Fla. 240; State *v.* Saxon, 25 Fla. 342; Swarth *v.* People, 109 Ill. 621; People *v.* Clark, 4 Cow. (N. Y.) 95, note; Com. *v.* M'Williams, 11 Pa. St. 61; State *v.* Foote, 11 Wis. 14. And whether the information is filed by the attorney general on relation of a claimant to office, or by a private person upon refusal of attorney general to institute suit, makes no difference as to a plea of non usurpavit. It cannot be allowed. Buckman *v.* State, 34 Fla. 48; State *v.* Anderson, 26 Fla. 240; State *v.* Saxon, 25 Fla. 342.

Denial of Material Allegations. — Though a simple plea of not guilty is not sufficient, a defendant may deny the material allegations tendered by his antagonist. Com. *v.* M'Williams, 11 Pa. St. 61.

In *Mississippi*, by statute, it is provided that defendant may plead generally by plea of not guilty. Miss. Anno. Code (1892), § 3525.

4. *Mississippi.* — Anno. Code (1892), § 3525.

have not for the space of *twelve* months last past before the filing of the information, been exercising, using and enjoying within the county of *Yazoo*, without legal warrant and authority, the franchises in said information set forth, as in said information pleaded, and this they pray may be inquired of by the country.

Jeremiah Mason, Attorney for defendants.

3. Of Justification.

a. To Information Against Corporation for Forfeiture of Franchise.[1]

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 3, p. 335.

This is substantially the form plea set in State *v.* Brown, 34 Miss. 688.

Effect of Plea. — The plea of not guilty to an information in the nature of a writ of quo warranto charging the defendant, as an individual, with usurping and exercising the franchise of a banking corporation, raises the issue whether or not the defendant, as an individual, had usurped and exercised the franchises as charged, and not the issue as to whether or not the corporation whose franchises he had used had, by misuser or nonuser, forfeited its charter; and hence, under that issue, the defendant may, in reply to evidence on the part of the state tending to show that he used the franchises as an individual, introduce proof to show that the corporation was duly organized according to law, and that he did the acts complained of not as an individual, but as an officer of the corporation. State *v.* Brown, 34 Miss. 688.

Not Guilty and Disclaimer Joined. — To an information in the nature of a writ of quo warranto charging the defendant, as an individual, with usurping and exercising the franchise of banking, he may plead not guilty and also a disclaimer of any right to do the acts complained of. The two defenses are not inconsistent with one another. State *v.* Brown, 34 Miss. 688.

1. Requisites of Answer or Plea, Generally. — See *supra*, note 1, p. 334.

Act of Incorporation. — Where an information is filed against a corporation calling upon it to show by what warrant it claims to be a corporation and to exercise corporate powers, it is the practice of the defendant to plead the act of the legislature granting to it the franchise named in the information. State *v.* Mississippi, etc., R. Co., 20 Ark. 495; State *v.* Walnut Hills, etc., Road Co., 7 Ohio Cir. Dec. 453; State *v.* Pennsylvania, etc., Canal Co., 23 Ohio St. 121. Or to set up its charter as the warrant for the exercise of the franchise. Atty.-Gen. *v.* Michigan State Bank, 2 Dougl. (Mich.) 359; State *v.* Commercial Bank, 33 Miss. 474. This has been held to constitute a prima facie defense. Defendant need not assume that the attorney general will insist upon a forfeiture of the charter and set out matter to anticipate this reply. Atty.-Gen. *v.* Michigan State Bank, 2 Dougl. (Mich.) 359. However, it has been held that the defendant must in its plea set out all matter on which it relies for its defense. Thompson *v.* People, 23 Wend. (N. Y.) 537. Thus defendant must show a perfect title, and that it has not been forfeited by any act of omission or commission. Territory *v.* Virginia Road Co., 2 Mont. 96.

Performance of Conditions Precedent. — Defendant is not bound to allege in its answer a performance of the conditions prescribed in the charter as precedent to the organization of the corporation. State *v.* Commercial Bank, 33 Miss. 474.

Continued Existence of Corporation. — Where a defendant shows the commencement of legal existence under a valid charter not yet expired, the law will presume its continued existence down to the period of the filing of the information; and if continued existence is alleged it will be considered surplusage. Atty.-Gen. *v.* Michigan State Bank, 2 Dougl. (Mich.) 359.

Another Precedent. — In People *v.* Niagara Bank, 6 Cow. (N. Y.) 196, is set out the material allegations of the following sufficient plea:

"And the said President, Directors and Company of the *Bank of Niagara*, having heard the said information read, complain, that, under color of the premises in the said information con-

Form No. 16920.[1]

(Precedent in North, etc., Rolling Stock Co. *v.* People, 147 Ill. 236.)[2]

tained, they are greatly vexed and disquieted; and this by no means justly; because, protesting that the said information and the matters therein contained are insufficient in law, and that they need not, nor are they obliged, by the law of the land, to answer thereto: yet, for plea in this behalf, the said President, etc., say, that by a certain act of the legislature of the people of this state, passed on the 17th day of April, A. D. 1816, entitled 'An act to incorporate the Bank of Niagara,' they, the said President, etc., were ordained, constituted and declared to be, from time to time, and until the *1st* day of *January*, A. D. 18*32*, a body corporate and politic, in fact and in name, by the name of *The President, Directors and Company of the Bank of Niagara*; and by that name, it is enacted and declared, in and by the said act, that they, the said President, etc., and their successors, until the said *1st* day of *January*, A. D. 18*32*, may, and shall have succession; and shall be, in law, persons capable of suing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended, in all courts and places whatsoever, and in all manner of actions, suits, complaints, matters and causes whatsoever; as by the said act of the legislature of the people of the state of *New York*, reference being thereunto had, will, among other things, more fully and at large appear. And the said President, etc., further say, that by the force of the said act of the legislature, and of the provisions thereof, they were created and constituted, and still continue to be, and are a body politic and corporate in fact and in name, and are entitled to do all lawful acts, and to have, use and enjoy all the rights, liberties, privileges, franchises and immunities granted to them, and conferred upon them, by the said act, and by the law of the land: by virtue whereof, they, the said President, etc., for all the time in the said information in that behalf mentioned, have used and exercised, and still do use and exercise, the liberties, privileges, and franchises of a body politic and corporate, in law, fact and name, by the name of *The President, Directors and Company of the Bank of Niagara*; and, by the same name, suing and being sued, pleading and being impleaded, defending and being defended, answering and being answered unto, in all courts and places whatsoever, and also the liberties, privileges and franchises of being and becoming proprietors of a bank or fund, for the purpose of issuing notes, receiving deposits, making discounts, and transacting other business which incorporated banks may lawfully transact, by virtue of their respective acts of incorporation; and of actually issuing notes, receiving deposits, making discounts and carrying on banking operations, and other monied transactions, which are usually performed by incorporated banks. And the said President, etc., have claimed, used and enjoyed, and yet do claim to have, use and enjoy, all the liberties, privileges and franchises, allowed to, and conferred on them, in and by the aforesaid act of the said legislature, as it was and is lawful for them to do. Without this, that the said President, etc., during all, or any part of the time mentioned in said information, have usurped or do still usurp the said liberties, privileges and franchises, mentioned in the said information, or any of them, upon the said people of the state of *New York*, in manner and form, as by the said information is above supposed; all which several matters and things, they, the said President, etc., are ready to verify, etc. Whereupon, they pray judgment, and that the aforesaid liberties, privileges and franchises, by them claimed in manner aforesaid, may be allowed and adjudged to them, the said *President, Directors and Company of the Bank of Niagara*; and that they may be dismissed and discharged by the court here, of and from the premises above charged upon them," etc.

1. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 112, par. 4.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 336.

2. No objection was made to the form of this plea. A replication and rejoinder were filed, and upon trial it was held that the replication was insufficient and judgment was rendered for the defendant.

The information is set out *supra*, Form No. 16860.

[(*Venue and title of court as in Form No. 10823.*)][1]

And now, on this day, comes the said *North and South Rolling Stock Company*, by *L. H. Hite*, its attorney, and having heard read the said information, for plea in this behalf says it is a duly organized and chartered company, incorporated under the laws of the state of *Illinois*, with license and charter duly issued by the Secretary of State of said state authorizing it to carry on the business of owning, leasing, buying, selling and operating railroad rolling stock, said corporation being organized under and by virtue of sections 1 to 28, inclusive, of an act entitled "An act concerning corporations," passed by the legislature of Illinois, approved by the Governor, and in force July 1, 1872. And by this warrant the said *North and South Rolling Stock Company* has used, during all the time mentioned in said information, and still uses, the said liberties, privileges and franchises of owning, leasing, buying, selling and operating railroad rolling stock, as the said *North and South Rolling Stock Company* well might and still may, without this, that said *North and South Rolling Stock Company* has usurped, or does now usurp, the liberties, privileges and franchises aforesaid, or any or either of them, upon the said People, as by the said information is above supposed, — all which matters the said *North and South Rolling Stock Company* is ready to verify, etc., wherefore it prays judgment [that the aforesaid liberties, privileges and franchises by it claimed in manner aforesaid be allowed and adjudged to it, the said *North and South Rolling Stock Company*, and that it may be dismissed and discharged from the court here of and from the premises above charged upon it.

L. H. Hite, Attorney for Defendant.][2]

b. To Information Against Park Commissioners for Exercising Control Over Certain Streets.

Form No. 16921.[3]

(Precedent in People *v.* Walsh, 96 Ill. 234.)[4]

[(*Venue and title of court as in Form No. 10823.*)][1]

And now, on this day, come the said *John R. Walsh*, *Cornelius Price*, *Paul Cornell*, *John B. Sherman* and *Martin J. Russell*, by *Joseph F. Bonfield*, their attorney, and having heard the said information read, protesting that the said information and the matters therein contained are not sufficient in law, to which said information the said *John R. Walsh*, *Cornelius Price*, *Paul Cornell*, *John B. Sherman* and *Martin J. Russell* are not, nor is either of them bound by the law of the land to answer; yet, for plea in this behalf, they say that, heretofore, under and by virtue of an act of the General

1. The matter to be supplied within [ ] will not be found in the reported case.

2. The matter enclosed by [ ] will not be found in the reported case.

3. *Illinois*. — Starr & C. Anno. Stat. (1896), c. 112, par. 4.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 336.

4. On demurrer, the plea in this case was held sufficient.

Assembly of the State of Illinois, approved and in force February 24, 1869, entitled "An act to provide for the location and maintenance of a park for the towns of South Chicago, Hyde Park and Lake," *five* persons, together with their successors, were constituted a board of public park commissioners for the towns of *South Chicago*, *Hyde Park* and *Lake*, to be known under the name of the *South Park Commissioners*, and that, under the authority conferred by said act, said *South Park Commissioners* became duly organized, and, as such municipal corporation, have performed the corporate duties and obligations imposed on said commissioners by said act, and all other acts supplementary to, or amendatory thereof.

And these defendants, each for himself, says that they are the members of said corporation known as the *South Park Commissioners*, and were duly and legally appointed such, and now actually exercise the office and franchise of said commissioners, and that they have, as such commissioners, and in no other capacity, entered upon and assumed jurisdiction and control of that portion of the street known as *Michigan* avenue, extending from the south line of *Jackson* street to the south line of *Thirty-fifth* street, and also that portion of said *Thirty-fifth* street extending from *Michigan* avenue to *Grand* boulevard.

And these defendants, each for himself, says that, under and by virtue of an act of the General Assembly of the state of Illinois, amendatory of and supplementary to an act to provide for the location and maintenance of a park for the towns of South Chicago, Hyde Park and Lake, approved and in force April 16, 1869, and also of a General Park act, entitled "An act to enable the corporate authorities of two or more towns for park purposes, to issue bonds in renewal of bonds heretofore issued by them, and to provide for the payment of the same; to make, revise and collect a special assessment on contiguous property for benefits by reason of the location of parks and boulevards, and to make necessary changes in their location," approved June 16, 1871, and in force July 1, 1871; and also of "An act to enable park commissioners or corporate authorities to take, regulate, control and improve public streets leading to public parks, to pay for the improvement thereof, and in that behalf make and collect a special assessment or special tax on contiguous property," approved and in force April 9, 1879, the powers, duties and obligations of your respondents as such *South Park Commissioners* were greatly enlarged, and they now, as such corporation, hold, manage and control about *1400* acres of land, including streets, avenues and driveways, for the purposes and uses mentioned in said acts, and for which said streets, avenues and driveways were dedicated, conveyed or condemned, all of which, excepting only that part of *Michigan* avenue and *Thirty-fifth* street set forth in the information of relator, and that part of *Grand* boulevard north of *Thirty-ninth* street, lie south of the corporate limits of the city of *Chicago*.

And these defendants, each for himself, says that heretofore, to-wit: On or about the *9th* day of *April*, *1879*, that part of *Michigan* avenue extending from the south line of *Jackson* street to the south

line of *Thirty-fifth* street, and that part of *Thirty-fifth* street extending from the east line of *Michigan* avenue to the east line of *Grand* boulevard, were public streets within the corporate limits, jurisdiction and control of the city of *Chicago*, and that such parts of said streets were laid out and established at the times and in the manner following, that is to say: From *Jackson* street to *Twelfth* street, *Michigan* avenue falls within a fractional section *15*, addition to *Chicago*, and was dedicated as a public street by plat recorded *July 20*, 1836.

After the year 1845, and prior to the year 1848, *Michigan* avenue, from *Twelfth* street to *Twenty-second* street, was duly and legally dedicated by the owners of lots abutting thereon. In the year 1848 *Michigan* avenue, from *Twenty-second* street to *Thirty-first* street, was dedicated as a public street by the trustees of the *Illinois and Michigan* Canal, by plat, recorded *September 4*, 1848, the same being *sixty-six* feet wide, according to said plat, and afterwards, and in the year 1869, the owners of lots abutting thereon conveyed *seven* feet on either side for like public uses, making the street *eighty* feet wide. From *Thirty-first* street to *Thirty-second* street *Michigan* avenue was dedicated as a street by a subdivision made by *C. H. Walker* in or about the year 1865. From *Thirty-second* street to *Thirty-fifth* street, *Michigan* avenue was dedicated as a street by subdivision made by *John Wentworth*, in the year 1867. *Thirty-fifth* street, in or about the year 1867, was likewise dedicated to the public in subdivisions made by *John Wentworth*, *H. O. Stone*, *Harriet Farlin*, *Francis J. Young* and others.

And these defendants, each for himself, says, that by virtue of such plats, dedications and conveyances, the fee in said part of said streets taken possession of as aforesaid by said *South Park Commissioners*, became vested in the public, and under the control of the people of the state of *Illinois* represented in the General Assembly.

And these defendants, each for himself, says that the parts of *Michigan* avenue and the part of *Thirty-fifth* street selected and taken by them as said *South Park Commissioners*, are what are commonly called residence streets, the abutting property being used for residence purposes, and lie within the district or territory the property of which is taxable for the maintenance of the parks under their control as such corporate authorities, and that the consent in writing of the owners of a majority of the frontage of the lots and lands abutting on said *Michigan* avenue and *Thirty-fifth* street, so far as selected and taken as aforesaid, was first obtained as required by said act before said parts of said streets were selected and taken as aforesaid, and that said parts of said streets so taken are continuous, and necessary to form and do form one continuous improvement.

And these defendants, each for himself, further says that on, to-wit, the *23d* day of *June*, 1879, at a regular meeting of the city council of the city of *Chicago*, there being present at such meeting *twenty-nine* aldermen, an ordinance was passed by yeas *25* and nays *4*. Said ordinance was duly approved by the mayor, and is as follows, to-wit: (*Here was set out the ordinance*).

And these defendants, each for himself, says, that after the passage

and approval of said ordinance, and on, to-wit, the *fifteenth* day of *July*, 1879, the said *South Park Commissioners*, at a regular meeting of that body, passed by an unanimous vote the following resolution: (*Here was set out the resolution*).

That the only proceedings which have been instituted or caused to be, by the said council and said commissioners, and under which said commissioners claim control or authority over said *Michigan* avenue and *Thirty-fifth* street, as heretofore set forth, have been the passage of the ordinance by the council in pursuance of the act of 1879 aforesaid, the passage of the resolution by the commissioners, and of the ordinance by the council, and the consent in writing of a majority of owners of the frontage, in manner and form as hereinabove detailed, and no other.

And these defendants, each for himself, says that by this warrant, and by reason of the said premises, they, as such park commissioners, and not otherwise, have used and exercised for all the time in the said information in that behalf mentioned, and still do use and exercise control, authority and jurisdiction over said parts of *Michigan* avenue and *Thirty-fifth* streets, and since the passage and approval of said ordinance, and of said resolution, have claimed and do yet claim to have, use and enjoy control, authority and jurisdiction over said parts of *Michigan* avenue and *Thirty-fifth* street, as they well might and still may, for the public purposes and uses for which said parts of said streets were dedicated and conveyed, and under the authority conferred and the duties imposed upon them by law, without this, that they, the said *John R. Walsh*, *Cornelius Price*, *Paul Cornell*, *John B. Sherman* and *Martin J. Russell* have usurped, or do now usurp, or illegally exercise control and jurisdiction over said parts of said streets, as by said information is above supposed.

All which matters and things, they, the said *John R. Walsh*, *Cornelius Price*, *Paul Cornell*, *John B. Sherman* and *Martin J. Russell*, are ready to verify, as the court shall consider.

Whereupon they pray judgment, and that the aforesaid liberties, privileges and franchises in form aforesaid claimed by these defendants may be allowed to them respectively as such *South Park Commissioners*, and that they may be dismissed and discharged by the court hereof and from the premises aforesaid.

[*Jeremiah Mason*, Attorney for Defendants.][1]

c. To Information for Usurping Office in Private Corporation.[2]

1. The matter enclosed by [ ] will not be found in the reported case.

2. **Requisites of Answer or Plea, Generally.** — See *supra*, note 1, p. 334.

Holding Over. — Where defendant claimed title to the office of trustee of a religious corporation by virtue of his election for a former term, which had expired, and a failure to choose a successor, whereby he was entitled to hold over, it was held that plea must show positively that no one had at any time been chosen to succeed defendant and that a statement showing that one attempt had been made to choose a new trustee without success was insufficient. People *v.* Phillips, 1 Den. (N. Y.) 388.

Duplicity. — To a quo warranto calling upon the defendants to show why they exercised the office of directors of a certain incorporated company they filed a plea, setting forth that on the ninth of January, 1837, they were duly

(1) That Defendants were Duly Elected Trustees of Religious Society.

elected and chosen directors, agreeably to the original charter and to the provisions of a certain act of assembly (which provided for an annual election), and thereby became entitled to all the rights, privileges, etc., of directors; and further, that on the first of May, 1837, they were again duly elected directors, agreeably to the provision of a certain other act of assembly and to certain resolutions of the corporation; and that on the second of May, 1837, at a meeting of the directors it was resolved that in case the last-mentioned election should prove to have been irregular and illegal, then, in obedience to the further section of the charter of incorporation, the persons so elected should continue to hold and exercise their offices by virtue of their election in January preceding. On demurrer to this plea, it was held that, as either election, if valid, would constitute a sufficient defense, the plea was bad for duplicity and uncertainty. Com. *v.* Gill, 3 Whart. (Pa.) 228.

Precedent — President, etc., of Bank. — In People *v.* Richardson, 4 Cow. (N.Y.) 97, note, the following plea, which was filed in People *v.* Kip, in the New York supreme court, is set out:

"And now in this same term, the said *L. K.*, *D. R.*, etc., come by *Charles G. Haines*, their attorney; and having heard the said information read, they say, that under color of the premises contained in the said information, they are greatly troubled; and this, by no means justly; because protesting that the said information, and the matter therein contained, are not sufficient in law, and that they are not obliged by the law of the land to answer thereto, for plea they say: That they do not think that the said people ought to impeach or trouble them by reason of the premises in the said information mentioned and specified; because, they say, that true it is, that in and by a certain act of the Legislature of the state of New York, passed on the twenty-third day of March, in the year of our Lord one thousand eight hundred and twenty-one, all such persons as then were, or thereafter should become, stockholders of a certain company, associated under the style of the '*North River Bank of the City of New York*,' were ordained, constituted, and declared, to be from time to time, and until the *first* day of *July*, in the year of our Lord one thousand eight hundred and *forty-two*, a body corporate and politic, in fact and in name, by the name of the '*President, Directors and Company of the North River Bank of the City of New York*;' and in and by the said act it was amongst other things enacted, that the stock, property, affairs, and concerns of the said corporation, should be managed and conducted by *thirteen* directors, being stockholders and citizens of the said state, which directors should hold their offices from the *first* day of *July* in every year, and should be elected on the *first Monday* of *June* in every year, at such time of the day and in such place, within the city of *New York*, as a majority of the said directors for the time being should appoint; and that public notice should be given by the said directors, not less than *fourteen* days previous to the time of holding the said election, by an advertisement to be inserted in at least *two* of the public newspapers printed in the city of *New York*; and that the said election should be made by such of the stockholders of the said corporation, as should attend for that purpose, either in person or by proxy; and that all elections for the directors should be by ballot, and that the *thirteen* persons who should have the greatest number of votes, should be directors; and that *L. K.*, *D. R.*, *T. B.*, etc., should be their present directors, and should hold their offices respectively until the *first Monday* of *July*, in the year of our Lord one thousand eight hundred and *twenty-two*. And further, that the directors for the time being, or a majority of them, should have power to make and prescribe such by-laws, rules and regulations, as to them should appear needful and proper, touching the government of the said corporation, the management and disposition of the stock, business, property, estate and effects of the said corporation; the time, manner and terms, at and upon which discounts and deposits shall be made and received in and by the same; the duties and conduct of the officers, clerks and servants employed; the election of directors, and all such other matters as might appertain to the concerns of the institution; and should

also have power to appoint so many officers, clerks and servants, for carrying on the said business, and with such salaries and allowances, as to them should seem meet; provided, that such by-laws, rules and regulations, were not repugnant to the constitution and laws of the United States and of this state; and provided also, that the said directors should keep open the said bank for discount as well as deposit, every day (except *Sundays*) during the usual business hours. And these defendants further say, that *The President, Directors and Company of the North River Bank of the City of New York*, now are, and for *one* year last past, and more, have been a body politic and corporate, in fact and in name, by the name of *The President, Directors and Company of the North River Bank of the City of New York*; that is to say, at the city of *New York*, and in the county of *New York* aforesaid. And these defendants further say, that heretofore, to wit, on the *twenty-sixth* day of *March*, in the year of our Lord one thousand eight hundred and *twenty-two*, the directors of the said corporation did make a certain by-law, in the words following, to wit:

'Be it ordained by *The President, Directors and Company of the North River Bank of the City of New York*, and it is hereby ordained by the authority of the same, that an election shall be held for *thirteen* directors of this corporation, being stockholders thereof, and citizens of this state, on the *first Monday* in *June next*, and on the *first Monday* in *June* in every year thereafter, between the hours of *eleven* o'clock in the *fore*noon, and *two* o'clock in the *after*noon, at the banking-house of this corporation, in the city of *New York*, and that public notice of the time and place of every such election shall be given not less than *fourteen* days previous to the time of holding the same, by an advertisement to be inserted in at least *two* of the public newspapers, printed in the city of *New York*; and every such election shall be by ballot, and shall be made by such of the stockholders of this corporation, as shall attend for that purpose, either in person or by proxy; and the *thirteen* persons who shall have the greatest number of votes, shall be directors; and *three* persons, being stockholders of this corporation, and citizens of this state, to be previously appointed by the directors, for the time being, shall be inspectors of every such election, and shall preside at, and hold the same, and shall certify to the directors at the next meeting, the names of the persons elected at such election.

And be it further ordained, that if it shall at any time happen that an election of directors shall not be made on the *first Monday* in *June*, in any year, then an election shall be held as soon as conveniently may be thereafter, on such day as the president shall appoint; which election shall be held at the said banking-house, and between the same hours of the day as are above mentioned; and *three* inspectors of such election, being stockholders and citizens as aforesaid, shall be appointed by the president, who shall perform the duties assigned to the inspectors above mentioned. And *fourteen* days notice of such election shall be given in the manner above directed, in relation to the elections to be held on the *first Monday* in *June*; and in case the office of president shall be vacant, then the day of election, and the inspectors thereof, shall be appointed in like manner by the cashier for the time being.'

And these defendants further say, that afterwards, to wit, on the *thirty-first* day of *May*, in the year last aforesaid, the said directors did appoint *D. B.*, *W. R.* and *D. D. S.* to be inspectors of the then next election for directors of the said corporation. And these defendants further say, that each of the said inspectors, *D. B.*, *W. R.*, etc., then was, and ever since hath been, and yet is, a stockholder of the said bank, and a citizen of the said state of *New York*, to wit, at the city and county of *New York*. And these defendants further say, that the said directors did cause public notice to be given of the said election, and of the time and place of holding the same *fourteen* days previous to the *first Monday* of *June*, in the year last aforesaid, being the time of holding the said election, by an advertisement inserted in *two* of the public newspapers printed in the city of *New York*, to wit, in a public newspaper printed in the said city, entitled the '*New York Evening Post*,' and in a certain other public newspaper in the said city, called the '*National Advocate*.'

And the said defendants further say, that an election for *thirteen* directors of

Form No. 16922.[1]

(Precedent in State *v.* Crowell, 9 N. J. L. 391.)[2]

[(*Title of court as in Form No. 15225.*)

the said corporation was held, before the said inspectors, on the *first Monday* of *June*, in the year last aforesaid, between the hours of *eleven* o'clock in the *fore*noon, and *two* o'clock in the *after*noon, of that day, at the banking-house of the said corporation, in the city of *New York*, and that an election of *thirteen* directors was then and there made, pursuant to the said act, by such of the stockholders of the said corporation, as did then and there attend for that purpose, in person or by proxy; and that the said election was by ballot; and that at such election the said *L. K.*, *D. R.*, *J. C. M.*, etc., had the greatest number of votes; and that at the next meeting of the directors, to wit, on the *third* day of *June*, in the year last aforesaid, at the city of *New York* aforesaid, the said *David Board*, *William Roe*, and *Daniel D. Smith*, did deliver to the said directors a certificate in the words following, to wit: 'We, the subscribers, inspectors of election for *thirteen* directors, to conduct the stock, property and affairs of *The President, Directors and Company of the North River Bank of the City of New York*, for the ensuing year, do certify, that the said election was this day held under our inspection; and that on canvassing the votes taken by us, it appears that *L. K.*, *D. R.*, *J. C. M.*, etc., were the *thirteen* persons who had the greatest number of votes, and are elected;' which foregoing certificate was dated the *third* day of *June*, in the year of our Lord one thousand eight hundred and *twenty-two*. And the said defendants further say, that afterwards, to wit, on the *first Monday* of *July*, in the year last aforesaid, they did, in pursuance of the said act, take upon themselves respectively, the office of directors of the said corporation, to wit, at the city and county of *New York* aforesaid; and by virtue of the premises, they then and there became, and on the *first Monday* of *July*, in the year aforesaid, at the city and county aforesaid, and from thence continually until the time of exhibiting the said information, were, and still are, directors of the said corporation, to wit, at the said city and county of *New York*; and by that warrant, the said defendants, for and during all the time in the said information in that behalf specified, at the said city and county, have respectively used and exercised, and still do use and exercise, the office of directors of the said corporation; and for and during all that time, have there claimed to be such directors, and to have, use, and enjoy all the liberties, privileges and franchises, to the said office belonging, as it was and is lawful for them to do:—Without this, that the said defendants, the said office, liberties, privileges, and franchises, in the said information above mentioned, or any of them, have usurped, and did usurp, upon the people of the state of *New York*, in manner and form as by the said information is above alleged against them; all and singular which matters and things the said defendants are ready to verify and prove, as the court shall award: Wherefore they pray judgment, and that the said office, liberties, privileges, and franchises, by them claimed in manner aforesaid, may be allowed and adjudged to them; and that they may be dismissed and discharged by the court hereof, and from the premises above charged against them. *C. G. H.*,

Attorney for defendants."

This action was settled immediately after plea.

1. *New Jersey.* — Gen. Stat. (1895), p. 2632, § 1 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 2, p. 341.

2. To this plea a replication was filed, setting up that the persons who attended on the fourth day of December, 1823, and by whom the election at that date was made, as set forth in the plea, were not members of the society, and that another election was held subsequent to that date at which another person was chosen instead of the defendant. A rejoinder and surrejoinder were filed, and upon trial judgment was rendered for the state upon the merits.

The replication is set out *infra*, Form No. 16937.

The State of New Jersey, ex rel. John Patrick and *Benjamin Maurice*, against *William M. Crowell, David Crowell, John D. See, Jacob Hadden, Abraham Ayres, John Wait* and *Thomas Griggs*. } On information in nature of quo warranto. Plea.][1]

And now in this same term of *February*, in the year of our Lord eighteen hundred and *twenty-five*, come the said *William M. Crowell, David Crowell, John D. See, Jacob Hadden, Abraham Ayres* and *John Wait*, defendants, by *George Wood*, their attorney, and having heard the information read, they complain that under color of the premises in the said information contained, they are greatly vexed and disquieted, and this by no means justly, because protesting that the said information, and the matters therein contained, are by no means sufficient in the law, and that they need not nor are obliged by law to answer thereto, yet for plea thereto they say they ought not to be impeached or impleaded by reason of the premises in the said information contained, because they say * that at the time of the exhibiting of the said information, and for *twelve* years last past, and for a long time before, there was and had been, in the city of *Perth Amboy*, in the said county of *Middlesex*, a religious society or congregation of Christians, entitled to protection in the free exercise of their religion by the constitution and laws of the state of *New Jersey*, and that during all the time last aforesaid the trustees of the said religious society or congregation were and had been a corporation duly incorporated pursuant to the act of the legislature of *New Jersey* in such case made and provided, by the name of *The Trustees of the Presbyterian Church* in the city of *Perth Amboy*; and these defendants in fact further say, that the members of the said religious society heretofore, viz., on the *eleventh* day of *February*, 1823, at the church, being the usual place of meeting for public worship by the members of the said religious society, assembled together for the purpose of electing trustees of the said corporation, due notice in writing of the time and place aforesaid of such meeting and assembling, and of the purpose aforesaid, having been given, by an advertisement in writing set up in open view at the door of the said church *ten* days previous to the said *eleventh* day of *February*, 1823, aforesaid; and these defendants further say, that an election was held on the said *eleventh* day of *February* aforesaid, at the said church, and that at the said election the said *William M. Crowell* was by a majority of such of the said members of the said religious society as did then and there attend for that purpose, elected a trustee of the said corporation; and these defendants in fact further say, that thereupon the said *William M. Crowell* being so elected trustee as aforesaid, afterwards, viz. on the ——— day of ———, in the year aforesaid, came before a justice of the peace in and for said county of *Middlesex*, and before the said justice took the oath to support the constitution of the United States, the oath of allegiance prescribed by law, and the oath for the faithful

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

execution of the trust reposed in him as such trustee as aforesaid, according to the best of his abilities and understanding, which said oaths were by the said justice then administered to him, and being reduced to writing were by him subscribed; and the said defendants further say, that afterwards, viz. on the day and year last aforesaid, he the said *William M. Crowell* did take upon himself the office of trustee of the said corporation, and by virtue of the said premises he then and there became and from thence continued until the time of exhibiting the said information was and still is a trustee of the said corporation, and by virtue thereof he the said *William M. Crowell*, during all the time in the said information in that behalf specified, has used and exercised, and still doth use and exercise, the office of trustee as aforesaid; and these defendants in fact further say, that the members of the said religious society heretofore, to wit, on the *fourth* day of *December*, in the year of our Lord eighteen hundred and *twenty-three*, at the church, being the usual place of meeting for public worship by the members of the said religious society, assembled together for the purpose of electing trustees of the said corporation, due notice in writing of the time and place aforesaid of such meeting and assembling, and of the purpose aforesaid, having been given by an advertisement in writing, set up in open view at the door of the said church, *ten* days previous to the said *fourth* day of *December* aforesaid; and these defendants further say, that an election was held on the said *fourth* day of *December*, eighteen hundred and *twenty-three*, before the said church and adjacent thereto, the door thereof then being locked, and the members of the said religious society, attending for the purpose aforesaid, being prevented from entering said church; and that an election of trustees of the said corporation was then and there made, pursuant to the act of the legislature of *New Jersey* in such case made and provided, by a majority of such of the members of the said religious society as did then and there attend for that purpose; and that at the said election the said *John Wait* was then and there elected a trustee of the said corporation, in lieu of *Alexander Semple*, being before and at the time of the making of said election a trustee of the said corporation; that at the said election the said *Jacob Hadden* was then and there elected a trustee of the said corporation in lieu of *James Harriot*, being before and at the time of the making of said election a trustee of the said corporation; that at the said election the said *Abraham Ayres* was then and there elected a trustee of the said corporation in lieu of *Charles Ford*, being before and at the time of the making of said election a trustee of the said corporation; that at the said election *David Crowell* was then and there elected a trustee of the said corporation, he the said *David Crowell* having before and until that time used and exercised the office of trustee of said corporation as aforesaid; that at the said election *Thomas Griggs*, since deceased, was elected a trustee of the said corporation, he the said *Thomas Griggs* having before and until that time used and exercised the office of trustee of said corporation as aforesaid; that at the said election the said *John D. See* was then and there elected a trustee of the said corporation, in lieu of *Daniel Latourette*, being before and at the time of the making of said election

a trustee of the said corporation; the said *Alexander Semple*, *James Harriot*, *Charles Ford* and *Daniel Latourette* having used and exercised the office of trustee as aforesaid for more than *one* year next preceding the said election; and these defendants in fact further say, that thereupon the said *John Wait*, *Jacob Hadden*, *Abraham Ayres*, *David Crowell* and *John D. See*, being so elected trustees of said corporation as aforesaid, came before *James Skinner*, esq., then being one of the justices of the peace in and for the said county of *Middlesex*, and they the said *John Wait*, *Jacob Hadden*, *Abraham Ayres*, *David Crowell* and *John D. See*, and each of them respectively, as such trustees as aforesaid, before the said justice, took the oath to support the constitution of the United States, the oath of allegiance prescribed by law, and the oath for the faithful execution of the trust reposed in them and each of them respectively as such trustees as aforesaid, according to the best of his abilities and understanding; which said oaths were by the said justice administered to them respectively, and being reduced to writing were by them subscribed respectively; and the said defendants further say, that afterwards, to wit, on the day and year last aforesaid, they the said *John Wait*, *Jacob Hadden*, *Abraham Ayres*, *David Crowell* and *John D. See*, did take upon themselves respectively the office of trustee of the said corporation as aforesaid, and by virtue of the premises they then and there became and on the said *fourth* day of *December*, eighteen hundred and *twenty-three*, and from thence continually until the time of the exhibiting of the said information, were and have been and still are trustees of the said corporation, and by virtue thereof during all the time in the said information in that behalf specified, they have respectively used and exercised, and still do use and exercise, the office of trustees of the said corporation as aforesaid; without this,† that the said defendants the said office, privileges, duties and immunities in the said information above mentioned, or any of them, have usurped and did usurp upon the state of *New Jersey*, in manner and form as by the said information is above alleged against them; all and singular which matters and things these defendants are ready to verify and prove as the court shall award; wherefore they pray judgment, and that the said office, privileges and immunities by them claimed in manner aforesaid, may be allowed and adjudged to them, and they may be discharged by the court here of and from the premises above charged against them.

[*George Wood*, Attorney for Defendants.][1]

(2) That Defendants were Duly Elected Warden and Vestrymen of Religious Society.

Form No. 16923.[2]

(Precedent in St. Stephen Church Cases, (C. Pl. Tr. T.) 25 Abb. N. Cas. (N. Y.) 254.)[3]

1. The matter enclosed by [] will not be found in the reported case.

2. *New York.* — Code of Civ. Proc., § 1948. See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 2, p. 341.

3. The issues in this proceeding were

[(*Commencement as in Form No. 11431.*)][1]

First. They admit that the rector, church-wardens and vestrymen of the *Protestant Episcopal Church of St. Stephen* in the city of *New York* is a religious corporation created by and organized under the laws of the state of *New York*, but they have no knowledge of information sufficient to form a belief as to whether it is incorporated under chapter *60* of the Laws of 1*813*.

Second. They admit that said corporation has its church edifice in said city on the *Forty-sixth* street, between *Fifth* and *Sixth* avenues.

Third. Upon information and belief they admit paragraph III of the complaint.

Fourth. Except as hereinbefore admitted or denied, they deny each and every allegation in the complaint contained.

Fifth. They allege that on *April 7th*, 1*890*, the defendant *Weeks* and one *Charles E. Fleming* were duly elected wardens of said church and corporation, to serve as such until *Easter Monday*, 1*891*, and until their successors are elected, and at the same time the defendants *Cock*, *Linen*, *Edmund Luis Mooney*, *S. Montgomery Pike* and *William G. Smith*, together with one *Charles Schroeder* and one *William S. Watson*, were duly elected vestrymen of said church and corporation to serve as such during the term or time aforesaid, and thereupon at the time of said election the rector of said church duly entered the proceedings of such election in the book of the minutes of the vestry of said corporation and signed his name thereto and offered the same to as many of the electors present as he thought fit, who thereupon signed and certified the same and delivered said certificate to the persons aforesaid, including the defendants, pursuant to the statute in such case made and provided, which entry and certificate is in the words and figures following, to wit: On this *Monday* in *Easter* week, *April 7*, 1*890*, morning prayer was said by the rector and the following gentlemen were duly elected wardens and vestrymen for *St. Stephen's* church to serve until *Monday* in *Easter* Week, 1*890*, viz.: For wardens: *Stephen R. Weeks*, *Charles E. Fleming*. For vestrymen: *Thomas F. Cock*, *M. D.*, *Edwin K. Linen*, *Henry W. Mooney*, *Edmund Luis Mooney*, *S. Montgomery Pike*, *Charles Schroeder*, *William G. Smith*, *William E. Watson*, *M. D.* (Signed) *A. B. Hart*, rector; *Stephen R. Weeks*, *George Mooney*, *Thomas F. Cock*, *Charles Schroeder*.

Sixth. That since the said *April 7th*, 1*890*, these defendants have continuously occupied the offices to which they were respectively elected as aforesaid, and have performed the duties and functions of the same by virtue of the election aforesaid and no person has been elected to succeed them or either of them.

Seventh. For a further and separate defense these defendants allege that notice of said election was given on *April 6th*, 1*890*, pursuant to a peremptory writ of mandamus issued in a proceeding brought in the *supreme* court in the name of the people of the state

brought to trial at a trial term, and judgment of ouster was rendered against the defendants.

The information in this case is set out *supra*, Form No. 16868.

1. The matter to be supplied within [ ] will not be found in the reported case.

of *New York* on the relation of *James Maclaury*, one of the relators in this action, against *A. Bloomer Hart*, the rector of said church, and not otherwise.

Wherefore these defendants demand that the complaint be dismissed with costs.

[(*Signature and office address of attorney, and verification as in Form No. 11431.*)][1]

d. To Information for Usurping Public Office.[2]

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **Requisites of Answer or Plea, Generally.** — See *supra*, note 1, p. 334.

Facts Establishing Defendant's Right — *Generally.*—Where defendant is charged with intrusion into a public office, and is called upon to show by what right he assumes to hold it, a plea of justification must show all the facts necessary to establish defendant's lawful right and title to hold such office. State *v.* Chatfield, 71 Conn. 104; Buckman *v.* State, 34 Fla. 48; Enterprise *v.* State, 29 Fla. 128; State *v.* Anderson, 26 Fla. 240; State *v.* Saxon, 25 Fla. 792; State *v.* Jones, 16 Fla. 306; People *v.* Bruennemer, 168 Ill. 482; McPhail *v.* People, 160 Ill. 77; Distilling, etc., Co. *v.* People, 156 Ill. 448; Catlett *v.* People, 151 Ill. 16; Kamp *v.* People, 141 Ill. 9; Carrico *v.* People, 123 Ill. 198; Holden *v.* People, 90 Ill. 434; People *v.* Ridgely, 21 Ill. 65; Clark *v.* People, 15 Ill. 213; Place *v.* People, 83 Ill. App. 84; People *v.* Crawford, 28 Mich. 88; People *v.* Miles, 2 Mich. 348; State *v.* Powles, 136 Mo. 376; State *v.* McCann, 88 Mo. 386; State *v.* Davis, 57 N. J. L. 80; State *v.* Kearn, 17 R. I. 391; People *v.* Clayton, 4 Utah 421. And a general allegation of election or appointment to office is insufficient. State *v.* Saxon, 25 Fla. 792; Place *v.* People, 83 Ill. App. 84; People *v.* Clayton, 4 Utah 421. And if a complete title is not shown, judgment of ouster must be rendered. State *v.* Chatfield, 71 Conn. 104; State *v.* Kearn, 17 R. I. 391.

Proceedings by Claimant or Relator. — In *Michigan*, it is held that in a statutory action by a private claimant to office to recover possession claimant has no right to compel respondent to show his title to the office until the claimant has shown his own right, and that a plea showing that claimant had no right is as proper as one setting up title in respondent, and if established is a complete defense. Vrooman *v.* Michie, 69 Mich. 42. In *Florida*, it is held, however, that where the proceeding is brought upon the relation of a private individual the respondent must set up the facts showing his title to the office. Buckman *v.* State, 34 Fla. 48; State *v.* Anderson, 26 Fla. 240.

Colorable Title. — The defendant must show a legal title to the office in controversy. A colorable title is not sufficient. State *v.* Beardsley, 13 Utah 502.

Defendant's Qualifications to Hold Office. — In State *v.* Jones, 16 Fla. 306, it was held that where a statute prescribed that a person appointed pilot should have served a regular apprenticeship for two years on a pilot-boat, a defendant against whom an information was filed to show by what authority he exercised the office and franchise of pilot need not plead in the language of the statute that he had served a regular apprenticeship, but he should plead such facts as in his judgment constitute a regular apprenticeship.

Continued existence of every qualification necessary to the enjoyment of the office in question must be shown. It is not sufficient to state the qualifications necessary to the appointment to the office and rely upon the presumption of their continuance. People *v.* Mayworm, 5 Mich. 146; State *v.* Beecher, 15 Ohio 723.

That All Legal Requisites have been Complied With. — The defendant must show by his answer that all legal requisites necessary to entitle him to take possession of the office in question have been complied with. It is not sufficient to show a due election or appointment. State *v.* Philips, 30 Fla. 579; State *v.* Anderson, 26 Fla. 240; State *v.* Saxon, 25 Fla. 342; State *v.* McCann, 88 Mo. 386.

That relator is not entitled to the office is not sufficient. The defendant must show that he himself is rightfully in

the office. Clark *v.* People, 15 Ill. 213; People *v.* Robertson, 27 Mich. 116.

Denial that Relator has Qualified. — Where the petition alleged that the relator had qualified as required by law and the answer denied that he had qualified as alleged in the petition, it was held that an issue of fact was raised which must be determined before the relator could be adjudged entitled to the office. Dyer *v.* Bagwell, 54 Iowa 487.

Conclusion. — Since it is for defendant charged with intrusion into office to show all facts necessary to establish his lawful right to hold the office in question, the plea must conclude with a verification. People *v.* Crawford, 28 Mich. 88.

Precedents. — In State *v.* Carneall, 10 Ark. 156, the following response was filed to the writ:

"And the said *John Carneall* comes into the Honorable the *Supreme* Court here, in obedience to the command of the writ of Quo Warranto issued against him, and shows and pleads as a legal and sufficient warrant for holding the office, and exercising the powers, and using the franchises of Sheriff of *Crawford* county in the state of *Arkansas*:

That on the *first Monday* of *August*, 184*8*, at a general election held in *Crawford* county, agreeably to law, he received a majority of the qualified votes for the said office, and was found to be, and was declared duly elected Sheriff of *Crawford* county for the constitutional period, and which election was, in accordance with the statute in that behalf provided, certified and returned to the Secretary of State:

And that afterward, to wit, on the —— day of ——, A. D. 18*4*–, he was duly commissioned as such Sheriff of *Crawford* county, in manner and form as prescribed by the constitution and laws of said state, and that immediately after the accepting thereof he took the oath prescribed by the constitution and laws of the state, before a person competent to administer the same, and that such oath was then endorsed upon the said commission:

That, within *fifteen* days after the receipt of said commission, he entered into bond to the said state with good and sufficient security, and which bond was approved by the county court of *Crawford* county, and was recorded in the Recorder's Office of that county in conformity with law, such approval being endorsed upon the said bond:

That afterwards, to wit: on the *10th* day of *January*, 18*49*, he filed in the office of the clerk of the county court of said *Crawford* county the affidavit required by the *seventh* section of the law concerning the state revenue, as contained in the Digest at page *871*, and to which he craves leave to refer:

That he also, before he entered on the discharge of the duties of assessor and collector, gave bond and security to the state, to the satisfaction of the county court of *Crawford* county, in double the amount of taxes levied for the state and county purposes, conditioned according to the law in that behalf made and provided:

And the respondent thereupon entered upon the discharge of the duties of sheriff and ex officio assessor and collector of *Crawford* county, as he might well do, and he pleads that by the aforesaid premises he was and is fully warranted to act as, and to be the Sheriff of *Crawford* county, until the expiration of his constitutional term of office without hindrance or molestation, anything in said writ of Quo Warranto to the contrary notwithstanding:

And the said respondent pleads the said election, qualification, giving bonds, and the other foregoing acts and things as a sufficient warrant for exercising the franchise of Sheriff of *Crawford* county aforesaid, and continuing so to do. And he prays that the same may be so adjudged by this honorable court, and he discharged.

Carneall — By *S. H. Hempstead.*"

In People *v.* Van Slyck, 4 Cow. (N. Y.) 297, is set out the following sufficient plea, omitting formal parts:

"And the said *Harmanus A. Van Slyck*, by *Alonzo C. Paige*, his attorney, comes, and having heard information, complains that he is, by color thereof, grievously used and disquieted, and this unjustly; because, protesting that the said information, and the matters therein contained, are not sufficient in law; to which said information the said *Harmanus* is not bound by the law of the land to answer; yet for plea, in this behalf, the said *Harmanus* saith, that, true it is, that the office of sheriff of the county of *Schenectady* hath been, for the space of *ten* years last past, and upwards, and still is a public office, and an office of great trust and preeminence

within the state of *New York*, to wit, at the city and in the county of *Schenectady* aforesaid, as in the said information is suggested; but the said *Harmanus* further saith, that an election was held in the several towns and wards of the said county of *Schenectady*, for the election, among other officers of the state of *New York*, and of the said county of *Schenectady*, of sheriff of said county of *Schenectady*, on the *first Monday* of *November*, A. D. 1822, and continued from day to day, for *three* successive days, including said *first Monday* of *November*, pursuant to an act of the legislature of the People of the state of *New York*, entitled an act for regulating elections, passed April 17th, 1822. And the said *Harmanus* further saith, that after the said election, to wit, on the *Tuesday* next following the said election, such of the inspectors of elections as did attend, and had been appointed by a major part of the inspectors, who had presided at the said election in the several towns and wards in the said county, according to the directions of the said act, to attend at the clerk's office in said county, and in person to deliver to the clerk of said county, at the office, or to his deputy, or to the keeper of said office, a true copy of the statement of the votes given at said election, in the respective towns and wards of said county, in which they were respectively inspectors as aforesaid, for (among other officers) the officer of sheriff aforesaid, did attend at the office of the clerk of said county, and in person, did deliver to the clerk of said county, a true copy of the statement of votes or certificate of the inspectors of the respective towns and wards in said county, of the votes given as aforesaid, for the officers aforesaid; and they, the said inspectors, so attending as aforesaid, having been appointed as aforesaid, and having respectively attended in person as aforesaid, at the time and place aforesaid, and having delivered their respective statements or certificates of the votes given as aforesaid, to the clerk of said county as aforesaid, did then and there, to wit, on the said *Tuesday* next following said election, at the office of the said clerk, according to the directions of, and in the manner required by the aforesaid act of the said legislature, together with the clerk of said county, form themselves into a board of canvassers, and appoint one of their number, to wit, *Simon A. Groot*, chairman, and the clerk of said county, to wit, *Jelles A. Fonda*, was present at and acted as secretary of said board, and as one of the members thereof; and the said *Harmanus* further saith, that the said board of canvassers, being so formed, and organized as aforesaid, did then and there proceed in the manner, and at the time required by the aforesaid act, to calculate and ascertain the aggregate amount or whole number of votes given as aforesaid, and delivered to the said clerk as required by the said act, for the respective candidates voted for as members of assembly, sheriff, clerk and coroners of said county, respectively, at said election; and did thereupon determine, conformably to the aforesaid statements or certificates of votes given as aforesaid, and delivered as aforesaid, to the clerk aforesaid, by the inspectors of election of the several towns and wards in said county, as aforesaid, appointed as aforesaid, upon the persons respectively duly elected, by the greatest number of votes in said county, as member of assembly, sheriff, clerk and coroners, of said county; and the said board of canvassers did then and there further, in pursuance of the directions of said act, make and cause to be subscribed by their aforesaid chairman and secretary, with their proper names and handwriting, a certificate of such determination, and caused the same to be recorded in a book kept in the office of the clerk of said county for that purpose, and a true copy thereof, subscribed as aforesaid, to be delivered to each of the persons so elected to the respective offices of member of assembly, sheriff, clerk and coroner of said county; and the said *Harmanus* further saith, that the said board of canvassers of the said county of *Schenectady*, so formed and organized as aforesaid, for the purpose aforesaid, upon calculating and ascertaining the aggregate amount, or whole number of votes given and delivered as aforesaid, for the respective candidates for the offices of sheriff, clerk and coroner of said county, at said election as aforesaid, among other things required of them by law, did thereupon determine conformably to the statements or certificates delivered as aforesaid, to the clerk as aforesaid, that he, the said *Harmanus A. Van Slyck*, was duly elected by the greatest number of

votes in said county, as sheriff of said county; and that said board of canvassers, upon such determination as aforesaid, did then and there, among other things required of them by law, make, and cause to be subscribed by their chairman and secretary aforesaid, with their proper names and handwriting, and to be recorded in the clerk's office, of said county as aforesaid, a certificate of such determination, that the said *Harmanus* had been duly elected as aforesaid as sheriff of said county as aforesaid; and that a true copy of said certificate of said board of canvassers, so made and subscribed as aforesaid, was by the said board of canvassers, caused to be delivered to him, the said *Harmanus*, so elected as aforesaid, to the said office of sheriff, of said county aforesaid, to wit, at the city and in the county of *Schenectady* aforesaid; which said certificate, the said *Harmanus* brings here into court. And the said *Harmanus* further saith, that having been duly elected sheriff of said county as aforesaid, and having received a true copy of the certificate of the determination of the board of canvassers, in the premises as aforesaid; he, the said *Harmanus*, thereafter, to wit, on the *first* day of *January*, A. D. 1823, at the city of *Schenectady*, in said county, in due form of law, entered into a bond to the People of the state of *New York*, in the penal sum of *five thousand* dollars, with *two* sureties, to wit, *John Haverly* and *Christian Haverly*, of the town of *Glenville*, in the county aforesaid, being freeholders in said county, jointly and severally, in said sum of *five thousand* dollars, to answer to the People of said state, and the parties, if any should complain, according to the act in such case made and provided; which said bond was then and there duly filed in the office of the clerk of said county of *Schenectady*, he, the said clerk of the said county, then and there judging of, and determining the competency of said sureties. And the said *Harmanus* further saith, that, upon filing said bond in the office of the clerk as aforesaid, to wit, on the *first* day of *January*, A. D. 1823, at the city and in the county aforesaid, he, the said *Harmanus*, did, in due manner and form, take and subscribe the oath for the due execution and faithful discharge of the duties of the office of sheriff of said county, as by law in such case is required, before *Jelles A. Fonda*, Esquire, clerk of the said county of *Schenectady*, who then and there had a lawful and competent authority to administer the same in that behalf. And the said *Harmanus* further saith, that at the time of the said election, and on the said *first* day of *January*, A. D. 1823, he, the said *Harmanus*, then was, and still is a substantial freeholder, to wit, at the town of *Rotterdam*, in said county of *Schenectady*. And thereupon, he, the said *Harmanus*, to wit, on the said *first* day of *January*, A. D. 1823, was then and there duly elected, appointed, qualified and admitted, according to the several statutes in such cases made and provided, into the said office of sheriff of said county of *Schenectady*, by reason of which said premises, he, the said *Harmanus* then and there became and was and still is sheriff of said county, to wit, at the county of *Schenectady* aforesaid, by virtue whereof the said *Harmanus*, for all the time in said information, in that behalf mentioned, hath used and exercised, and still doth use and exercise, the said office of sheriff of the said county of *Schenectady*; and hath there claimed, and still doth claim, to be sheriff of said county of *Schenectady*, and to have, use and enjoy all the liberties, privileges and franchises, to the said office of sheriff of the county of *Schenectady* aforesaid, belonging and appertaining, as it was lawful for him to do. Without this, that the said *Harmanus* hath usurped the said office, liberties and franchises upon the said People of the state of *New York*, in manner and form, as, by the said information, is above supposed; all of which said several matters and things, he the said *Harmanus* is ready to verify, as the court shall consider; whereupon he prays judgment, and that the aforesaid office, liberties, privileges and franchises, in form aforesaid claimed, by him the said *Harmanus*, may, for the future, be allowed to him, and that he may be dismissed and discharged by the court hereof, and from the premises aforesaid."

In Seay *v.* Hunt, 55 Tex. 545, the defendant pleaded two special answers; the material allegations of the first were as follows:

"That this court ought not to have and exercise any further jurisdiction of this case for this reason: That the city of *Dallas*, whose office of mayor it is alleged this respondent has usurped,

was heretofore, to wit, on the *5th* day of *April*, A. D. 18*81*, and has been ever since, and is now, a municipal corporation, chartered and existing under and by virtue of an act of the legislature of Texas, entitled 'An act to incorporate the city of Dallas and to grant a new charter to said city,' approved August 9, A. D. 1876, and the acts amendatory thereof.

That on said *5th* day of *April*, A. D. 18*81*, one *John J. Good* was the duly elected and qualified and lawfully acting mayor of said city of *Dallas*, entitled by the terms of said charter to hold said office until said *5th* day of *April*, A. D. 18*81*, and until his successor, then to be elected, should be elected and qualified * * * That afterwards, to wit, on the *18th* day of *April*, A. D. 18*81*, the city council of the city of *Dallas*, having duly met in pursuance of the charter and ordinances of said city for the purpose of installing the officers elected at said election, the relator, *John Stone*, presented himself before the said city council for the purpose of taking the oath of office, and of having his official bond approved, and of being installed as mayor of said city. That at the time and place last aforesaid, an objection was raised to the installing of said *John Stone* as mayor, for the reason that said *John Stone* did not then, nor on the date of the election, possess the qualifications prescribed by said charter for eligibility to the said office of mayor of said city. That said city council did then and there refuse to administer the oath of office to said *John Stone* as mayor, and did then and there refuse to pass upon and approve the official bond of said *John Stone* as mayor, and did then and there refuse to install the said *John Stone* as mayor of the said city of *Dallas*, until an investigation could be had by said city council as to the eligibility or ineligibility of said *John Stone* for said office of mayor. That an investigation as to the eligibility of said *John Stone* for the said office of mayor was held by said city council, during which said investigation every facility and opportunity desired by the said *John Stone* for the production of testimony and for argument upon the law and the facts was accorded him, and the said city council, having concluded said investigation, did on, to wit, the —— day of ——, A. D. 18*81*, adjudge said *John Stone* to be, and to have been at the time of his said election, ineligible and disqualified to hold the office of mayor of said city of *Dallas*, by reason of not having been a resident of said city for the requisite length of time prescribed by said charter, as a necessary qualification for said office of mayor; and said city council did on, to wit, the *30th* day of *April*, A. D. 18*81*, adopt the following resolution, to wit:

'Whereas, *John Stone*, who received a majority of the votes cast for mayor of the city of *Dallas* at an election held on the *5th* day of *April*, 18*81*, had not been a resident of the city of *Dallas* for the length of time required by the charter thereof, therefore

Resolved, first. That the election of said *John Stone* to said office is null and void.

Resolved, second. That another election for mayor of the city of *Dallas* be and the same is hereby ordered to take place on *Tuesday*, the *17th* day of *May*, 18*81*.'

That by the terms of said charter, and especially of sections *28* and *29* of said charter, which said sections read as follows, to wit: —

'Section *28*. The mayor and aldermen shall constitute the council of the city. The city council shall meet at such times and places as they shall by resolution direct. The mayor, when present, shall preside at all meetings of the city council, and shall have in all cases a casting vote, except in elections. In his absence and the absence of the president *pro tem.*, any one of the aldermen may be appointed to preside.

Section *29*. The said city council shall hold stated meetings, and the mayor, of his own motion, or on the application of three aldermen, may call special meetings by notice to each of the members of said council, the secretary and the city attorney, served personally, or left at their usual place of residence. Petitions and remonstrances may be presented to the council in writing only, and the council shall determine the rules of its proceedings, and be the judge of the election and qualification of its own members, and have the power to compel the attendance of absent members and punish them for disorderly conduct.'

— the said city council has and had the exclusive jurisdiction and authority to judge of the qualification of the said *John Stone* for the said office of mayor.

(1) That Defendant was Duly Appointed.[1]

(a) *Clerk of Court to Fill Vacancy Caused by Election of Relator to United States Senate.*

Form No. 16924.[2]

(Precedent in State *v.* Parkhurst, 9 N. J. L. 427.)[3]

[(*Commencing as in Form No. 16922, and continuing down to* *.)][4]

That by an act of the legislature of the state of New Jersey, passed on the first day of December, 1801, entitled "An act to repeal an act entitled 'An act partially to repeal part of an act therein named,'" it was enacted, that an act entitled "An act partially to repeal part of an act therein named," passed the seventeenth day of November, in the year of our Lord eighteen hundred, be and the same was thereby

That the said city council has exercised, as aforesaid, the authority so granted therein, and, in pursuance and exercise of said authority and jurisdiction, declared said *John Stone* ineligible and disqualified for said office as aforesaid, and has adjudged his said election to be thereby void, and said judgment of said city council is conclusive.

Respondent further shows that heretofore, on, to wit, the *30th* day of *April*, A. D. 18*81*, the said *John J. Good* tendered his resignation of the said office of mayor held by him as aforesaid, and said resignation was accepted by said city council; that by reason of said *John J. Good's* resignation as aforesaid, and of said *John Stone* having been adjudged ineligible and disqualified, and his said election void as aforesaid, and of this respondent's being president *pro tem.* as aforesaid, it is the duty of this respondent to discharge the duties of mayor of said city of *Dallas* until some one is elected and qualified to fill said office of mayor under said charter. And it is in the discharge of this last duty as president *pro tem.* as aforesaid, and in this capacity, that respondent is now exercising the rights, discharging the duties and enjoying the emoluments of said office of mayor of the city of *Dallas*, until some one shall have been duly elected at said election ordered for *May 17*, A. D. 18*81*, as aforesaid, and qualified to fill said office of mayor, all of which this respondent is ready to verify; wherefore he prays judgment whether or not this honorable court ought longer to take, have and exercise jurisdiction herein, and for such other relief as may to the court seem proper."

It was held that the answer was, on general demurrer, sufficient.

1. **Requisites of Answer or Plea, Generally.** — See *supra*, note 2, p. 349.

Particulars of appointment must be set up in the answer. People *v.* Clayton, 4 Utah 421.

Particulars of dismissal of former incumbent must be set up in the answer, where defendant claims the office under an appointment to fill a vacancy caused by the removal of the former incumbent. People *v.* Clayton, 4 Utah 421.

Removal of Relator for Omission of Duty. — Where a plea set up that the relator, who claimed the office in controversy, had been intoxicated at different times when attending or at the time he should have been attending to the duties of his office, and that an order was entered by the county board removing him from the office for omission of duty and declaring the office vacant, and setting up the appointment of the respondent to fill the vacancy, it was held sufficient on demurrer. It was further held that it was not necessary that the respondent should allege what particular duty the relator had omitted. People *v.* Mays, 117 Ill. 257.

2. *New Jersey.* — Gen. Stat. (1895), p. 2632, § 1 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, this page.

3. In this case it was held that the offices of senator of the United States and clerk of the court of common pleas were incompatible and judgment was rendered for the defendant.

4. The matter to be supplied within [ ] will not be found in the reported case.

repealed. And it was further enacted, that in every case where any person or persons holding a commission or appointment to any civil office under the authority of the said state, and who had been elected a member to represent the said state either in the senate or house of representatives of the United States since the passing of the act entitled "An act to prevent the holding of appointments and commissions in certain cases under this state and the United States at the same time," passed the seventeenth day of March, in the year of our Lord seventeen hundred and ninety-five, and who had taken his seat or accepted of such appointment under the general government, the commission or appointment of such person or persons under the authority of the said state, should be considered as vacated, unless he or they should within *twenty* days after the passing of the said act, notify in writing the governor of the said state of the resignation of his or their seat or appointment as a member of the senate or house of representatives in the congress of the United States. And the said *Jabez* further saith, that since the passing of the said act of the legislature, entitled "An act to prevent the holding of appointments and commissions in certain cases under this state and the United States at the same time," passed the seventeenth day of March, in the year of our Lord seventeen hundred and ninety-five, and before the passing of the said act of the legislature entitled "An act to repeal an act entitled 'An act partially to repeal part of an act therein named,'" passed the first day of December, in the year of our Lord one thousand eight hundred and one, to wit, on the thirtieth day of November, in the year of our Lord one thousand eight hundred and one, at *Newark*, in the county of *Essex* aforesaid, one *Aaron Ogden*, esquire, claimed to have, use and enjoy, and did claim, have, use and enjoy, the office of clerk of the *Inferior* Court *of Common Pleas* for the county of *Essex*, and clerk of the *General Quarter Sessions of the Peace*, for the said county of *Essex*, which said offices the said *Jabez* doth aver to be civil offices, held by commission or appointment under the authority of the said state of *New Jersey*, according to the intent and meaning of the said act of the legislature before recited. And the said *Jabez* further saith, that at a joint meeting of the council and assembly of the said state of *New Jersey*, held at *Trenton* aforesaid, on the *twenty-sixth* day of *February*, in the year of our Lord one thousand eight hundred and *one*, the said *Aaron Ogden*, esquire, was duly elected a member of the senate of the United States, to represent the said state of *New Jersey* in the said senate, to which joint-meeting the right to appoint such senator did of right belong and appertain. And the said *Jabez* further saith, that the said *Aaron Ogden*, esquire, afterwards, to wit, on the *fourth* day of *March*, in the year last aforesaid, at the city of *Washington*, to wit, at *Newark* aforesaid, did accept of the commission or appointment of a senator to represent the state of *New Jersey* in the senate of the United States, and took his seat accordingly as a member thereof; and so the said *Jabez* says that afterwards, to wit, on the said *thirtieth* day of *November*, in the year aforesaid, at *Newark* aforesaid, the said *Aaron Ogden*, esquire, held the civil offices of clerk of the *Inferior* Court *of Common Pleas* for the county of *Essex*, and clerk *of the General*

Quarter Sessions of the Peace for the said county of *Essex*, under the authority of the said state of *New Jersey*, and had been elected a member to represent the said state in the senate of the United States, and had taken his seat and accepted of such appointment under the general government at the same time. And the said *Jabez* further saith, that the said *Aaron Ogden*, esquire, did not, within *twenty* days from the passing of the said act of the legislature before recited, to wit, from the said *first* day of *December*, in the year of our Lord one thousand eight hundred and *one*, notify in writing the governor of the said state of *New Jersey*, of the resignation of his seat or appointment as a member of the senate in the congress of the United States; by reason whereof, and by force of the statute aforesaid, the commission or appointment of the said *Aaron Ogden*, esquire, to the offices of clerk of the *Inferior* Court *of Common Pleas* for the county of *Essex*, and clerk *of the General Quarter Sessions of the Peace* for the said county of *Essex*, held under the authority of the said state of *New Jersey*, afterwards, to wit, on the *twenty-second* day of *December*, in the year of our Lord one thousand eight hundred and *one*, at *Newark* aforesaid, became vacated. And the said *Jabez* further saith, that the said *Aaron Ogden*, esquire, being duly removed from the said offices of clerk of the *Inferior* Court *of Common Pleas* for the county of *Essex*, and clerk of the Court *of the General Quarter Sessions of the Peace* for the said county of *Essex*, and the said offices being vacant as aforesaid, *Joseph Bloomfield*, esquire, governor, captain-general and commander in chief, in and over the state of *New Jersey* and territories thereunto belonging, chancellor and ordinary in the same, to whom of right did belong the filling of such vacancies and the appointment to such offices during the recess or adjournment of the legislature of the said state of *New Jersey*, by his appointment or commission, in writing, bearing date at *Trenton*, the *twenty-third* day of *December*, in the year of our Lord eighteen hundred and *one*, and of American independence the *twenty-sixth*, directed to him the said *Jabez Parkhurst*, reciting whereas in and by an act of the council and general assembly of *New Jersey*, entitled, "An act to repeal an act entitled 'An act partially to repeal part of an act therein named,'" passed the first day of December, in the year of our Lord eighteen hundred and one, among other things it was enacted, that in every case where any person or persons holding a commission or appointment to any civil office under the authority of the said state, and who had been elected a member to represent the said state either in the senate or house of representatives of the United States since the passing of the act entitled "An act to prevent the holding of appointments and commissions in certain cases under this state and the United States at the same time," passed the seventeenth day of March, in the year of our Lord seventeen hundred and ninety-five, and who had taken his seat or accepted of such appointment under the general government, the commission or appointment of such person or persons under the authority of the said state should be considered as vacated, unless he or they should within *twenty* days after the passing of that act notify, in writing, the governor of the said state of the resignation of his or their seat or appointment as a member of the

senate or house of representatives in the congress of the United States, as in and by the said recited act fully and at large would appear; and did further recite, that whereas *Aaron Ogden*, esquire, theretofore clerk of the Courts *of General Quarter Sessions of the Peace* and *Inferior* Court *of Common Pleas* for the county of *Essex* in the said state, had been elected a member to represent the said state in the senate of the United States, by which and the above recited law the commission or appointment of the said *Aaron Ogden*, under the authority of the said state, as clerk of the *Court of General Quarter Sessions of the Peace*, and *Inferior* Court *of Common Pleas* for the county of *Essex*, was declared to be vacated; and did further recite, that whereas the supreme executive power in the said state was vested by the constitution of the said state in the governor thereof, therefore the said *Joseph Bloomfield*, esquire, governor, etc., as aforesaid, reposing special trust and confidence in the integrity, prudence and ability of him, the said *Jabez Parkhurst*, thought fit to constitute and appoint, and did by the said commission or appointment constitute and appoint him, the said *Jabez Parkhurst*, clerk of the Court *of General Quarter Sessions of the Peace*, and *Inferior* Court *of Common Pleas* for the county of *Essex* in the said state, and him, the said *Jabez Parkhurst*, was by that commission or appointment commissioned to be clerk of the said Court *of General Quarter Sessions of the Peace* and *Inferior* Court *of Common Pleas* for the said county of *Essex*, to have, hold and enjoy the said office, with all powers, privileges, fees, perquisites, rights and advantages to the same belonging or appertaining, until the next meeting of the council and assembly of the said state in joint-meeting, or until the council and assembly of the said state in joint-meeting should think proper to make an appointment of clerk *of General Quarter Sessions of the Peace*, and *Inferior* Court *of Common Pleas*, for the said county of *Essex*, as by the said commission or appointment, duly issued under the hand of the said *Joseph Bloomfield*, esquire, governor, etc., as aforesaid, and the great seal of the said state of *New Jersey*, and countersigned by his excellency's command by *John Beatty*, secretary to the said state of *New Jersey*, and now in the custody and possession of the said *Jabez Parkhurst* and ready to be produced, reference thereunto being had will more fully and at large appear. And the said *Jabez* further saith, that afterwards, to wit, on the *thirtieth* day of *December*, in the year of our Lord one thousand eight hundred and *one*, at *Newark* aforesaid, in the county of *Essex* aforesaid, he, the said *Jabez*, assented to and accepted of the said commission or appointment of clerk of the Court *of General Quarter Sessions of the Peace* and *Inferior* Court *of Common Pleas* for the county of *Essex* aforesaid; and did afterwards, to wit, on the same day and year last aforesaid, at *Newark* aforesaid, take and subscribe the oath of office required of him by law, before *James Hedden*, esquire, one of the judges of the *Inferior* Court *of Common Pleas* in and for the said county of *Essex*, who then and there had lawful and competent authority to administer the same in that behalf; and did then and there before the said *James Hedden*, take all oaths usual and necessary to be taken upon being sworn into the said offices; and the said *Jabez* did then and

there also enter into bond unto the said state of *New Jersey*, with *Caleb Parkhurst* and *Uzal Pierson*, two good and sufficient freeholders, who were then and there approved by the said *James Hedden*, esquire, judge as aforesaid, who had lawful and competent authority to approve of the sufficiency of the said securities in that behalf, in the sum of *two thousand* dollars, with condition for the delivery of the records, books and other writings, entire and undefaced, to his successor in office, and for the faithful performance of those duties required by an act of the legislature of the said state of *New Jersey* entitled "An act respecting conveyances," and which said bond was duly executed, and contained a penalty and condition according to the act of the legislature in such case lately made and provided. And the said *Jabez* further saith, that he hath done all and every thing required by law of him to be done before executing the duties of the said offices. And the said *Jabez* further saith, that by virtue of the premises he, the said *Jabez*, on the same day and year last aforesaid, at *Newark*, in the county of *Essex* aforesaid, and from thence continually afterwards to the time of exhibiting the said information, and by virtue of the commission or appointment aforesaid, he, the said *Jabez Parkhurst*, during the time in the information in that behalf specified, at *Newark* aforesaid, in the county of *Essex* aforesaid, hath there used, exercised and claimed, and still there doth use, exercise and claim, the said offices of clerk of the Courts *of General Quarter Sessions of the Peace* and *Inferior* Court *of Common Pleas* in and for the county of *Essex*, and to have, use and enjoy, all the powers, privileges, fees, perquisites, rights and advantages to the same belonging or appertaining, until the council and assembly of the said state of *New Jersey* shall think proper at a joint-meeting to make an appointment of a clerk *of General Quarter Sessions of the Peace* and *Inferior* Court *of Common Pleas* for the said county of *Essex*, as it was and is lawful for him, the said *Jabez*, to do; [without this (*concluding from* † *as in Form No. 16922*).][1]

(*b*) *Judge.*

aa. Of Circuit Court, and that a Constitutional Amendment which Purported to Affect His Right to Hold the Office was Invalid Because Not Properly Submitted to the People.

Form No. 16925.[2]

(Precedent in State *v.* Powell, 77 Miss. 545.)[3]

[(*Venue and title of court and cause as in Form No. 15223.*)][4]

Now comes *Robert Powell*, defendant herein, and entering his appearance to this suit he waives all defenses that could or might be

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

2. *Mississippi.* — Anno. Code (1892), § 3520 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 354.

3. A demurrer to the above plea was overruled. The plea was held good and valid in law.

The information is set out *supra*, Form No. 16876.

4. The matter to be supplied within [ ] will not be found in the reported case.

made, if any, to the information filed against him because no claimant of the office is a relator therein; and this he does for the reason that he is himself desirous of having, and is interested to have, his own title to the office which he holds and claims the right to hold, adjudged and passed upon by the judicial department of the state government, and so desiring he pleads in bar to said information the following facts, viz.: Defendant was, on the *20th* day of *January*, 19*00*, duly appointed by the governor of the state, Hon. *A. H. Longino*, to the office of judge of the *circuit* court for the *seventh circuit* court district of said state, of which district and state this defendant was then and now is a resident citizen and qualified elector, and had been for more than *five* years next preceding a practicing lawyer of this state, and had then attained the age of *26* years, and possessed all the qualifications for appointment to, accepting and holding said office, and the said county of *Lincoln* is embraced in and forms a part of said district; and defendant was so appointed for the full and complete term of *four* years from said date; and the said appointment of this defendant to said office was at once, on said *20th* day of *January*, 19*00*, by the governor of the state submitted to the senate, of the legislature of this state, then in session, for confirmation or refusal to confirm, and the senate did on *January 20*, 19*00*, confirm and approve of defendant's said appointment to said office, and thereupon on the same day notified the governor of its confirmation and approval of said appointment; and the governor thereupon, on said *20th* day of *January*, 19*00*, issued and delivered to this defendant, and defendant accepted the same, a commission, under his, the governor's, hand and the great seal of the state, authorizing and empowering this defendant to exercise and perform all the duties and receive the emoluments of the said office for said term of *four* years from said date. And thereupon, in pursuance of said appointment, confirmation thereof and of said commission, this defendant did, at *Jackson*, *Hinds* county, *Mississippi*, on said day, *January 20*, 19*00*, before the clerk of the *circuit* court of *Hinds* county, *Mississippi*, said last named county being a part of and embraced in said *seventh circuit* court district, take and subscribe the oath of office prescribed by section *155* of the constitution of this state, adopted in 18*90*, which oath of office was in writing, and it was duly filed in the record of the *circuit* court of said *Hinds* county — first district thereof at *Jackson* — and recorded on the minutes of said last named court, then in session; and this defendant accepted said office of judge of said *circuit* court district, qualified as such, and then and there entered upon the discharge of the duties thereof, and has continuously since and is now performing the duties thereof, under and by virtue of said appointment, confirmation, commission and qualification aforesaid.

Defendant further shows that the pretended amendment or amendments of the state constitution, known as the "Noel" amendment or amendments, printed in the volume entitled "Laws of Mississippi, 1898," and therein denominated "sec. 145," did not and could not affect defendant's right to hold said office, because, he says, the concurrent resolution proposing said amendment or amendments

embraced more than one, several, proposed amendments to the constitution of the state, all of which were submitted to the qualified electors of the state at one and the same time and at one and the same election, and they were not submitted in such manner and form that the people might or could vote for each amendment separately, but they were submitted in such manner and form that the voters were compelled to vote for all of them or none, against all of them or none, or not vote at all directly either for or against any and all of them; and even when so submitted at the election held in *November*, 1899, they, or, if but one, it, did not receive a majority of the votes of the qualified electors voting at said election; they, or, if but one, it, received only *21,169* votes in the entire state, whilst there were cast for the office of governor, at said election, the full number of *48,370* votes, and there were cast against said amendment or amendments *8,643* votes. Large numbers of the qualified electors of the state who voted at said election for governor and other state, district, county, and county district officers did not vote directly, either for or against the said proposed amendment or amendments, but whose votes not being for it, or them, should be counted, and should have been counted, as if voted expressly against it or them; and a majority of the electors voting at said election did not vote for the proposed changes, alterations, amendment or amendments. And the legislature of the state did not take any action or pretend in any way to insert the said proposed amendment or amendments as a part or parts of the constitution of this state until the *26th* day of *January*, 1900, after the appointment, confirmation and commissioning of this defendant as aforesaid, and after this defendant had qualified and entered upon the discharge of the duties of the office now held by him. This the defendant is ready to verify.

McWillie & Thompson, Defendant's Attorneys.

bb. Of Court of Common Pleas, and that His Appointment was Constitutional.

Form No. 16926.[1]

(Precedent in Leib *v.* Com., 9 Watts (Pa.) 207.)[2]

[(*Title of court and cause as in Form No. 6430.*)][3]

And now, the *twenty-seventh* day of *May*, in the year of our Lord one thousand eight hundred and *forty*, comes the said *Samuel D. Leib*, by *Edward Owen Parry*, his attorney, and protesting that the suggestion filed in this case is altogether insufficient in law, and that he need not, according to the law of the land, to make answer thereunto; nevertheless, for a plea in this behalf, he saith that the said Commonwealth ought not to implead him by reason of the premises in the said suggestion set forth, because he saith, that at the time of the

1. *Pennsylvania.* — Bright. Pur. Dig. (1894), p. 1774, § 9.
See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 354.

2. On demurrer, the plea in this case was held sufficient.

3. The matter to be supplied within [ ] will not be found in the reported case.

adoption of the amendments to the constitution of the Commonwealth of *Pennsylvania*, his excellency *Joseph Ritner* was governor of the said Commonwealth; and by the *fifth* section of the schedule to the said amendments, it was provided that the governor who should be elected in *October*, eighteen hundred and *thirty-eight*, should be inaugurated on the *third Tuesday* in *January*, eighteen hundred and *thirty-nine*, to which time the then executive term was thereby extended. And the said *Joseph Ritner*, so being the governor of the said Commonwealth of *Pennsylvania*, did, by a commission in due form of law, bearing date the *twenty-ninth* day of *December*, in the year of our Lord eighteen hundred and *thirty-eight*, under the great seal of the Commonwealth, signed and issued by the said *Joseph Ritner*, then being governor of the said Commonwealth, according to the constitution of the said Commonwealth, did appoint and commission the said *Samuel D. Leib*, to fill the said office of associate judge of the county of *Schuylkill*, which was then vacant, which said commission, duly signed and sealed, bearing date as aforesaid, the said *Samuel D. Leib* brings here into court. And the said *Samuel D. Leib* further saith, that afterwards, to wit: on the *thirty-first* day of *December*, A. D. eighteen hundred and *thirty-eight*, he duly accepted the said commission, and on the same day last mentioned, duly and according to the constitution and laws of this Commonwealth, took and subscribed the affirmation required by the said constitution and laws, and entered upon the duties of the said office of associate judge of *Schuylkill* county aforesaid, and has continued from thence hitherto, continually to perform the same duties, and still doth perform the said duties according to the said constitution and laws, and under and by virtue of the said appointment and commission. And the said *Samuel D. Leib* further saith, that by the *ninth* section of the schedule of the said amendments of the said constitution it is provided that the legislature of this Commonwealth, at its *first* session under the amended constitution, should divide the associate judges of the state, other than the associate law judges, into *four* classes. That the commission of those of the *first* class should expire on the *twenty-seventh* day of *February*, eighteen hundred and *forty*; of those of the *second* class on the *twenty-seventh* day of *February*, eighteen hundred and *forty-one*; of those of the *third* class, on the *twenty-seventh* day of *February*, eighteen hundred and *forty-two*; and of those of the *fourth* class, on the *twenty-seventh* day of *February*, eighteen hundred and *forty-three*; that the said classes from the *first* to the *fourth*, should be arranged according to the seniority of the commissions of the several judges. And the said *Samuel D. Leib* further saith that the legislature of the said Commonwealth, at its *first* session under the amended constitution, to wit: on the *twentieth* day of *June*, in the year of our Lord one thousand eight hundred and *thirty-nine*, did, by an act entitled "An act to classify the associate judges of the state," divide the associate judges of the state into *four* classes, and arranged the same according to the seniority of their commissions; and by the *fourth* section of the said act, did provide that the said *Samuel D. Leib*, among others, should constitute the *fourth* class, whose commissions should expire on the *twenty-seventh* day of *February*, eighteen hundred and *forty-three*. And

the said *Samuel D. Leib* further saith, that the said Act of Assembly passed the seventh day of March, A. D. eighteen hundred and forty, entitled an act supplementary to and explanatory of an act entitled an act to classify the associate judges of the state, and set forth in the said suggestion, is unconstitutional, null and void, and inoperative.

And the said *Samuel D. Leib* further saith, that by the said schedule to the said constitution, it is not provided that the legislature shall divide the associate judges of the said state into *four* classes, to be arranged according to the seniority of their commissions, as in the said suggestion is set forth; but by the said schedule to the said constitution, and in the *ninth* section of the said schedule, it is provided, that the legislature of this Commonwealth, at its *first* session under the amended constitution, should divide the associate judges of the state, other than the associate law judges, into *four* classes as above set forth in this answer; and by the *fourth* section of the said schedule it is provided that the general assembly which should convene in *December*, eighteen hundred and *thirty-eight*, should continue its session, notwithstanding the provisions of the *eleventh* section of the *first* article, and shall at all times be regarded as the *first* general assembly under the amended constitution. And the said *Samuel D. Leib* further saith, that it does not appear from the said amended constitution and schedule, nor from the decision of the *Supreme* Court of the said Commonwealth, in the case of the said Commonwealth against *Oristus Collins*, that, from the said time of the adoption of the said amended constitution as aforesaid, until the *first* day of *January*, eighteen hundred and *thirty-nine*, the governor of the said Commonwealth had no authority to appoint and commission any judge of any Court *of Common Pleas* for said Commonwealth, for or longer than until the *first* day of *January*, eighteen hundred and *thirty-nine*, as in the said suggestion is set forth, but that by the said constitution and the amendments, and by the decision of the *Supreme* Court in the said case of the said Commonwealth against *Oristus Collins*, it does appear that the said governor of the said Commonwealth, between the time of the adoption of the said amended constitution, viz.: the *ninth* day of *October*, eighteen hundred and *thirty-eight*, and the *first* day of *January*, eighteen hundred and *thirty-nine*, had full power and authority to appoint and commission any judge of any Court *of Common Pleas* for the said Commonwealth, so long as he should behave himself well, subject only to the provisions of the said amended constitution and the said schedule. And the said *Samuel D. Leib* further saith, that he was not appointed and commissioned an associate judge for said county, in the room of *Daniel Yost*, as is set forth in the said information, but that he was appointed and commissioned an associate judge of the state for the county of *Schuylkill*, as is above set forth in this answer, and as manifestly appears by his said commission — without this the said *Samuel D. Leib* the office of associate judge of *Schuylkill* county, in the said suggestion mentioned, from and since the *first* day of *January*, A. D. eighteen hundred and *thirty-nine*, hath usurped, and still doth usurp upon the said commonwealth in the manner and form as by the said suggestion is supposed. All which the said *Samuel D. Leib* is ready to verify; as the court shall award,

wherefore he prays judgment, and that the said office of associate judge of *Schuylkill* county, by him above claimed, may be adjudged and allowed to him, and that he may be dismissed and discharged by the court hereof, and from the premises above charged on him.

[*Edward Owen Parry*, Attorney for defendant.][1]

cc. Of Police Court by Board of Police Commissioners Appointed by Executive Council on Petition of Householders of the City, Under a Statute Providing for Such Appointment.

Form No. 16927.[2]

(Precedent in State *v.* Hunter, 38 Kan. 578.)[3]

[(*Title of court and cause as in Form No. 6450.*)][4]

The defendant *J. H. Hunter*, for his answer to the petition herein, says that he admits that *J. H. Atwood* is the county attorney of said county of *Leavenworth*; that the city of *Leavenworth* is a city of the *first* class as alleged in said petition; and that the office of police judge of said city was an office existing by virtue of general laws of the state of *Kansas* applicable to cities of the first class.

Defendant further avers that, in pursuance of an act of the legislature of the state of Kansas, entitled "An act providing for the police government of cities of the first class through a board of police commissioners appointed by the executive council, also for a similar government for cities of the second class in certain contingencies," approved March 1, 1887, the executive council of this state duly appointed a board of police commissioners for the city of *Leavenworth*, consisting of *three* members, who thereupon qualified, and are still such commissioners; that said appointment was made in pursuance of a petition of *two hundred* bona fide householders of said city having the qualifications of electors, duly presented to said executive council, praying for the appointment of such police commissioners, which said petition duly represented to said executive council that the laws of the state of *Kansas* against the illegal sale of intoxicating liquors were not being enforced in said city of *Leavenworth*, and that the then police force of the said city of *Leavenworth* was making no effort to enforce said laws, which said representation was in fact true; that on the *11th* day of *March*, 1887, said board of police commissioners duly appointed the defendant police judge of said city, as will more fully appear by the commission issued to him, a copy of which is attached hereto as part hereof; that the defendant thereupon duly qualified as police judge under such appointment, and gave bond, which was approved by the mayor and council of said city; that the office and the records thereof were

1. The matter enclosed by [ ] will not be found in the reported case.

2. *Kansas.* — Gen. Stat. (1897), c. 96, § 97 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 354.

3. The answer in this case was held sufficient on demurrer. The court held that the obvious purpose of the action was to obtain a determination of the constitutionality of the statute under which defendant claimed to hold his office of police judge.

4. The matter to be supplied within [ ] will not be found in the reported case.

thereupon duly surrendered to defendant by *James P. Stinson*, who was at that time the police judge by virtue of an election in pursuance of the laws relating to cities of the *first* class, said laws being more commonly designated as the charter of such cities; that thereupon the defendant assumed the duties of his said office, and has ever since exercised the same; and that there is no other person who claims or assumes to be entitled to the powers of said office.

And said defendant further avers that he holds said office of police judge only as above stated, and avers that he is lawfully entitled thereto, and denies that he usurped or intruded into the same.

Wherefore, he prays judgment that he go hence without day, and have and recover his costs herein.

[(*Signature and verification as in Form No. 6450.*)][1]

(*c*) *Superintendent of Streets by New Board of Commissioners of Public Works in Place of Relator, Who Claims to Hold Over Under Appointment from Old Board.*

Form No. 16928.[2]

(Precedent in State *v.* Chatfield, 71 Conn. 106.)[3]

[(*Title of court and cause as in Form No. 16930.*)][1]

And now the said *Albert I. Chatfield* comes into court, by his attorneys, and protesting that said information is not sufficient in the law, so that he is not bound to answer thereunto, yet for plea and answer thereto saith that the state of *Connecticut* ought not to implead him by reason of the premises in said information contained, because he says that:

1. Though true it is that the said *Edward B. Reiley*, the relator therein, was, on the *16th* day of *December*, 1897, a freeman of the city of *Waterbury*, and an elector of the state of *Connecticut*, and a resident of said city, and has been such freeman and resident for more than *ten* years previous thereto; and that on said day his name was enrolled on the registry list of the *fifth* ward of said city as a voter thereof; and that he then had all the qualifications required by law to entitle him to vote in said ward at any city election in said city, or to be voted for for the office of superintendent of streets of said city; and that he did on the *17th* day of *December*, 1897, enter upon

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *Connecticut.* — Gen. Stat. (1888), § 1300 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 354.

3. This action was commenced by an information in the nature of quo warranto in the superior court and was reserved by that court upon an agreed statement of facts for the consideration and advice of the supreme court. The materal facts are that an old charter of the city of Waterbury, which provided, among other things, that the superintendent of streets should hold office for a term not exceeding three years, was superseded by a new charter. The point in issue was whether or not this provision was repealed by the new charter. If it was, the relator was a usurper; if it was not, the defendant was a usurper. The court decided that said provision was impliedly but not expressly repealed, and advised the superior court to dismiss the application.

the performance of the duties of such office. Yet it is not true, and the defendant hereby denies that any such ordinance concerning streets as is set out in paragraph *4 1-2* of the complaint was in force on the *16th* day of *December*, 1897; and denies that the vote passed by the board of commissioners of public works on that day was passed in pursuance to the provisions of the laws of the state of *Connecticut* and of the charter and ordinances of said city, and that said *Reiley* was appointed superintendent of streets for the term of *three* years by virtue either of said vote or of the declaration of the mayor of said city.

2. On the contrary, the said *Reiley* was appointed to hold said office of superintendent of streets only during the pleasure of the board of commissioners of public works, and not longer than the term of office of the board by which he was appointed, and until his successor should be chosen, and should have duly qualified.

3. Thereafter, and after a new board of commissioners of public works had been legally appointed, confirmed, and qualified, and had entered upon the discharge of its duties, to wit, on the *5th* day of *January*, 1898, at a regular meeting legally held, said board, under the provisions and by authority of the charter of said city, appointed the defendant to be superintendent of streets of said city, and the mayor of said city, as ex officio chairman of said board, declared the defendant so appointed.

4. On said day said defendant had all the qualifications required by law to entitle him to hold said office, and thereafter, to wit, on the *7th* day of *January*, 1898, the defendant accepted said office and took the oath required by the charter of said city, and has ever since acted as such superintendent of streets by virtue of said appointment.

5. On the *8th* day of *January*, 1898, the said *Edward B. Reiley* was duly notified of the appointment and qualification of the defendant to be superintendent of streets of said city, but the relator then and there and ever since has refused to recognize the defendant as such officer.

6. Thereafter, to wit, on the *10th* day of *January*, 1898, the said board of commissioners of public works filed in writing as a public record with the city clerk of said city a notice of the appointment of the defendant to be superintendent of streets, and that the relator, the said *Edward B. Reiley*, had been dismissed from said office because his successor had been duly chosen and qualified.

7. And this defendant denies that he has ever exercised, claimed, usurped, or now exercises, claims, or usurps any office of superintendent of streets of the city of *Waterbury* of or rightfully belonging to the said relator. All of which things the defendant is ready to verify as this court shall award, and thereupon he prays that said office, privileges and franchises may be adjudged to him, and that he may be dismissed by the court of and from the premises charged upon him as aforesaid.

[*Albert I. Chatfield*,
by *John Doe*, his Attorney.][1]

1. The matter enclosed by [ ] will not be found in the reported case.

(2) That Defendant was Duly Elected.[1]

(*a*) *City Recorder of a City, Complying with Legislative Act Authorizing Creation of Such Office.*

Form No. 16929.[2]

(Precedent in Com. *v.* Denworth, 145 Pa. St. 173.)[3]

[(*Title of court and cause as in Form No. 6430.*)

And the said *James B. Denworth*, by his attorney, *Jeremiah Mason*, comes and defends against the information and suggestion filed in this cause by the attorney general, and, excepting and reserving all manner of exception to the errors both in form and substance, makes answer to the said information:][4]

1. That the city of *Williamsport* was, at the time of the passage of an act entitled (*setting out title*), approved March 24, 1877, P. L. 47, and still is, a city whose population does not exceed *thirty thousand*, and is not less than *eight thousand five hundred*; and said city did, by an ordinance duly adopted by the councils thereof and approved by the mayor, accept the provisions of the said act, and cause to be filed in the Court *of Common Pleas* of the county of *Lycoming*, in which said city is situated, and also to be recorded by the recorder of deeds of said county, a duly certified copy of the said ordinance, the same being done prior to the passage of the supplement to the said act of 1877, approved May 1, 1879, P. L. 44, and the supplement approved February 14, 1881, P. L. 6; and the said city of *Williamsport*, upon the filing and recording of the said ordinance as aforesaid, became, and still is, by the terms of the said act of 1877, and the supplements thereto, entitled to have a recorder for the purposes and with the jurisdiction and powers by the said act and its supplements provided.

2. Defendant, who was and is a person duly qualified to hold the

1. Requisites of Answer or Plea, Generally. — See *supra*, note 2, p. 349.

Manner of election must be specifically set out. Com. *v.* Gill, 3 Whart. (Pa.) 228. And to allege generally that respondent was duly elected is not sufficient. Com. *v.* Gill, 3 Whart. (Pa.) 228. But where a plea, in addition to the allegation that defendant was duly elected, sets out the time and place of the election and avers that such election was held in pursuance of the authority granted by the charter and the provision of an act of assembly, annexing copies thereof, it is sufficient. Com. *v.* Gill, 3 Whart. (Pa.) 228.

Number of Votes Cast. — Where the plea states the number of votes cast at the election, it is sufficient, and need not negative the casting of a greater number of votes. Atty.-Gen. *v.* McIvor, 58 Mich. 516.

That respondent received a majority of votes cast at the election is sufficient as against the relator, and also as to the state in so far as its right to judgment depends upon the election of the relator. State *v.* Saxon, 25 Fla. 792.

Citizenship or other qualifications of respondent need not be stated. If the plea shows that respondent was elected, it is sufficient. Atty.-Gen. *v.* McIvor, 58 Mich. 516.

2. *Pennsylvania.* — Bright. Pur. Dig. (1894), p. 1774, § 9.

3. Issue was joined on the matters alleged in the answer in this case. No objection was made to the form of answer, but the statute creating the office was held unconstitutional.

The information in this case is set out *supra*, Form No. 16886.

4. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

office of city recorder, within the requirements of the aforesaid act of 1877, and its supplements, was, on the *fifteenth* day of *February*, 1887, by the duly qualified electors of the city of *Williamsport*, elected to fill the office of city recorder of said city, and was, upon the *fourteenth* day of *April*, 1887, commissioned by the governor of the commonwealth of *Pennsylvania*, to hold said office for a term of *five* years, which term has not yet expired; and did, also, before entering upon the discharge of the duties of said office, give the bond required by § *13* of the aforesaid act of 1877, which bond was approved by the Court *of Common Pleas* of the said county of *Lycoming*, and filed and recorded as by the said act required; whereupon, by the terms of the aforesaid act of 1877, and its supplements, defendant became, and still is, entitled to hold the office of city recorder of the city of *Williamsport*.

Wherefore, defendant prays the judgment of this honorable court whether he should be compelled to make any further answer to the said suggestion of the attorney general, and prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

[(*Signature as in Form No. 16926.*)][1]

(*b*) *Councilman Over Relator, Who Received a Smaller Number of Votes.*

Form No. 16930.[2]

(Conn. Prac. Act, p. 223, No. 422.)

State ex rel. Alvin L. Willoughby vs. *Benjamin W. Gates.* } *Superior* Court, *New Haven* County, *December* Term, 1875.

Plea.

And now the said *Benjamin W. Gates* comes into court, by his attorney, and protesting that said information is not sufficient in the law, so that he is not bound to answer thereunto, yet for plea and answer thereto saith that the state of *Connecticut* ought not to implead him by reason of the premises in said information contained, because he says that,

1. Though true it is that the said *Alvin L. Willoughby*, the relator therein, was, on the *first Monday* of *October*, 1875, a freeman of said city of *New Haven*, resident in the *Fourth* Ward of said city, and did at the annual meeting in said city, holden on said day, receive sundry votes in said ward, from qualified freemen thereof, for the office of councilman for the then next ensuing municipal year, yet it is not true, and the defendant hereby denies, that said relator received a sufficient number of such votes at said meeting to elect him one of such councilmen.

2. On the contrary, at said meeting, the freemen of said ward duly

1. The matter to be supplied within [] will not be found in the reported case.

2. *Connecticut.* — Gen. Stat. (1888), § 1300 *et seq.* See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 366.

elected the defendant, with *two* other freemen resident therein, other than said relator, to be the councilmen of said city from said ward for said then next ensuing municipal year, and at the time of said meeting, and for more than *five* years next prior thereto, the defendant was and ever had been a freeman of said city, resident in said ward; and for a more particular statement of the votes cast at said meeting in said ward for said officers, this defendant further says that the voting in said ward was duly held at the store of *S. V. Taft* therein, and that *Charles B. Foote* was duly appointed and acted as presiding officer at said ward meeting, and that the ballot boxes were duly kept open for the reception of votes in said ward, from the hour of *six* o'clock in the *fore*noon until the hour of *five* o'clock in the *after*noon of said day, when they were closed, and the ballots therein duly and publicly counted, and that of said ballots, by said official count, *Adam Miller* was duly found and declared to have received *four hundred and ten*, and *Edward Wines* was duly found to have received *three hundred and ninety-three*, and the defendant was duly found to have received *three hundred and eighty-five*, and sundry other persons duly found to have received a less number, to wit, the said relator *three hundred and eighty-three*, *Thomas Wallace, Junior*, *three hundred and seventy-four*, *Franklin S. Bradley*, *three hundred and seventy-two*, *Alvin J. Willoughby*, *thirty-five*, and *Thomas Wallace*, *eighteen*.

3. Thereupon the result of said election was duly declared and certified to the meeting of freemen of said city, held in the *First* Ward thereof, whereof, and of the said city meeting holden on said day, *John F. Comstock* was duly appointed and acted as moderator and presiding officer, and thereupon said *John F. Comstock*, being the moderator of said city meeting as aforesaid, before the adjournment thereof, in open meeting publicly declared that *Adam Miller*, *Benjamin W. Gates*, and *Edward Wines* had been on said day duly elected councilmen of said city from said ward for the said then next ensuing municipal year, after which said city meeting was duly adjourned without day, and due return of said election made by said presiding officer to the clerk of said city, under his hand, all of which is fully set forth in the records of the doings of said city meeting in the records of said city, duly attested by *John S. Fowler*, clerk of said city and of said meeting thereof.

4. This defendant was duly notified by the city sheriff to attend the first meeting of the council of said city, at the opening of said municipal year, and did attend the same, and was duly sworn and accepted said office of councilman, and hath ever since acted as such councilman, by virtue of said election.

5. And this defendant denies that he has ever exercised, claimed, usurped, or now exercises, claims, or usurps any office of councilman of or rightfully belonging to said relator.

All which things the defendant is ready to verify as this court shall award, and thereupon he prays that said office, privileges, and franchises may be adjudged to him, and that he may be dismissed by the court of and from the premises charged upon him as aforesaid.

Benjamin W. Gates,
by *John Doe*, his attorney.

(*c*) *County Treasurer, and that He Qualified as Such.*

Form No. 16931.[1]

(Precedent in Com. *v.* Read, 2 Ashm. (Pa.) 263.)[2]

[(*Title of court and cause as in Form No. 6430.*)][3]

And now, that is to say, on this *17th* day of *June*, in the year of our Lord one thousand eight hundred and *thirty-nine*, comes the said *George Read*, by *William B. Read*, *Frederick A. Raybold* and *James Goodman*, *Esqs.*, his attorneys; and having heard the suggestion filed in this case read, he complains, that under color of the premises, in the said suggestion contained, he is greatly vexed and troubled, and that by no means justly, because, protesting that the said suggestion and the matter contained therein are insufficient in law, and that he need not, nor is he bound by the law of the land to answer thereto; yet, for plea in this behalf, he saith, that the said commonwealth ought not to impeach or implead him, by reason of the premises, in the said suggestion above specified; because, he saith, that true it is, that by an act of the general assembly of this commonwealth, duly passed upon the 15th day of April, anno Domini one thousand eight hundred and thirty-four, entitled, "An act relating to counties and townships, and county and township officers," it is, among other things, provided, that the commissioners of each county shall annually, in the *first* week in the month of *January*, appoint a respectable citizen as county treasurer; and, in the event of the death, removal from the county, or misbehavior in office of such treasurer, it shall be the duty of the commissioners to appoint a fit person to fill the vacancy until the end of the year: and, it is further provided, that it shall be the duty of the commissioners of each county annually, within *ten* days after the appointment of county treasurer, to grant to such treasurer a certificate of his appointment, under the county seal, which shall be entered of record in the office of the recorder of deeds in the same county.

And, he further saith, that true it is, that by an act of assembly duly passed on the 16th day of June, in the year of our Lord one thousand eight hundred and thirty-six, entitled, "An act for regulating election districts, and for other purposes," it is, among other things, enacted, that the county board for the city and county of *Philadelphia*, for the time being, shall meet at the commissioners' office in the city of *Philadelphia*, on the *first Monday* of *June*, in the year one thousand eight hundred and *thirty-seven*, and on the *first Monday* in *June*, in every *second* year thereafter, between the hours of *two* and *six* in the *after*noon, and then and there elect, by ballot, a county treasurer, to serve for *two* years from said election, who shall perform the duties, and incur the liabilities, now prescribed by

1. *Pennsylvania.* — Bright. Pur. Dig. (1894), p. 1774, § 9.

2. No objection was made to the form of this plea. A verdict was returned in favor of defendant.

The suggestion in this case is set out *supra*, Form No. 16896.

The replication in this case is set out *infra*, Form No. 16939.

3. The matter to be supplied within [ ] will not be found in the reported case.

law for the said treasurer; no person being eligible as county treasurer, for *two* consecutive terms of *two* years each; and the present county treasurer shall continue in office till an election shall be held under the provisions of this act; and in case, at any time, there should be a vacancy by death, resignation, or otherwise, in the said office, it shall be the duty of the county board, for the time being, at a special meeting to be held for that purpose, on not less than *six* days' notice, to supply the same.

And, he further says, that by an act of the general assembly, duly passed in the form of a joint resolution, on the *twenty-seventh* day of *March*, in the year one thousand eight hundred and *thirty-nine*, it was provided, that so much of the *42d* section of an act, passed the 16th day of June, one thousand eight hundred and thirty-six, entitled, "An act regulating election districts, and for other purposes," as provides that the election of the county treasurer for the city and county of *Philadelphia*, shall take place on the *first Monday* of *June*, be, and the same is hereby repealed, so far as regards the election of the said treasurer in eighteen hundred and *thirty-nine*, and that the county board are hereby authorized to elect the said treasurer on the *second Wednesday* of *April next*: provided, that nothing herein contained shall be so construed as to abridge the time for which the present county treasurer was elected.

And he further saith, that the said county board for the city and county of *Philadelphia*, for the time being, did meet at the commissioners' office, in the city of *Philadelphia*, on the *second Wednesday* in *April*, in the year eighteen hundred and *thirty-nine*, between the hours of *two* and *six* in the afternoon, as required by law; and did, then and there, elect by ballot, him the said *George Read* to be county treasurer, to serve for *two* years from the *first Monday* of *June*, eighteen hundred and *thirty-nine*, in manner and form as required by the above recited acts of assembly, and that the said county board did then and there, to wit, on the said *second Wednesday* of *April*, give unto him the said *Read*, a certificate signed by a majority of said county board, that he was elected county treasurer, to serve as aforesaid: which said election he the said *George Read* avers to have been by ballot, according to the said act of assemby, and not by word of mouth, as stated in such suggestion.

And, he further saith, that on the *19th* day of *April*, eighteen hundred and *thirty-nine*, it being within *ten* days from the said appointment, the commissioners of the said county did grant to him the said defendant a certificate, under the county seal, that on the *tenth* day of *April*, anno Domini eighteen hundred and *thirty-nine*, it being the *second Wednesday* of *April*, between the hours of *two* and *six* in the *after*noon, he the said *George Read* was duly elected treasurer of said county, to serve for *two* years from the *first Monday* of *June*, eighteen hundred and *thirty-nine*; which said certificate has been duly entered in the office of the recorder of deeds for said county.

And, he further saith, that being so duly and legally elected, as aforesaid, he, the said *George Read*, having received the said certificate, did, before undertaking any of the duties of the said office of

county treasurer, give bond with sureties to the satisfaction of the said commissioners, conditioned for the faithful performance of the duties of his office, for a just account of all moneys that might come into his hands on behalf of the county, for the delivery to his successor in office, of all books, papers, documents, and other things held in right of his said office, and for the payment to him of any balance of money belonging to the county, remaining in his hands; and that he did also, before entering upon the duties of his said office, give a bond with sufficient security, approved by *two* of the judges of the Court *of Quarter Sessions* of the said county, and in such penalty as the said judges deemed sufficient, conditioned for the faithful discharge of all duties enjoined on him by law, in behalf of the commonwealth, and for the payment, according to law, of all moneys received by him for the use of the commonwealth; which said bond was duly taken by, and acknowledged before, the recorder of deeds of the said county, and recorded in his office, and that the original was forthwith forwarded to the Auditor General.

And, he further saith, that after giving the said bonds, and before entering on the duties of his said office, he the said *George Read* did take and subscribe an oath, in due form of law, to support the constitution of the United States and of the state of *Pennsylvania*, and to execute the duties of his said office of county treasurer with fidelity. And, thereupon, he the said *George Read*, to wit, on the said *first Monday* in *June*, eighteen hundred and *thirty-nine*, having been duly elected and appointed, was then and there duly qualified and admitted, according to the several acts of assembly in such case made and provided, into the said office of county treasurer of the county of *Philadelphia*, by reason of which said premises, he the said *George Read* then and there became, and was, and still is, treasurer of said county; by virtue whereof, he the said *George Read*, for all the term in the said information in that behalf mentioned, hath used and exercised, and still doth use and exercise, the said office of treasurer of said county; and hath thus claimed, and still doth claim, to be treasurer of the said county, and to have, use, and enjoy, all the liberties, privileges and franchises thereunto belonging and appertaining, as it was and is lawful for him to do. Without this, that the said *George Read* hath usurped the said office, liberties and franchises upon the said commonwealth of *Pennsylvania*, in manner and form as by the said information is supposed; all which said matters and things, he the said *George* is ready to verify as the court shall consider; whereupon, he prays judgment, that the aforesaid office, liberties, privileges and franchises, in form aforesaid, claimed by him the said *George* may for the future be allowed to him; and that he may be dismissed and discharged by the court hereof and from the premises aforesaid.

[*William B. Read*,
Frederick Raygold,
James Goodman,
Attorneys for the Defendant.][1]

1. The matter enclosed by [ ] will not be found in the reported case.

(*d*) *Judge.*

aa. Of District Court, there being a Vacancy in Said Office, and that Pretended Appointment of Plaintiff to Such Office was Without Authority of Law.

Form No. 16932.[1]

(Precedent in Bawden *v.* Stewart, 14 Kan. 356.)[2]

[(*Title of court and cause as in Form No. 1325.*)][3]

Now comes the defendant, and for answer to the petition of said plaintiff denies each and every allegation therein contained. (2) For further answer to the petition of said plaintiff said defendant alleges and avers that for more than *thirty* days[4] prior to the last general election, on *November 3*, 1874, there was a vacancy in the office of judge of said *Sixth* judicial district; that said defendant, at said election, by the electors of said district, was duly elected to fill said vacancy, and on the *twenty-eighth* day of *November*, 1874, received from the state board of canvassers of said state his certificate of election therefor, and on the *twelfth* day of *December*, 1874, and before the *fourteenth* day of said month, duly qualified for said office, and entered upon his duties as such judge, and has ever since said time held and discharged the duties of said office, and does now; and said defendant avers that any pretended appointment or commission which the plaintiff may have as judge of said district was and is without authority of law.

[(*Signature of attorney and verification as in Form No. 6450.*)][3]

bb. Of Probate Court, and that Relator Appointed to the Office to Fill a Vacancy was Holding Over After Vacancy had Terminated.

Form No. 16933.[5]

(Precedent in State *v.* Cogswell, 8 Ohio St. 622.)[6]

[(*Commencing as in Form No. 6449*)][3] that said office of *probate* judge of *Pickaway* county became vacant in the month of *March*, 1857, by the resignation of *W. W. Bierce*, the then incumbent of said office; and that *Seymour G. Renick* was, in said month of *March*, 1857, appointed by the governor to fill said vacancy, and that said

1. *Kansas.* — Gen. Stat. (1897), c 96, § 97 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 366.

2. There was a judgment for the defendant in this case, to the effect that he was rightfully elected to the office of district judge and entitled to hold it.

The petition is set out *supra*, Form No. 16877.

3. The matter to be supplied within [ ] will not be found in the reported case.

4. It is provided by the Kansas constitution that in case of a vacancy in any judicial office it shall be filled by appointment of the governor until the next regular election that shall occur more than thirty days after such vacancy shall have happened. Const., art. 3, § 11.

5. *Ohio.* — Bates' Anno. Stat. (1897), § 6772.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 366.

6. A demurrer to the answer in this case was overruled.

The information is set out *supra*, Form No. 16879.

Renick having qualified himself, according to law, entered into the exercise of said office immediately after his said appointment, and continued to hold and exercise said office until the expiration of said term of said office to which the said *Bierce* had been elected previous to his said resignation, to wit, on the *9th* day of *February*, 1858, on which day the said vacancy to fill which the said *Renick* had been appointed by the governor, as aforesaid, ended and was determined in due course of law. And this defendant further answering, says, that by virtue of the provisions of the constitution of *Ohio* (art. *4*, sec. *13*), there should have been an election in *October*, 1857, for a *probate* judge to fill the unexpired term of Judge *Bierce*; but he further says, that by the constitution and laws of said state, there should have been an election at the same election, in *October*, 1857, for a *probate* judge, to fill the next regular term of said office for said *Pickaway* county, commencing on the *10th* day of *February*, 1858; and that at said election, held on the *second Tuesday* of *October*, 1857, he, this defendant, was in due form of law, by the electors of said county, elected to the said office of *probate* judge for said county, and that no other person was elected at said election to said office for either the said regular term thereof, or for the unexpired term thereof, as successor to the said *Bierce*.

And this defendant is advised, and charges and insists, that by virtue of his said election, and because no other person was elected to said office, either for the regular term thereof, or for the said unexpired term thereof, he became and was duly and lawfully elected to fill said office, for both the said regular term thereof, commencing on the said *10th* day of *February*, 1858, and the said unexpired term thereof, as successor to the said *Bierce*. And he is further advised and charges, that it was legally competent, and did not involve any legal incompatibility, for the said electors, as they did, in manner aforesaid, to elect him, this defendant, to said office, generally, to the end that he should fill both the vacancy and the regular term thereof. And he further avers and charges, that it was equally lawful and competent for him, having been so elected, to decline to qualify himself to fill said office during the said unexpired term of said *Bierce*, leaving the said *Renick* in the exercise of said office, with the full right so to do, according to law, to the expiration of said term; and then to qualify himself and, being duly commissioned, as he avers he was and is, to fill said office for and during the regular term thereof, to enter into, and take possession of, said office, and to exercise the same for and during said term. He further avers, that being elected to said office, as aforesaid, and being duly commissioned to the same, he did, in due form of law, qualify himself to fill the same, for and during the said regular term thereof, by taking the oath of office, and giving bond, as required by law. And after having been unlawfully resisted, and hindered, and prevented from entering into and exercising said office, for a short period of time after the commencement of said regular term, by the said *Seymour G. Renick*, and the said *Walter Thrall*, in the information named, he, this defendant, did, afterward, on the *18th* day of *February*, 1858, without any unlawful force, enter into and take possession of said

office, and from thence hitherto, hath continued to exercise and discharge the duties thereof; and still doth exercise and discharge the duties of said office, as by right he lawfully may, for the causes aforesaid, the said term of said office to which he was so elected, and for which he qualified himself as aforesaid, being unexpired. All which this defendant is ready to verify, and he doth show all and singular the matters and things aforesaid, as his lawful warrant and authority for holding and exercising said office, and he doth deny that he in any manner unlawfully holds and exercises said office. And in like manner, he doth deny that the said *Walter Thrall*, at the general election, in *October*, 1858, was duly elected *probate* judge of said *Pickaway* county. On the contrary, this defendant avers, charges, and insists, that at the said election, there was not any vacancy in said office to be filled by the election of an incumbent thereto, and that there were more than *two* years of the said regular term of said office to which this defendant had been elected as aforesaid, and which he was then exercising, remaining unexpired at the time of the holding of said election, in *October*, 1858; and that if any votes were cast at said election for the said *Walter Thrall*, for *probate* judge of said county, the same were void and inoperative in law, as was also any return thereof, and any certificate of election, and any commission which may have issued to the said *Thrall*, founded upon any such votes. And this defendant now exhibits herewith a copy of the certificate of his said election to said office, issued to him pursuant to his said election, together with a copy of the official oath by him taken and subscribed, and of his official bond given by him in the premises; and he prays that the same be taken as a part of this, his answer, and he will exhibit and produce the original or office copies of said exhibits on hearing or otherwise as by the court here shall be ordered.

[(*Signature and verification as in Form No. 6949.*)][1]

(3) That Defendant was Ex-officio Clerk of District Court by Reason of His Election as County Clerk.

Form No. 16934.[2]

(Precedent in People *v.* McCallum, 1 Neb. 185.)[3]

[(*Title of court as in Form No. 1331.*)
State of Nebraska, at the relation of *Guy A. Brown*,
against
George R. McCallum.
} Answer.][4]

And now comes the said *George R. McCallum*, defendant as aforesaid, and denies that the said defendant usurps, invades or intrudes

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *Nebraska.* — Comp. Stat. (1899), § 6297.
See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 366.

3. A demurrer to the answer in this case was overruled.

4. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

into, or unlawfully holds or exercises the office of clerk of the *District* Court in and for the county of *Otoe* aforesaid. But, on the contrary thereof, this defendant alleges that by virtue of his office he, this defendant, has good right and lawful authority to have, hold and exercise the office of clerk of said *District* Court, and that no other person whatsoever has any right or title to said office. And said defendant further alleges and says, that on the *second Tuesday* in *October*, A. D. 1867, he, this defendant, was duly elected county clerk by the qualified voters of *Otoe* county aforesaid, and gave bond, and in all respects qualified himself for holding said office and for the discharge of the duties thereof. And being county clerk as aforesaid, this defendant on the *fourth* day of *July*, 1869, by the law of the land, became ex-officio clerk of the *District* Court in and for the county of *Otoe* aforesaid, and bound to perform all and singular the duties of the clerk of said *District* Court, and entitled to receive all and singular the emoluments of said office. And said defendant, *George R. McCallum*, being by operation of law, ex-officio clerk of said *District* Court, the said *Guy A. Brown* made application to this defendant to become, and did become, by appointment of this defendant, deputy clerk of said *District* Court under this defendant, and on the *24th* day of *July*, A. D. 1869, gave bond in the penal sum of *five thousand* dollars, with good and sufficient security, conditioned for the faithful performance of his duties as deputy of this defendant. And afterwards, to wit: On the *twenty-seventh* of *July*, 1869, the said *Guy A. Brown* made solemn oath that he would faithfully and impartially perform the duties of deputy district clerk in and for said county of *Otoe*, and had the same endorsed on said bond, as by reference thereto will more fully and at large appear. Wherefore, said *Guy A. Brown* ought not to be permitted or allowed in a court of law to dispute the title of this defendant to be clerk of said *District* Court, but ought to be estopped from so doing.

And this defendant, *George R. McCallum*, further alleges and says, that on the *second Tuesday* in *October*, 1869, the said *George R. McCallum*, by the qualified voters of said *Otoe* county, was duly elected county clerk of said county; and within the time prescribed by law, the said *George R. McCallum* took the oath prescribed by law, and gave bond in the penal sum of *six thousand* dollars, with *Jacob Blum*, *James Smith*, and *W. H. H. Waters*, as his sureties, the date of which is the *eighteenth* day of *October*, 1869; which said bond was conditioned for the faithful performance of all the duties required by law of said *George R. McCallum*, in consequence of his said election and the same, and the sureties therein were approved by the *Probate* Judge of said *Otoe* county, and lodged in his office, as by reference thereto will more fully and at large appear.

And by virtue of said election, the said *George R. McCallum* became, and was and is, ex officio clerk of the *District* Court, in and for said *Otoe* county, in said information mentioned, and is fully entitled to the care, custody and control of the books, papers, records and seal belonging and appertaining to said *District* Court, and to exercise all the functions, and to perform and execute all the duties devolving upon the clerk of said *District* Court, according to the

statute in such case made and provided, and the tenor and effect of said bond so executed, approved and filed as aforesaid, and this the said defendant is ready to verify.

Wherefore, he prays judgment that this information in the nature of quo warranto be dismissed, and that he, this defendant, recover of said *Guy A. Brown* his costs in this behalf expended, and go hence without day.

[*Jeremiah Mason*, Defendant's Attorney.][1]

(4) That Defendant was Ex-officio Member of School Committee of Town and School District by Reason of His Position as Secretary of State Board of Education.

Form No. 16935.[2]

(Precedent in State *v.* Hine, 59 Conn. 51.)[3]

[(*Commencing as in Form No. 16930.*)][4]

1. That he, on said *11th* day of *May*, 1*889*, was, ever since has been, and now is, secretary of the state board of education.

2. That on said *11th* day of *May*, 1*889*, and ever since that time, within the town and school district of *New Britain* has been situated a school whose teachers are appointed by the state board of education, to wit, the State Normal School.

3. That the defendant has since said time claimed and now does claim to be, and acts as, ex-officio a member of the school committee of said town and school district of *New Britain*, in pursuance of the provisions of chapter *125* of the public acts of 1*889*.

4. And this defendant denies that he has ever usurped or wrongfully used, exercised or enjoyed said office as charged in said information.

[All which things the defendant is ready to verify (*concluding as in Form No. 16930*).][5]

XIII. Replication or Reply.[6]

1. The matter enclosed by [ ] will not be found in the reported case.

2. *Connecticut.* — Gen. Stat. (1888), § 1300 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 334.

3. On demurrer, the answer in this case was held sufficient.

The information in this case is set out *supra*, Form No. 16884.

4. The matter to be supplied within [ ] will not be found in the reported case.

5. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

6. **Requisites of Replication or Reply, Generally.** — For the formal parts of a replication in a particular jurisdiction see the titles Replications; Replies.

Special matter relied upon to show usurpation of office or franchise must be set up in the replication. People *v.* River Raisin, etc., R. Co., 12 Mich. 389; People *v.* Niagara Bank, 6 Cow. (N. Y.) 196; People *v.* Hudson Bank, 6 Cow. (N. Y.) 217; People *v.* Manhattan Co., 9 Wend. (N. Y.) 351; State *v.* Pennsylvania, etc., Canal Co., 23 Ohio St. 121; State *v.* Walnut Hills, etc., Road Co., 7 Ohio Cir. Dec. 453. And material facts must be alleged. People *v.* Manhattan Co., 9 Wend. (N. Y.) 351. Where the replication apprises the respondent of the matters upon which the relator re-

1. That Corporation has Forfeited Its Franchises by Reason of Its Insolvency.[1]

lies and to which the evidence is to be directed, it is sufficient. Atty.-Gen. *v.* May, 97 Mich. 568.

Replication should be to special matter set up in plea, and should not take issue on the traverse of the plea. State *v.* Olcott, 6 N. H. 74.

Departure. — The replication must not be a departure from the information. North, etc., Rolling Stock Co. *v.* People, 147 Ill. 234; Noel *v.* Aron, (Miss. 1891) 8 So. Rep. 647. Where a petition is brought to oust certain persons from municipal offices and the allegations admit the incorporation of the municipality, a replication which seeks to put in issue the validity of the incorporation of such municipality, instead of the right of the defendants to the said offices, is bad as constituting a departure. Noel *v.* Aron, (Miss. 1891) 8 So. Rep. 647.

Duplicity. — The information at common law being in the nature of a criminal action, the attorney general has a right to set up several distinct causes of forfeiture in his replication, the statute as to replying double not being applicable to criminal cases. People *v.* Manhattan Co., 9 Wend. (N. Y.) 351. And in People *v.* Plymouth Plank Road Co., 31 Mich. 178, it was held that a replication is not bad for duplicity for stating several distinct facts relied upon as a ground of forfeiture which went to make out the one ultimate fact complained of.

Must Conclude with Verification. — Where the replication sets up new matter in answer to the plea, it should conclude with a verification and not to the country. People *v.* Kingston, etc., Turnpike Road Co., 23 Wend. (N. Y.) 193.

1. Requisites of Replication or Reply, Generally. — See *supra*, note 6, p. 376.

Cause of Forfeiture. — In a quo warwanto proceeding against a corporation for forfeiture of its franchise, the state calls upon such corporation to show by what warrant it claims to be a corporation and to exercise corporate powers, and thereupon the corporation sets forth the act of incorporation and justifies under it, and the state must reply by setting out the cause of forfeiture. People *v.* River Raisin, etc., R. Co., 12 Mich. 389; Commercial Bank *v.* State, 6 Smed. & M. (Miss.) 599; People *v.* Niagara Bank, 6 Cow. (N. Y.) 196; State *v.* Pennsylvania, etc., Canal Co., 23 Ohio St. 121; State *v.* Walnut Hills, etc., Road Co., 7 Ohio Cir. Dec. 453.

In *Montana*, it has been held that the defendant must show a perfect title, and that it has not been forfeited by any act of omission or commission. Territory *v.* Virginia Road Co., 2 Mont. 96 (*citing* Thompson *v.* People, 23 Wend. (N. Y.) 537).

Prayer. — The prayer should be for judgment of dissolution. State *v.* Walnut Hills, etc., Road Co., 7 Ohio Cir. Dec. 453; State *v.* Pennsylvania, etc., Canal Co., 23 Ohio St. 121.

Precedents. — In State *v.* Cincinnati Gas-Light, etc., Co., 18 Ohio St. 262, the third replication was as follows, to wit:

"And the said *William H. West*, attorney-general, for a further replication in this behalf, saith that true it is that the *Cincinnati Gas-Light and Coke Company* did charge as the price of gas supplied and furnished to the citizens of said city of *Cincinnati* at the rate of *two* dollars and *fifty* cents for every *thousand* cubic feet thereof, as alleged in said pleas; but the said attorney-general further saith that the said general assembly, by an act passed on the 5th day of April, 1854, provided, 'That after the passage of this act, it shall be lawful for the city council of any city in which a gas company has been or may be hereafter established, to fix, from time to time, by ordinance, the minimum price at which such council shall require such company to furnish gas to the citizens or public buildings of such city, or for the purpose of lighting the alleys and public grounds thereof, for any period not exceeding ten years; and from and after the assent of said company to such ordinance, by a written acceptance thereof, filed in the clerk's office of such city, it shall not be lawful for such city council to require the said company to furnish gas to the citizens, public buildings, public grounds, or public lamps of such city at a less price during the period agreed on, not exceeding ten years as aforesaid; provided that this act shall not operate to impair or affect any contract heretofore made between any city and gas-light, or gas-light and coke company.' And that the city

Form No. 16936.[1]

(*Title of court and cause.*)

And the said *Samuel A. Talcott*, attorney general, having heard the said plea of the said *President, Directors and Company of the Bank of Niagara*, for the said People of the state of *New York*, saith, that the said People ought not to be barred from having their aforesaid information against the said *President, Directors and Company of the Bank of Niagara*, because he says that the said *President, Directors and Company of the Bank of Niagara*, after their incorporation, did wilfully or negligently so transact and manage the affairs of the said corporation that afterwards, to wit, on the *first* day of *January*, 18*18*, the total amount of debts due by the said corporation over and above the specie then actually deposited in the bank did exceed *three* times the sum of the capital stock subscribed and actually paid in to said bank, and this said attorney general for the said People of the state of *New York* is ready to verify.

Wherefore he prays judgment that the aforesaid *President, Directors and Company of the Bank of Niagara* to the said information aforesaid do answer.

And the said attorney general further says that the said People ought not to be barred from having their aforesaid information against the said *President, Directors and Company of the Bank of Niagara*, because he says that after the passing of the act of incorporation in the said plea of the said *President, Directors and Company of the Bank of Niagara* mentioned, to wit, on the *first* day of *July*, 18*19*, they, the said *President, Directors and Company of the Bank of Niagara*, did refuse on demand being made at their banking house during the regular hours of doing business, to redeem in specie or other lawful money of the United States, the bills, notes and evidences of debt, issued by the said *President, Directors and Company of the Bank of Niagara*, and the said *President, Directors and Company of the Bank of Niagara* did not thereupon wholly discontinue and close their banking operations by way of discount and otherwise until such time as the said *President, Directors and Company of the Bank of Niagara* did resume the redemption of their bills, notes and other

council of the city of *Cincinnati*, on the *16th* day of *August*, 18*67*, by an ordinance, duly passed, provided, 'That for the period of one year from and after the first day of September, A. D. 1867, the Cincinnati Gas-Light and Coke Company shall furnish gas of the standard quality to the public buildings of the city of Cincinnati and to citizens or private consumers at the rate of two dollars for each one thousand feet so furnished, and shall not charge any greater sum than that herein specified; provided, however, nothing herein is to be so construed as a waiver by the city of her right to obtain possession of the works of said company, as provided by contract therewith.' And this he is ready to verify, and, therefore, prays judgment," etc.

This replication was held sufficient on demurrer.

For form of reply setting forth forfeiture of franchise, held sufficient, see State *v.* Walnut Hills, etc., Road Co., 7 Ohio Cir. Dec. 453.

1. This form is substantially the replication in People *v.* Niagara Bank, 6 Cow. (N. Y.) 196. In that case the court said that it was perfectly satisfied with the form of the pleading. Judgment, however, was rendered for defendant on the merits. The proceeding by information in the nature of quo warranto has been superseded in *New York* by a civil action upon

evidences of debt, but on the contrary thereof, after such refusal to redeem their said bills, notes and other evidences of debt, and before they resumed the redemption thereof, to wit, on the *second* day of *July* in the year aforesaid, and at divers other days and times, the said *President, Directors and Company of the Bank of Niagara* did receive deposits, discount notes and issue promissory notes of the said *President, Directors and Company of the Bank of Niagara*, and this the said attorney general for the said People of the state of *New York* is ready to verify.

Wherefore he prays judgment that the aforesaid *President, Directors and Company of the Bank of Niagara* to the said information aforesaid do answer.

And the said attorney general further says that the said People ought not to be barred from having their aforesaid information against the said *President, Directors and Company of the Bank of Niagara*, because he says that after the passing of the said act of incorporation in the said plea mentioned, and after the said *President, Directors and Company of the Bank of Niagara* had entered upon the business of banking, to wit, on the *second* day of *July*, 1819, large amounts of the bills, notes and evidences of debt of the said *President, Directors and Company of the Bank of Niagara* had been put in circulation by the said *President, Directors and Company of the Bank of Niagara* and then were in circulation, and that while the said bills, notes and evidences of debt were in circulation, to wit, on the day and year last aforesaid, the said *President, Directors and Company of the Bank of Niagara*, by the fraud, neglect or mismanagement of them or some or all of their officers, or agents, became wholly insolvent and unable to redeem the said bills, notes and evidences of debt so in circulation, in specie or other lawful money of the United States, whereupon the said *President, Directors and Company of the Bank of Niagara*, to wit, on the day last aforesaid, discontinued, ceased and closed their banking operations, and from that time afterwards, to wit, until the *first* day of *October*, 1824, neglected to resume their banking operations either by way of discount or otherwise, and this the said attorney general for the People of the state of *New York* is ready to verify.

Wherefore he prays judgment that the aforesaid *President, Directors and Company of the Bank of Niagara* to the said information aforesaid do answer.

2. That Defendants were Not Elected Trustees of Religious Society, but that Relators Were, at a Legal Election.

Form No. 16937.[1]

(Precedent in State *v.* Crowell, 9 N. J. L. 394.)[2]

complaint and answer. This form, however, may be found useful in drafting pleadings in those jurisdictions where the old form of proceeding remains.

1. *New Jersey.* — Gen. Stat. (1895), p. 2632, § 1 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 6, p. 376.

2. No objection was made to the form of the replication in this case.

The plea is set out *supra*, Form No. 16922.

The rejoinder in this case is set out *infra*, Form No. 16941.

[(*Title of court as in Form No. 15225.*)
The State of New Jersey, ex rel. John Patrick and *Benjamin Maurice*, against *William M. Crowell, David Crowell, John D. See, Jacob Hadden, Abraham Ayres, John Wait* and *Thomas Griggs.* } On information in nature of quo warranto. Replication.][1]

And the said attorney-general saith, that for anything alleged by the said *William M. Crowell, the state of New Jersey* ought not to be barred from having the information aforesaid against the said *William M. Crowell*, because he saith * that though true it is that at the time of the exhibiting of the said information and for *twelve* years last past, and for a long time before, there was and had been in the city of *Perth Amboy*, in the said county of *Middlesex*, a religious society or congregation of Christians, entitled to protection in the free exercise of their religion, by the constitution and laws of the state of *New Jersey*, and that during all the time last aforesaid, the trustees of the said religious society or congregation were and had been a corporation duly incorporated pursuant to the act of the legislature of *New Jersey* in such case made and provided by the name of *The Trustees of the Presbyterian Church* in the city of *Perth Amboy*, and though it may be true that the members of the said religious society heretofore, viz., on the *eleventh* day of *February*, 1823, at the church, being the usual place of meeting for public worship by the members of the said religious society, assembled together for the purpose of electing trustees of the said corporation, due notice in writing of the time and place aforesaid of such meeting and assembling, and of the purpose aforesaid, having been given; and though it may be true that an election was held on the said *eleventh* day of *February*, 1823, at the said church, and that at the said election the said *William M. Crowell* was by a majority of such of the said members of the said religious society as did then and there attend for that purpose, elected a trustee of said corporation and took the oaths required by law as such trustee, and afterwards, viz., on the day and year last aforesaid, took upon himself the office of trustee of said corporation, as the said *William* hath by his plea above alleged, yet the said attorney-general saith, that by the said act of the legislature of the state of New Jersey, entitled "An Act to incorporate trustees of religious societies," it is provided and enacted that it shall and may be lawful for the members of the said religious society or congregation to assemble at any time they may think proper, giving notice thereof as in said act is provided, for the election of the *first* trustees or for the election of any other trustee or trustees in the stead of those or any of those before elected, in case they see cause for the removal of any of the said trustees, provided such removal shall not be in less than *one* year after his or their election into office; and the said attorney-general further saith, that the said religious society or congregation, more than *one* year after the election of the said *William M. Crowell* as a trustee aforesaid, viz., on the *twenty-second* day of *March*, 1824,

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

at the church, being the usual place of meeting for public worship by the members of the said religious society, assembled together for the purpose of electing trustees of the said corporation, due notice in writing of the time and place aforesaid of such meeting having been given by an advertisement in writing, set up in open view at the door of the said church, *ten* days previous to the said *twenty-second* day of *March*, 1824, aforesaid; and the said attorney-general further saith that an election was held on the said *twenty-second* day of *March*, 1824, aforesaid, at the said church, and that at the said election *James Harriot*, *Daniel Latourette*, *John Patrick*, *Charles Ford*, *Oliver W. Ogden*, *Benjamin Maurice* and *Alexander Semple*, were by a majority of such of the said members of the said religious society as did then and there attend for that purpose, elected trustees of said corporation, the said *William M. Crowell* being before and at the time of said election a trustee of said corporation; and the said attorney-general in fact further saith, that thereupon the said *Alexander Semple*, *James Harriot*, *Benjamin Maurice* and *Daniel Latourette*, being so elected trustees as aforesaid, afterwards, viz., on the *twenty-second* day of *March*, 1824, and the said *John Patrick*, and *Oliver W. Ogden*, being elected such trustees as aforesaid, afterwards, viz., on the *twenty-second* day of *April*, 1824, came severally before *James Skinner*, esq., a justice of the peace in and for the county of *Middlesex*, and before the said justice took the oath to support the constitution of the United States, the oath of allegiance prescribed by law, and the oath for the faithful execution of the trust reposed in them as such trustees as aforesaid, according to the best of their abilities and understandings, which said oaths were then administered by the said justice to them and each of them, and being reduced to writing were by them subscribed; and the said attorney-general further saith, that afterwards, to wit, on the day and year last aforesaid, the said *Alexander Semple*, *James Harriot*, *Benjamin Maurice*, *Daniel Latourette*, *Charles Ford*, *John Patrick* and *Oliver W. Odgen*, did severally take upon themselves the office of trustees of said corporation, and that from thenceforth the said *William M. Crowell* became and was no longer a trustee of said corporation; and this the said attorney-general is ready to verify: Wherefore he prays judgment for the state, and that he the said *William M. Crowell*, of the premises above charged upon him by said information may be convicted. And for further replication to the plea, so as aforesaid pleaded by the said defendants, the said attorney-general further saith, he expressly denies that the members of the said religious society heretofore, viz., on the *fourth* day of *December*, 1823, at the church, being the place of meeting for public worship by the members of the said religious society, did assemble together for the purpose of electing trustees of said corporation, due notice in writing of the time and place aforesaid of such meeting and assembling, and of the purpose aforesaid having been given by an advertisement in writing set up in open view at the door of said church *ten* days previous to the said *fourth* day of *December* aforesaid; and the said attorney-general further saith, that though it may be true that an election was held on the said *fourth* day of

December, 1823, before the said church and adjacent thereto, the door thereof then being locked, and persons calling themselves members of said religious society attending for the purpose aforesaid, being prevented from entering the said church, yet he expressly denies that an election of trustees of the said corporation was then and there made pursuant to the act of the legislature of *New Jersey* in such case made and provided, by such of the members of the said religious society as did then and there attend for that purpose, but that the persons who did then and there attend for that purpose were not members of the said religious society or congregation; so that the said *John Wait* was not then and there duly and legally elected a trustee of said corporation, in lieu of *Alexander Semple*, the said *Alexander Semple* being before and at the time of making the said election a trustee of said corporation; and therefore that at the said election the said *Jacob Hadden* was not then and there duly and legally elected a trustee of said corporation in lieu of *James Harriot*, the said *James* being before and at the time of making said election a trustee of said corporation; that therefore at the said election the said *Abraham Ayres* was not then and there duly elected a trustee of said corporation in lieu of *Charles Ford*, the said *Charles* being before and at the time of said election a trustee of said corporation; that therefore at the said election the said *David Crowell* was not then and there duly and legally elected a trustee of said corporation, the said *David* moreover before and until that time not having used and exercised the office of trustee of said corporation; and therefore that at the said election the said *John D. See* was not legally elected a trustee of said corporation in lieu of *Daniel Latourette*, the said *Daniel* being before and at the time of making such election a trustee of said corporation; and therefore that the said defendants on the day and year aforesaid had no right or authority to take upon themselves respectively the office of trustees of said corporation; and that by virtue of the premises they were not and are not now trustees of said corporation, and by virtue thereof have no authority to use and exercise the office of trustees of said corporation as aforesaid, and that they the said *William M. Crowell*, *John Wait*, *Jacob Hadden*, *Abraham Ayres*, *David Crowell* and *John D. See*, have for the whole time in the said information above mentioned, upon the said state usurped, intruded into, and unlawfully held the said offices; and this the said attorney-general is ready to verify; whereupon he prays judgment for the state, and that the said *William M. Crowell*, *John Wait*, *Jacob Hadden*, *Abraham Ayres*, *David Crowell* and *John D. See*, of the premises above charged upon them by said information may be convicted.

[*Arthur Frelinghausen*, Attorney General.
Jeremiah Mason, Attorney for Relators.][1]

3. Usurpation of Public Office.[2]

1. The matter enclosed by [ ] will not be found in the reported case.

2. **Requisites of Replication or Reply, Generally.** — See *supra*, note 6, p. 376.

Specific Acts of Misconduct and Neglect. — Where an information against a person, for usurping an office from which he had been removed, charged official

a. That Defendant was Not Elected Councilman, but that Relator Was, by Reason of Certain Votes which Ought to have been Counted for Him.

misconduct and neglect of duty, and this was denied by the plea, it was held that a replication which failed to state the specific acts of misconduct and neglect of duty with which the respondent was charged, was insufficient. Dullam *v.* Willson, 53 Mich. 392.

Precinct in Which Illegal Votes were Cast. — Where, to an information to test the title to office, the plea alleged that at an election held on a certain day the respondent received the greatest number of votes and was duly elected, it was held that a replication which alleged that a certain number of votes in said election were void and illegal, for certain reasons, was held demurrable for failure to set forth the precincts in which such votes were cast. Atty.-Gen. *v.* May, 97 Mich. 568.

Verification. — In Atty.-Gen. *v.* May, 97 Mich. 568, the plea to an information to test the title to office of county clerk alleged that an election was held on a certain day and that respondent received the greatest number of votes and was duly elected to the office, and the issue of facts presented by the replication was whether certain illegal ballots were cast because the voters were unregistered. It was held that a verification to the replication in the following language was sufficient, to wit: "And this the said attorney general is ready to verify, in and by the last said election returns and in and by the registry of the qualified voters of the last said precinct and the poll-list of the persons who voted in the last said precinct, kept by the poll-clerks of the last said precinct at said election, when, where and in such manner as this court may direct; wherefore he prays judgment," etc. The objection was that the replication should have concluded with a general verification.

The court held that the law required the registration and poll-lists to be preserved and filed in certain public offices, and that if respondent desired to dispute said public records or to avoid their *prima facie* effect, he should in his rejoinder give the relator notice of his defense thereto.

Precedents. — In State *v.* Gates, 43 Conn. 533, the state in its replication alleged:

"That for anything above alleged by the defendant the state ought not to be barred from having said information against the defendant, because said Attorney saith that true it is that at the time of the annual meeting of said city, holden on said *first Monday* of *October*, 1875, the defendant was, and for more than *five* years next prior thereto had been, a freeman of said city, resident in said ward; that the voting in said ward was duly held at the store of *S. V. Taft* in said ward; that *Charles B. Foote* was duly appointed and acted as presiding officer at said ward meeting; that the ballot boxes were duly kept open for the reception of votes in said ward from the hour of *six* o'clock in the *fore*noon until the hour of *five* in the *after*noon of said day, when they were closed; that the ballots therein were duly and publicly counted, and that of said ballots, by said official count, *Adam Miller* was duly found and declared to have received *four hundred and ten*, and *Edward Wines* was duly found to have received *three hundred and ninety-three*, that said *Benjamin W. Gates* was duly found to have received *three hundred and eighty-five*, that said relator was found to have received *three hundred and eighty-three*, that *Thomas Wallace, Jr.*, was found to have received *three hundred and seventy-four*, that *Franklin S. Bradley* was found to have received *three hundred and seventy-two*, that *Alvin J. Willoughby* was found to have received *thirty-five*, and that *Thomas Wallace* was found to have received *eighteen*; that thereupon the said result of said election was duly declared and certified to the meeting of freemen of said city held in the *first* ward thereof, whereof, and of the said city meeting holden on said day, *John F. Comstock* was duly appointed and acted as moderator and presiding officer; that thereupon said *Comstock*, as said moderator and before the adjournment thereof, in open meeting publicly declared that *Adam Miller*, *Benjamin W. Gates*, and *Edward Wines* had been on that day duly elected councilmen of said city from said ward for the said next ensuing municipal year; and that thereupon said city meeting was duly adjourned without day and due return of said election made by said presiding

officer to the clerk of said city under his hand. Also that true it is that the defendant was duly notified by the city sheriff to attend the *first* meeting of the council of said city at the opening of said municipal year, and did attend the same and was duly sworn, and accepted said office of councilman, and hath ever since acted as such councilman by virtue of said election. But said Attorney further saith that the said *thirty-five* ballots cast as aforesaid at said meeting for *Alvin J. Willoughby* were intended by the freemen who cast said ballots to be cast for said relator, and said ballots so cast were cast for said relator *Alvin L. Willoughby* by the name of *Alvin J. Willoughby*, and ought in truth and right to have been counted for said relator; and so said Attorney says that the said *Benjamin W. Gates* was not elected to the office of councilman of said city of *New Haven* from the aforesaid ward for the term aforesaid as in the said plea is supposed; and this said Attorney is ready to verify; wherefore," etc.

On a demurrer to the replication, it was held sufficient.

In People *v.* Van Slyck, 4 Cow. (N. Y.) 297, is set out the following sufficient replication:

"And the said *Samuel A. Talcott*, Esquire, Attorney-General of the people of the state of *New York*, who for the said people, at the relation of the said *Garshom Van Voast*, prosecuted in this behalf, being present here in court, and having heard the said plea of the said *Harmanus A. Van Slyck*, by him above pleaded in bar read, for the said people, saith, that, for anything by him, the said *Harmanus A. Van Slyck*, therein alleged, the said people ought not to be barred from having and maintaining their aforesaid information against him; because, protesting, that the said plea of the said *Harmanus A. Van Slyck*, and the matters therein contained, are insufficient in law to bar the said people from having and maintaining their aforesaid information against the said *Harmanus A. Van Slyck*, for replication nevertheless, in this behalf, the said Attorney-General saith, that, true it is, that an election was held in the several towns and wards of the said county of *Schenectady*, for the election (among other officers of the state of *New York*, and of the said county of *Schenectady*), of sheriff of said county of *Schenectady*, on the *first Monday* of *November*, A. D. 1822, and continued from day to day, for *three* successive days, including said *first Monday* of *November*, pursuant to an act of the legislature of the people of the state of New York, entitled 'an act for regulating elections,' passed April 17th, 1822; and that after the said election, to wit, on the *Tuesday* next following the said election, such of the inspectors of election as did attend, and had been appointed by a major part of the inspectors, who had presided at the said election, in the several towns and wards in the said county, according to the directions of the said act, to attend at the clerk's office in said county, and in person to deliver to the clerk of said county, at the office, or to his deputy, or to the keeper of said office, a true copy of the statement of the votes given at said election, in the respective towns and wards in said county, in which they were respectively inspectors as aforesaid, for (among other officers) the office of sheriff aforesaid, did attend at the office of the clerk of said county, and in person did deliver to the clerk of said county a true copy of the statement of votes, or certificate of the inspectors of the respective towns and wards in said county, of the votes given as aforesaid for the officers aforesaid. But the said Attorney-General for the said people further saith, that the said inspectors attending as aforesaid, having been appointed as aforesaid, and having respectively attended in person as aforesaid, at the time and place aforesaid, and having delivered their respective statements or certificates of the votes given as aforesaid, to the clerk of said county as aforesaid, did not then and there, to wit, on the said *Tuesday next* following said election, at the office of the said clerk, according to the directions of, and in the manner required by, the aforesaid act of the said legislature, together with the clerk of said county, form themselves into a board of canvassers, and appoint such chairman, and have such secretary, as in the said plea of the said *Harmanus* is mentioned; and this the said Attorney-General prays may be inquired of by the country, and the said *Harmanus* doth the like, etc. And the said Attorney-General further saith, that the said supposed board of canvassers did not, at the time, place and in the manner in the said plea alleged, proceed to calculate and ascertain the aggregate amount or whole number of

Form No. 16938.[1]

(Conn. Prac. Act, p. 237, No. 454.)

State ex rel. Alvin L. Willoughby vs. *Benjamin W. Gates.* } *Superior* Court, *New Haven* County, *December* Term, 1875.

votes given as aforesaid, and delivered to the said clerk as required by the said act, for the respective candidates voted for as members of assembly, sheriff, clerk and coroners of said county respectively, at said election; and this, etc. And the said Attorney-General further saith, that the said supposed board of canvassers did not determine, conformably to the aforesaid statements or certificates of votes given as aforesaid, and delivered as aforesaid, to the clerk aforesaid, by the inspectors of election of the several towns and wards in said county appointed as aforesaid, upon the persons respectively duly elected by the greatest number of votes in said county, as member of assembly, sheriff, clerk and coroners of said county; and this, etc. And the said Attorney-General further saith, that the said supposed board of canvassers did not, at the time and place, and in the manner in the said plea, for that purpose mentioned, cause to be subscribed, by the supposed chairman and secretary, such certificate of such determination, as in the said plea is alleged; and this, etc. And the said Attorney-General further saith, that the said supposed board of canvassers did not cause such supposed certificate of such supposed determination, as in the said plea is alleged, to be recorded in a book kept in the office of the clerk of said county for that purpose; and this, etc. And the said Attorney-General further saith, that the said supposed board of canvassers did not cause a true copy of such supposed certificate, subscribed as in the said plea is alleged, to be delivered to each of the persons so elected, to the respective offices of member of assembly, sheriff, clerk and coroner of said county; and this, etc. And the said Attorney-General further saith that the said supposed board of canvassers of the said county of *Schenectady* did not determine, conformably to the statements or certificates delivered as aforesaid to the clerk aforesaid, that he, the said *Harmanus*, was duly elected by the greatest number of votes in said county, as sheriff of said county, as in the said plea is alleged; and this, etc. And the said Attorney-General further saith, that the said supposed board of canvassers did not make and cause to be subscribed by their supposed chairman and secretary, and to be recorded in the clerk's office of said county, a certificate of a determination that the said *Harmanus* had been duly elected sheriff of said county, as in the said plea is alleged; and this, etc. And the said Attorney-General further saith, that a true copy of said last mentioned supposed certificate of said supposed board of canvassers, made and subscribed as in the said plea is alleged, was not, by the said supposed board of canvassers, caused to be delivered to the said *Harmanus* as in the said plea is supposed; and this, etc. And the said Attorney-General further saith, that the said *Harmanns* was not elected sheriff of the said county of *Schenectady*, as in the said plea is supposed; and this, etc. And the said Attorney-General further saith, that true it is that the said *Harmanus*, at the time and place for that purpose in the said plea mentioned, did enter into such bond in such penal sum, with such sureties and condition, and that such bond was filed in such office as in the said plea alleged, and also that the said *Harmanus* did, on the day and year, and at the place in the said plea alleged, take and subscribe such oath before the said *Jelles A. Fonda*, as is also in the said plea alleged; and further, that the said *Harmanus*, on the said *first* day of *January*, A. D. 1823, was, and still is a substantial freeholder, to wit, at the place in the said plea for that purpose mentioned; but the said Attorney-General further saith, that the said *Harmanus* was not, on the said *first* day of *January*, or at any time since, nor is he now, sheriff of the said county of *Schenectady*, as in the said plea is alleged; and this, etc.

1. *Connecticut.* — Gen. Stat. (1888), § 1300.

Replication.

And now the said *Eleazer K. Foster*, Esquire, State's Attorney, and who prosecutes in this behalf at the relation of *Alvin L. Willoughby*, saith that, for anything above alleged by the said *Benjamin W. Gates*, the state of *Connecticut* ought not to be barred from having said information against the said *Benjamin W. Gates*, because he saith, that,

1. So much of paragraph *second* of said plea, as follows the words therein contained, "and for a more particular statement of the votes cast at said meeting in said ward for said officers, this defendant further says," and also all the matter pleaded in the *third* and *fourth* paragraphs of said plea are true.

2. Yet the said Attorney further saith that the said *thirty-five* ballots, cast as aforesaid at said meeting for said *Alvin J. Willoughby*, were intended, by the freemen who cast said ballots, to be cast for said relator, and said ballots so cast were cast for said relator *Alvin L. Willoughby* by the name of "*Alvin J. Willoughby*," and ought in truth and right to have been counted for said relator.

And so the said Attorney says that said *Benjamin W. Gates* was not elected to the office of councilman of said city of *New Haven* for said ward for the term aforesaid, as in said plea is supposed; and this the said Attorney is ready to verify; wherefore he, for the state of *Connecticut*, at the relation of *Alvin L. Willoughby* aforesaid, prays judgment, and that the said *Benjamin W. Gates* of the premises above charged upon him by the said information may be convicted.

Eleazer K. Foster, State's Attorney.

b. Traversing Allegations of Plea that Defendant was Entitled to Office of County Treasurer.[1]

Form No. 16939.[2]

(Precedent in Com. *v.* Read, 2 Ashm. (Pa.) 266.)[3]

[*The Commonwealth of Pennsylvania*, at the relation of *Hugh Clark*, against *George Read.*] In the Court *of Common Pleas* of *Cumberland* County, *June* Term, 1*839*, No. *102*.][4]

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 2, p. 382.

1. **Requisites of Replication or Reply, Generally.** — See *supra*, note 2, p. 382.

Must Traverse All Allegations of Plea. — The replication must traverse all the allegations of the plea; and where defendant justified by pleading his appointment, that his oath of office was filed, and that his official bond was accepted and approved, a replication denying, first, that the defendant had been so appointed, and, second, that his bond had been accepted and approved, failed to traverse that part of the plea averring that defendant's oath of office had been filed, and that averment stood confessed. Launtz *v.* People, 113 Ill. 137.

2. *Pennsylvania.* — Bright. Pur. Dig. (1894), p. 1774, § 9.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, this page.

3. Issue was joined on this replication, and the jury, on trial, returned a verdict in favor of the defendant.

The plea in this case is set out *supra*, Form No. 16931.

The suggestion in this case is set out *supra*, Form No. 16896.

4. The matter supplied within [ ] will not be found in the reported case.

And the said relator, who prosecutes for the commonwealth in this behalf, having heard the plea of the said *George Read*, in manner and form aforesaid, above pleaded, in bar to the said suggestion for the said commonwealth, saith, that by anything in that plea alleged, the said commonwealth ought not to be barred from having the said suggestion against him the said *George Read*, because, protesting that the said plea and the matters therein contained, are not sufficient in law to bar the said commonwealth from having the aforesaid suggestion against the said *George Read*; to which said plea, in manner and form above pleaded, the said relator is under no necessity nor any ways obliged by the law of the land to answer; for replication, nevertheless, saith, That the said county board, in the said plea mentioned, at the time and place as the same is therein averred, did not elect by ballot, him the said defendant to be county treasurer; to serve for *two* years from the *first Monday* of *June*, in the year eighteen hundred and *thirty-nine*, as the said defendant, in his said plea hath alleged; and this the said commonwealth, as aforesaid, prays may be inquired of by the county; and the said relator for the said commonwealth further saith, that the said county board, in the said plea mentioned, did not, upon the day and year in the said plea specified, give unto him the said *George Read*, a certificate signed by a majority of the members of the said county board, that he was elected county treasurer to serve as aforesaid, as the said defendant in his plea hath alleged; and this the said commonwealth as aforesaid prays may be inquired of by the country. And the said relator, for the said commonwealth further saith, that the county commissioners, in the said plea mentioned, did not, upon the day and year in the said plea specified, grant unto him the said *George Read*, a certificate under the county seal, that he the said *George Read* had been duly elected treasurer of said county, to serve for *two* years from the *first Monday* of *June*, in the year eighteen hundred and *thirty-nine*, as the said defendant in his said plea hath alleged; and this the said commonwealth prays may be inquired of by the country. And the said relator for the said commonwealth further saith, that he the said defendant did not, before undertaking the duties of said office of county treasurer, give bond with sureties to the satisfaction of the said county commissioners, conditioned as in said plea is set forth, as the said defendant in his plea hath alleged; and this the said commonwealth as aforesaid prays may be inquired of by the country.

And, the said relator for the said commonwealth further saith, that the said defendant did not, before entering upon the duties of the said office of county treasurer, give bond with sufficient security, approved by *two* of the judges of the Court *of Quarter Sessions* of said county, and in such penalty as the said judges deemed sufficient, conditioned as in said plea is set forth, as the said defendant in his plea hath alleged; and this the said commonwealth as aforesaid prays may be inquired of by the country.

And the said relator for the said commonwealth further saith, no bond with sufficient surety, approved by *two* of the judges of the Court *of Quarter Sessions*, conditioned as in said plea is alleged, was acknowledged before and duly taken by the recorder of deeds for

said county, and recorded in his office, as the said defendant in his plea hath alleged; and this the said commonwealth as aforesaid prays may be inquired of by the country.

And the said relator for the said commonwealth further saith that no bond with sufficient security, approved by *two* of the judges of the Court *of Quarter Sessions*, conditioned as in said plea is averred, and duly acknowledged before, and taken by, the recorder of deeds of said county, and recorded in his office, was forwarded to the Auditor General, as the said defendant in his said plea hath averred; and this the said commonwealth as aforesaid prays may be inquired of by the country.

And the said relator for the said commonwealth further saith, that the said defendant did not, before entering on the duties of the said office of county treasurer, take and subscribe an oath, in due form of law, to support the constitution of the United States and of the state of *Pennsylvania*, and to execute the duties of the office of county treasurer with fidelity, as the said defendant, in his plea, hath alleged; and this the said commonwealth as aforesaid prays may be inquired of by the country.

And the said relator for the said commonwealth further saith, that no certificate of the commissioners of the said county, under the county seal, was granted unto him the said *George Read*, upon the day and year in the said plea averred, that he was duly elected treasurer of said county, as in said plea is averred, was duly entered of record in the office of recorder of deeds for the said county, as the said defendant in his said plea hath alleged; and this by the said commonwealth as aforesaid prays may be inquired of by the country.

[*Carroll Brewster*, Attorney General.][1]

XIV. REJOINDER.[2]

1. That Defendant was Duly Elected and Commissioned Clerk of Court.

Form No. 16940.[3]

(Precedent in State *v.* Foster, 7 N. J. L. 103.)[4]

[(*Title of court and cause as in Form No. 16941.*)

And the said *Jeremiah J. Foster* as to the said plea of the said

1. The matter supplied within [ ] will not be found in the reported case.

2. **Requisites of Rejoinder, Generally.** — For the formal parts of a rejoinder in a particular jurisdiction consult the title REJOINDERS.

May Traverse or Admit Allegations of Replication. — Respondent may, in his rejoinder to the replication, either traverse or admit any of the allegations therein set forth. Atty.-Gen. *v.* May, 97 Mich. 568. Or he may traverse or confess and avoid the allegations in the replication. Atty.-Gen. *v.* McQuade, 94 Mich. 439; State *v.* Taylor, 25 Ohio St. 279. But where the defendant, in a rejoinder, neither traverses nor confesses and avoids the allegations of the replication they will be taken as confessed and true. Atty.-Gen. *v.* McQuade, 94 Mich. 439; State *v.* Taylor, 25 Ohio St. 279.

3. *New Jersey.* — Gen. Stat. (1895), p. 2632, § 1 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 2, this page.

4. It was held in this case that the

attorney general of the state of *New Jersey*, in reply pleaded, protesting that the said plea and the matters therein contained are not sufficient in law to convict him of the premises above charged upon him, yet, for plea thereto by the said *Jeremiah J. Foster*, he saith that][1] true it is, that the said joint-meeting, so constituted as aforesaid, did proceed to vote for, and elect, a clerk of the said court, in and for the county of *Gloucester*, yet, for rejoinder in this behalf, he says, that at the first vote had and taken for clerk, as aforesaid, *ten* of the said members did vote for one *Thomas Hendry*, to be such clerk as aforesaid; *thirteen* others of said members did vote for one *Samuel Kille*, to be such clerk as aforesaid; *sixteen* others of said members did vote for the said *Ephraim Miller*, to be such clerk as aforesaid; and *fourteen* others of said members did vote for the said *Jeremiah J. Foster* to be such clerk as aforesaid; whereupon, and before any person whatever was duly appointed as such clerk as aforesaid, and while the election for the said clerk was incomplete and undetermined, and yet under the control of the said joint-meeting, it was resolved by the said joint-meeting, that neither of the candidates so voted for was elected to be such clerk as aforesaid, and that the said joint-meeting would proceed to vote a *second* time for said clerk; and the secretary of said joint-meeting was directed to call again the names of the said members; and the same being called, upon the said *second* vote, *twenty-eight* of said members did vote for the said *Ephraim Miller* to be such clerk as aforesaid, and *twenty-seven* of said members did vote for the said *Jeremiah J. Foster* to be such clerk as aforesaid; whereupon the said clerk having read over the names of the members so voting as aforesaid, and announced the number voting for each of said persons, the chairman of said joint-meeting did, as such chairman and presiding officer of said joint-meeting, declare that there was no election and appointment of any person to be such clerk as aforesaid, and did thereupon propose to the said joint-meeting the following question, viz: "Will the joint-meeting proceed to another vote for clerk of the county of *Gloucester*?" which said question was then and there decided, by the said joint-meeting, in the affirmative, no member voting in the negative; whereupon, and before any person whatever was duly appointed as such clerk as aforesaid, and while the election for the said clerk was incomplete and undetermined, and yet under the control of the said joint-meeting, the secretary of the said joint-meeting was then and there directed again to call the names of the said members for a *third* vote for such clerk as aforesaid, and the same being legally called, *twenty-eight* of said members, upon the said *third* vote, did vote for the said *Ephraim Miller* to be such clerk as aforesaid, and *twenty-seven* of said members did vote for the said *Jeremiah J. Foster* to be such clerk as aforesaid; whereupon the said secretary having read over the names of the members, so voting as aforesaid, and announced the number

meeting had a right to reconsider the vote first taken, that there was nothing illegal or unconstitutional in the proceedings of the joint meeting, and that the information could not be sustained.

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

voting for each of said persons, the said chairman, as such chairman and presiding officer of said joint-meeting, again did declare that there had been no election or appointment as such clerk as aforesaid, and did thereupon again propose to the said joint-meeting the said question, viz: "Will the joint-meeting proceed to another vote for clerk of the county of *Gloucester*?" which said question was then and there decided, by the said joint-meeting, in the affirmative, no member voting in the negative; whereupon, and before any person whatever was duly appointed as such clerk as aforesaid, and while the election for the said clerk was incomplete and undetermined, and yet under the control of the said joint-meeting, the said secretary was then and there directed to call the names of said members for a *fourth* vote for such clerk as aforesaid. [That thereupon the said secretary, pursuant to such direction, began to call the names of said members of said joint-meeting for a *fourth* vote for such clerk as aforesaid;] that after the said secretary had called a part of the names of the said members of said joint-meeting, for a *fourth* vote for such clerk as aforesaid, and the said members, so called, had voted, *one* of the members of said joint-meeting objected to the said secretary's proceeding to call the said names of the said members, and insisted that the decision of the said meeting upon said election had been incorrect, and that the said *Ephraim Miller* was duly elected clerk as aforesaid, and proposed to said meeting, that the names of the said members be no further called, which being agreed to by said meeting, the said member did then move the following question, viz: "Is the said decision, so as aforesaid made, correct?" and the same, being by the said joint-meeting discussed and considered, was thereupon duly proposed by the said chairman, and determined, by the said meeting, in the affirmative, a large majority of said meeting then and there voting in the affirmative of said question, so as aforesaid put and proposed by the said chairman; whereupon *one* of the members of said joint-meeting did thereupon propose and move, that the election of said clerk be indefinitely postponed, which said motion, being in due form proposed to said meeting, was, by a large majority of the votes of said members, decided in the negative; whereupon the following question, being put, viz: "Will the joint-meeting now proceed to another vote for clerk of the said county of *Gloucester*?" it was then and there decided in the affirmative, a large majority of said joint-meeting voting therefor; and thereupon, and before any person whatever was duly appointed as such clerk as aforesaid, and while the election for the said clerk was incomplete and undetermined, and yet under the control of the said joint-meeting, the secretary of said joint-meeting was directed again to call the names of said members for a *fourth* vote for such clerk as aforesaid, and the same being called, *thirty-one* of the members did then and there vote for and elect the said *Jeremiah J. Foster* to be such clerk as aforesaid, and *twenty-four* of said members did then and there vote for the said *Ephraim Miller* to be such clerk as aforesaid, and it was then and there announced and declared, by the said joint-meeting, that the said *Jeremiah J. Foster* was duly elected and appointed to be such clerk as aforesaid, and the said joint-meeting having so

announced and declared, did thereupon adjourn *sine die*, and the said *Jeremiah J. Foster* was duly commissioned by his excellency the governor of this state, as in the plea of this defendant alleged and stated, which are the same election and appointment mentioned in the plea and replication aforesaid; wherefore the said *Jeremiah J. Foster* saith, that the said *Ephraim Miller* was not then and there appointed to be clerk as aforesaid, and entitled to be commissioned as such clerk, and to claim, use, and enjoy the said offices of clerk of the *Inferior Court of Common Pleas of Gloucester*, and to have and enjoy all the powers, privileges, and emoluments thereto of right appertaining, for the time limited in the constitution of said state, as he hath done, and as it was and is lawful for him, the said *Jeremiah J. Foster*, [to do, and this he, the said *Jeremiah J. Foster*,] is ready to verify.

[Wherefore the said *Jeremiah J. Foster*, for want of a sufficient replication in this behalf, prayeth judgment, and that the said office of clerk of the *Inferior Court of Common Pleas of Gloucester* may be adjudged and allowed to him as in and by the said plea he hath above already prayed, and that he may be dismissed and discharged by the court hereof and from the premises above charged upon him.

(*Signature as in Form No. 16941.*)][1]

2. That Defendants were Duly Elected Trustees of Religious Society by a Majority of the Members of the Society.

Form No. 16941.[2]

(Precedent in State *v.* Crowell, 9 N. J. L. 398.)[3]

[(*Title of court as in Form No. 15225.*)

The State of *New Jersey*, *ex rel. John Patrick* and *Benjamin Maurice*, against *William M. Crowell*, *David Crowell*, *John D. See*, *Jacob Hadden*, *Abraham Ayres*, *John Wait* and *Thomas Griggs*. } On information in nature of quo warranto. Rejoinder.][1]

And the said *William M. Crowell*, *David Crowell*, *John D. See*, *Jacob Hadden*, *Abraham Ayres* and *John Wait*, as to the said plea of the said attorney-general, for the state of *New Jersey*, in reply pleaded, protesting that the said plea and the matters therein contained are not sufficient in law to convict them of the premises above charged upon them respectively, yet for plea thereto by the said *William M. Crowell*, for himself, he saith, that although it may be true that heretofore, to wit, on the *twenty-second* day of *March*, 1824, at the said church, being the usual place of meeting for public worship by the members of the

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

2. *New Jersey.*—Gen. Stat. (1895), p. 2632, § 1 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 2, p. 388.

3. Upon the issue raised by the rejoinder in this case as to whether or not the election of the 4th of December, 1823, was made by persons who

said religious society, an election was held, and at the said election the said *James Harriot*, *Daniel Latourette*, *John Patrick*, *Charles Ford*, *Oliver W. Ogden*, *Benjamin Morris* and *Alexander Semple*, were by a majority of such of the said members of the said religious society as did then and there attend for that purpose, elected trustees of the said corporation, yet the said *William M. Crowell* saith, that the notice in writing of the time and place of the last mentioned meeting and assembling, and of the purpose aforesaid, was by an advertisement in writing given and directed only to those members of the said religious society who were pewholders of the said church, there being then and there other persons members of the said religious society, who were not pewholders as aforesaid, who were not requested or directed by the said notice to attend, as aforesaid, and to whom the said notice by advertisement as aforesaid was not given and directed; and so the said *William M. Crowell* saith, that in due notice in writing of the time and place of the last mentioned meeting and assembling, and of the purpose aforesaid, was not given, and that the last mentioned election was illegal and void; and this he is ready to verify; wherefore he prays judgment, and that the said office of trustee of the said corporation, and the privileges, duties and immunities thereof by him claimed as aforesaid, be adjudged to him; and that he be discharged by the court here from the premises above charged upon him. And the said *William M. Crowell* in fact further saith, that due notice in writing of the said meeting and assembling last above mentioned, and of the purpose aforesaid, was not given for *ten* days next preceding the said meeting and assembling, and of the said election; and of this he puts himself upon the country; and the said attorney-general doth the like. And for plea thereto by the said *David Crowell*, *John D. See*, *Jacob Hadden*, *Abraham Ayres* and *John Wait*, they say, that at the said election held on the said *fourth* day of *December*, 1823, before the said church and adjacent thereto, the door thereof being locked, and the members of the said religious society being prevented from entering the said church, as above in pleading set forth, persons being in fact members of the said religious society did assemble together for the purpose of electing trustees of the said corporation, and then and there an election of trustees of the said corporation, viz, of the said *David Crowell*, *John D. See*, *Jacob Hadden*, *Abraham Ayres*, *John Wait*, and *Thomas Griggs*, since deceased, was then and there duly made, by persons being in fact members of the said congregation or religious society, viz, by a majority of the members thereof then and there attending for that purpose; and of this they put themselves upon the country; and the said attorney-general for the state of *New Jersey* in this behalf doth the like.

[(*Signatures of attorneys.*)][1]

XV. SURREJOINDER.

were in fact members of the religious society, there was a judgment for the state.

The replication is set out *supra*, Form No. 16937.

The surrejoinder is set out *infra*, Form No. 16942.

1. The matter to be supplied within [ ] will not be found in the reported case.

Form No. 16942.[1]

(Precedent in State *v.* Crowell, 9 N. J. L. 399.)[2]

[(*Title of court as in Form No. 15225.*)

The State of *New Jersey*, *ex rel. John Patrick* and *Benjamin Maurice*, against *William M. Crowell*, *David Crowell*, *John D. See*, *Jacob Hadden*, *Abraham Ayres*, *John Wait* and *Thomas Griggs*.

On information in nature of quo warranto. Surrejoinder.][3]

And the said attorney-general having heard the said plea of them the said *William M. Crowell*, *David Crowell*, *John D. See*, *Jacob Hadden*, *Abraham Ayres* and *John Wait*, by them above pleaded by way of rejoinder in manner and form aforesaid, saith, true it is that the notice in writing for the meeting and assembling of the members of the said religious society or congregation on the *twenty-second* day of *March*, 1824, at the said church, being the usual place of meeting for public worship by the members of the said religious society, when an election was held, at which election the said *James Harriot*, *Daniel Latourette*, *John Patrick*, *Charles Ford*, *Oliver W. Ogden*, *Benjamin Maurice* and *Alexander Semple*, were by a majority of such of the members of the said religious society as did then and there attend for that purpose, elected trustees of the said corporation, was by an advertisement in writing, yet the said attorney-general saith, that the said advertisement in writing was not given and directed only to those members of the said religious society who were pewholders of the said church, and so that due notice was given of the time and place of the last mentioned meeting and assembly and of the purpose aforesaid, and that the last mentioned election was legal and proper; and the said attorney-general further saith, that there were not then and there other persons, members of the same religious society as aforesaid, who were not pewholders as aforesaid, who were not requested or directed by the said notice to attend as aforesaid, and to whom the said notice by advertisement as aforesaid was not given or directed, but that all the said members of the said religious society entitled to vote as aforesaid at said election were pewholders, and so that due notice in writing of the time and place of the last mentioned meeting and assembling, and of the purpose aforesaid, was given, and the last mentioned election was legal and proper, as the said attorney-general in his said replication hath above alleged; and this he prays may be enquired of by the country, and the said *William M. Crowell* [*David Crowell*, *John D. See*, *Jacob Hadden*, *Abraham Ayres* and *John Wait*][4] do the like.

[(*Signatures of attorneys.*)][3]

1. *New Jersey.* — Gen. Stat. (1895), p. 2632, § 1 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217.

2. Upon the issue raised by the rejoinder in this case as to whether or not the notice given to the pewholders was a notice to all members of the religious society entitled to vote, there was a judgment for the state.

The rejoinder is set out *infra*, Form No. 16941.

3. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

4. The matter enclosed by [ ] will not be found in the reported case.

XVI. MOTION FOR JUDGMENT.[1]

Form No. 16943.[2]

(Precedent in State *v.* Gleason, 12 Fla. 259.)[3]

Supreme Court of the state of *Florida*, at *an extra and special* term, *December 14th*, 1868.

The State of *Florida*, upon the relation of the Attorney-General of said state, who prosecutes in the name and by the authority of said state,
vs.
William H. Gleason, Lieutenant-Governor of said state.
} Information in the nature of a quo warranto.

And now comes the said Attorney-General, who prosecutes in the name and by the authority of said state, and moves the said *Supreme* Court to pronounce final judgment of ouster in said cause against the said respondent, said respondent having failed to plead to the information heretofore filed herein by said Attorney-General, or to show sufficient cause why said final judgment of ouster should not be awarded against him as required by the rule of said *Supreme* Court.

Almon R. Meek,
Attorney-General of the state of *Florida*.

XVII. RULE FOR JUDGMENT.[4]

Form No. 16944.[5]

New Jersey Supreme Court.

The State, ex rel. John Doe, relator, against *Richard Roe*.
} On quo warranto. Rule for judgment.

The information in the above cause, by leave of the court, having been duly filed, and the defendant having demurred thereto, and the plaintiff having joined in demurrer, and the cause been regularly set down and noticed for hearing, and having been argued before the court by *Jeremiah Mason*, counsel for plaintiff and relator, and by *Oliver Ellsworth*, counsel for defendant, and the court having considered said cause, and directed a judgment in favor of the plaintiff, and of ouster against the defendant, from the office of chosen freeholder of the county of *Hudson*, and that he pay costs to the relator, it is ordered that judgment in favor of plaintiff and of ouster, with

1. **For the formal parts** of a motion in a particular jurisdiction see the title MOTIONS, vol. 12, p. 938.

2. *Florida*. — Rev. Stat. (1892), §§ 1782, 1783.
See also list of statutes cited *supra*, note 1, p. 217.

3. The motion in this case was granted and final judgment was entered.

4. **For the formal parts** of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

5. *New Jersey*. — Gen. Stat. (1895), p. 2632, § 1 *et seq*.
See also list of statutes cited *supra*, note 1, p. 217.
This is substantially the form set out in Besson's Forms and Entries (1875), p. 325, and is substantially the rule for

costs to the relator against the defendant, be entered in the above entitled suit.

On motion of *Jeremiah Mason*, Attorney for Relator.

Rule entered this *tenth* day of *May*, A. D. 1875.

Andrew Jackson, Attorney General.

XVIII. JUDGMENT.

1. Against Corporation, for Forfeiture of Its Franchise.[1]

judgment in the case of State *v.* Van Horn, decided at the June term, 1875, of the New Jersey supreme court.

1. Requisites of Judgment, Generally. — For the formal parts of a judgment in a particular jurisdiction see the title JUDGMENTS AND DECREES, vol. 10, p. 645.

At common law, judgment of seizure was given against the corporation for a forfeiture of its corporate privileges. State *v.* Real Estate Bank, 5 Ark. 595; People *v.* Dashaway Assoc., 84 Cal. 114; State Bank *v.* State, 1 Blackf. (Ind.) 267; Chambers *v.* Baptist Educational Soc., 1 B. Mon. (Ky.) 215; Com. *v.* Union F. & M. Ins. Co., 5 Mass. 230; Campbell *v.* Talbot, 132 Mass. 174; Atty.-Gen. *v.* Salem, 103 Mass. 138; People *v.* Ravenswood, etc., Turnpike, etc., Co., 20 Barb. (N. Y.) 518; People *v.* Rensselaer, etc., R. Co., 15 Wend. (N. Y.) 113; State *v.* Pennsylvania, etc., Canal Co., 23 Ohio St. 121. Or of ouster of the particular franchise, but not of being a corporation where the object was to oust the corporation from exercising a particular franchise not authorized by the charter. People *v.* Dashaway Assoc., 84 Cal. 114; People *v.* Young Men's Father Mathew Total Abstinence Benev. Soc. No. 1, 41 Mich. 67; People *v.* Rensselaer, etc., R. Co., 15 Wend. (N. Y.) 113; State *v.* Pennsylvania, etc., Canal Co., 23 Ohio St. 121; Com. *v.* Delaware, etc., Canal Co., 43 Pa. St. 295.

A judgment against a corporation for violation of its charter must be confined to a seizure of the franchise. If it be extended to a seizure of the property of the corporation, that part of the judgment will be erroneous. State Bank *v.* State, 1 Blackf. (Ind.) 267.

In Campbell *v.* Talbot, 132 Mass. 174, the court said: "In this commonwealth, in the case of a business corporation, where the object of the information is merely to declare the charter forfeited and to exclude the corporation from the right further to exercise its franchises, a judgment of ouster is appropriate. Strictly and technically, a judgment either of seizure or of ouster probably does not dissolve the corporation, but it at least suspends the right to exercise its franchises."

Under Statute. — In several jurisdictions, when it is found that a corporation has, by an act done or omitted, surrendered or forfeited its corporate rights, privileges and franchises, judgment must be entered that it be ousted and excluded therefrom. Ala. Civ. Code (1896), § 3433; Horner's Stat. Ind. (1896), § 1141; Miss. Anno Code (1892), § 3529; Neb. Comp. Stat. (1899), § 6303; Nev. Comp. Laws (1900), § 3798; N. Car. Code Civ. Proc. (1900), § 617; Bates' Anno. Stat. Ohio (1897), § 6780; Okla. Stat. (1893), § 4565; Hill's Anno. Laws Oregon (1892), § 366; S. Car. Code Civ. Proc. (1893), § 438; Tenn. Code (1896), § 5181; Utah Rev. Stat. (1898), § 3623; Ballinger's Anno. Codes & Stat. Wash. (1897), § 5789. And that corporation be dissolved. Ala. Civ. Code (1896), § 3433; Horner's Stat. Ind. (1896), § 1141; N. Car. Code Civ. Proc. (1900), § 617; Bates' Anno. Stat. Ohio (1897), § 6780; Okla. Stat. (1893), § 4565; Hill's Anno. Laws Oregon (1892), § 366; S. Car. Code Civ. Proc. (1893), § 438; Tenn. Code (1896), § 5181; Utah Rev. Stat. (1898), § 3623; Ballinger's Anno. Codes & Stat. Wash. (1897), § 5789.

Costs. — Where a corporation is excluded or ousted from its franchises for acts done amounting to a surrender or forfeiture, costs will be awarded against it. Ala. Civ. Code (1896), § 3433; Horner's Stat. Ind. (1896), § 1141; Iowa Code (1897), § 4324; Miss. Anno. Code (1892), 3529; Neb. Comp. Stat. (1899), § 6303; Nev. Comp. Laws (1900), § 3794; Tenn. Code (1896), § 5181; Ballinger's Anno. Codes & Stat. Wash. (1897), § 5789.

Form No. 16945.[1]

At a *special* term of the *Supreme* Court of the state of *New York*, held at the county court-house in the city of *Albany*, on the *twenty-first* day of *June*, 1898.

Present: the Hon. *John Marshall*, Justice.

The People of the State of New York against *The Consolidated Ice Company.* } Judgment.

The summons and complaint in this action having been duly served on the defendant, and said defendant having served its answer herein, and the issue in said case having been tried at a trial term of this court at the court-house in the city of *Albany*, on the *twenty-first* day of *April*, 1898, before the Hon. *John Marshall*, one of the justices thereof, and a jury, and at the close of the evidence submitted the above named plaintiffs, having moved the court to direct a verdict for the plaintiff, and the above named defendant having moved the court to direct a verdict for the defendant, and said motion of the defendant having been denied by the court, and said motion of plaintiffs having been granted by the court, and the jury under the directions of the court having rendered a verdict in favor of the plaintiffs, a motion for judgment now coming on to be heard, now, upon reading and filing the summons and complaint, the answer and verdict aforesaid, and on motion of *Jeremiah Mason*, attorney general, and after hearing Mr. *Oliver Ellsworth*, of counsel for defendant, in opposition thereto (or *no one appearing in opposition thereto*) it is

Ordered, adjudged and decreed that the said defendant has offended against the provisions of the act under which it was created and has violated provisions of law, whereby it has forfeited its charter and become liable to be dissolved by abuse of its power.

It is further adjudged and decreed that said defendant, *The Consolidated Ice Company*, be and the same hereby is dissolved and the corporate rights, privileges and franchises of said defendant are hereby declared forfeited to the people of the state of *New York*.

It is further adjudged and decreed that the said defendant, *The Consolidated Ice Company*, its trustees, directors, managers and other officers, attorneys and agents, be and each of them hereby is forever restrained and enjoined from exercising any of the corporate franchises, powers, rights or privileges of the defendant, and from collecting or receiving any debts or demands belonging to or held by the defendant, and from paying out or in any manner interfering

Precedent. — In State Bank *v.* State, 1 Blackf. (Ind.) 267, judgment was given "that the privileges, liberties and franchises of said President, Directors and Company of the said bank, be seized into the hands and custody of the said state, together with all and singular their goods and chattels, rights, credits and effects, and all and singular their lands, tenements, and hereditaments, of what kind, nature, and description, soever, with costs, etc."

On writ of error, this judgment was affirmed in part and reversed as to that part which awarded that the goods and chattels, rights, credits and effects, lands, tenements and hereditaments of the corporation be seized into the custody of the state.

1. *New York.* — Code Civ. Proc., § 1785 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 395.

with, transferring or delivering to any person any of the deposits, moneys, securities, property or effects of the said defendant or held by it.

It is further adjudged and decreed that *Nathan Hale*, Esquire, of the city of *Albany*, be and he hereby is appointed receiver of all the property, real and personal, things in action and effects of the said corporation, *The Consolidated Ice Company*, held by and vested in it, or in or to which it may be in any wise interested or entitled, with the usual powers and duties enjoyed and exercised by receivers, according to the practice of this court and statutes of the state of *New York* in such case made and provided.

It is further adjudged and decreed that the said receiver, before entering upon the duties of his trust, execute and file with the clerk of the county of *Albany* a bond with at least *two* sufficient sureties to the people of the state of *New York*, in the penal sum of *fifty thousand* dollars, conditioned for the faithful discharge of the duties of his trust by said receiver, said bond to be approved as to its sufficiency, form and manner of execution by a justice of the *Supreme* Court; and the said receiver, upon the filing of such bond thus approved, is authorized and directed to take possession of and sequestrate the property, things in action and effects, real and personal, of the above defendant, and to take and hold all property held by or in possession of said defendant, and to secure and reduce to possession all property to which said corporation may be entitled; that an account of the assets and property and debts and liabilities of said defendant be taken, and that the property of said defendant be distributed among its stockholders or persons lawfully entitled thereto, and fair and honest creditors, in the order and proportions prescribed by law in case of the voluntary dissolution of a corporation.

It is further adjudged and decreed that the said receiver may make such further application to this court under the provisions of this decree or order as he may be advised is proper and necessary for his instruction in the management and conduct of his trust.

It is further adjudged and decreed that no application shall be made to any court against the above named receiver relative to or in any way connected with the duties of said receiver or the funds or assets of the above named defendant, or their transfer, sale or delivery, unless at least *five* days' notice of such application be first given to said receiver, and to the attorney general of the state of *New York*, and to the attorney of defendant.

It is further adjudged and decreed that the said receiver proceed according to law to convert into money all the property and assets held or owned by said defendant or to which said defendant may be in any wise entitled, and that upon receiving such money he shall forthwith deposit the same in the *State Trust Company* of the city of *Albany*, to the credit of said receiver, to be held by him subject to the further order of this court, and said money so deposited as aforesaid with the said *State Trust Company* shall not be delivered over by it unless the check, draft or demand therefor be accompanied with a certified copy of an order of this court directing such payment;

such order to be made only on notice to the attorney general and to the attorney of defendant.

It is further adjudged and decreed that the above named plaintiffs, the people of the state of *New York*, recover of the said defendant, *The Consolidated Ice Company*, the sum of *two hundred* dollars, costs and disbursements of this action, and said receiver is hereby directed to pay said sum to the attorney general.

Calvin Clark, Clerk.

2. That Defendant be Custed from Exercising Corporate Powers.[1]

1. Requisites of Judgment, Generally. — — For the formal parts of a judgment in a particular jurisdiction see the title JUDGMENTS AND DECREES, vol. 10, p. 645.

At common law, judgment of ouster is proper against an individual where a privilege or franchise is wrongfully usurped. People *v.* Dashaway Assoc., 84 Cal. 114; People *v.* Ravenswood, etc., Turnpike, etc., Co., 20 Barb. (N. Y.) 518; People *v.* Rensselaer, etc., R. Co., 15 Wend. (N. Y.) 113.

Under statute, judgment against a person guilty of usurping or intruding into or unlawfully holding any franchise or privilege must be that such person be excluded or ousted from such franchise or privilege. Ala. Civ. Code (1896), § 3432; State *v.* Webb, 97 Ala. 111; Ariz. Rev. Stat. (1901), § 3798; Cal. Code Civ. Proc. (1897), § 809; Mills' Anno. Code Colo. (1896), § 295; Idaho Rev. Stat. (1887), § 4618; Horner's Stat. Ind. (1896), § 1141; Iowa Code (1897), § 4324; Mich. Comp. Laws (1897), §§ 9959, 9960; Mo. Rev. Stat. (1899), § 4461; Mont. Code Civ. Proc. (1895), § 1422; Neb. Comp. Stat. (1899), § 6303; Nev. Comp. Laws (1900), §§ 3421, 3794; N. J. Gen. Stat. (1895), p. 2632, § 2; Hammer *v.* State, 44 N. J. L. 667; N. Y. Code Civ. Proc., § 1956; N. Car. Code Civ. Proc. (1900), § 615; N. Dak. Rev. Codes (1895), § 5751; Bates' Anno. Stat. Ohio (1897), § 6774; Okla. Stat. (1893), § 4565; Hill's Anno. Laws Oregon (1892), § 365; Bright. Pur. Dig. Pa. (1894), p. 1775, § 11; S. Car. Code Civ. Proc. (1893), § 437; Dak. (S. Dak.) Comp. Laws (1887), § 5356; Tenn. Code (1896), § 5180; Tex. Rev. Stat. (1895), art. 4347; Ballinger's Anno. Codes & Stat. Wash. (1897), § 5789; Wis. Stat. (1898), § 3475; Wyo. Rev. Stat. (1887), § 3106.

Recovery of Costs — *In General.* — It is provided by statute, in many states, that where defendant is found guilty of usurping or intruding into or unlawfully holding any franchise or privilege, judgment must be rendered that he pay the costs of the proceeding. Ala. Civ. Code (1896), § 3432; State *v.* Webb, 97 Ala. 111; Ariz. Rev. Stat. (1901), § 3798; Cal. Code Civ. Proc. (1897), § 809; Mills' Anno. Code Colo. (1896), § 295; Idaho Rev. Stat. (1887), § 3618; Horner's Stat. Ind. (1896), § 1141; Iowa Code (1897), § 4324; Mich. Comp. Laws (1897), §§ 9959, 9960; Neb. Comp. Stat. (1899), § 6303; Nev. Comp. Laws (1900), §§ 3421, 3794; N. J. Gen. Stat. (1895), p. 2632, § 2; N. Y. Code Civ. Proc., § 1956; N. Car. Code Civ. Proc. (1900), § 615; N. Dak. Rev. Codes (1895), § 5751; Hill's Anno. Laws Oregon (1892), § 365; Bright. Pur. Dig. Pa. (1894), p. 1775, § 11; S. Car. Code Civ. Proc. (1893), § 437; Dak. (S. Dak.) Comp. Laws (1887), § 5356; Tenn. Code (1896), § 5180; Ballinger's Anno. Codes & Stat. Wash. (1897), § 5789; Wis. Stat. (1898), § 3475; State *v.* Pierce, 35 Wis. 93.

By Relator. — By statute, in several states, it is provided that the relator may recover his costs where judgment is against the defendant. Starr & C. Anno. Stat. Ill. (1896), c. 112, par. 6; Mo. Rev. Stat. (1899), § 4461; Mont. Code Civ. Proc. (1895), § 1422; N. J. Gen. Stat. (1895), p. 2632, § 2; N. Y. Code Civ. Proc., § 1956; Bates' Anno. Stat. Ohio (1897), § 6774; Tex. Rev. Stat. (1895), art. 4347; Utah Rev. Stat. (1898), § 3620; Wyo. Rev. Stat. (1887), § 3106.

Imposition of Fine. — By statute, in many states, it is provided that when a defendant is adjudged guilty of usurping or intruding into or unlawfully holding any franchise or privilege, the court may, in its discretion, impose upon the defendant a fine. Ariz. Rev. Stat. (1901), § 3798; Cal. Code Civ. Proc. (1897), § 809; People *v.* Perry, 79 Cal.

Form No. 16946.[1]

(Precedent in Whelchel *v.* State, 76 Ga. 649.)[2]

Whereupon it is considered, ordered and adjudged that the respondents, *Davis Whelchel*, *R. E. Green* and *A. G. Whelchel*, having failed to show any charter, license or other sufficient authority to demand, collect or receive toll for the privilege of crossing the bridge mentioned in the pleadings, be, and they are hereby ousted of the right or privilege of charging, demanding or collecting toll in any manner from persons for crossing said bridge.

[(*Signature as in Form No. 11848.*)][3]

3. That Defendant be Ousted from Office.[4]

105; Mills' Anno. Code Colo. (1896), § 295; Idaho Rev. Stat. (1887), § 4618; Starr & C. Anno. Stat. Ill. (1896), c. 112, par. 6; Mich. Comp. Laws (1897), §§ 9959, 9960; Miss. Anno. Code (1892), § 3529; Mo. Rev. Stat. (1899), § 4461; Nev. Comp. Laws (1900), § 3421; N. J. Gen. Stat. (1895), p. 2632; § 2; State *v.* Davis, 57 N. J. L. 203; State *v.* Haines, 48 N. J. L. 25; N. Y. Code Civ. Proc., § 1956; N. Car. Code Civ. Proc. (1900), § 615; N. Dak. Rev. Codes (1895), § 5751; Hill's Anno. Laws Oregon (1892), § 365; S. Car. Code Civ. Proc. (1893), § 437; Dak. (S. Dak.) Comp. Laws (1887), § 5356; Tex. Rev. Stat. (1895), art. 4347; Utah Rev. Stat. (1898), § 3620; Wis. Stat. (1898), § 3475; State *v.* Pierce, 35 Wis. 93.

1. *Georgia.* — 2 Code (1895), § 4878 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, p. 398.

2. The judgment in this case was affirmed.

3. The matter to be supplied within [ ] will not be found in the reported case.

4. **Requisites of Judgment, Generally.** — For the formal parts of a judgment in a particular jurisdiction see the title JUDGMENTS AND DECREES, vol. 10, p. 645.

At common law, a judgment of ouster was proper against a person usurping a public office. People *v.* Dashaway Assoc., 84 Cal. 114; State *v.* Bernoudy, 36 Mo. 279; State *v.* Utter, 14 N. J. L. 84; People *v.* Ravenswood, etc., Turnpike, etc., 20 Barb. (N. Y.) 518; People *v.* Rensselaer, etc., R. Co., 15 Wend. (N. Y.) 113; State *v.* Owens, 63 Tex. 261.

In Atty.-Gen. *v.* Johnson, 63 N. H. 622, the information alleged relator's election to a certain office and defendant's usurpation of said office, and prayed judgment of ouster. Defendant filed a paper in which he stated that to avoid further controversy he resigned the office in dispute and made no further claim to it, whereupon the defendant moving to dismiss and plaintiff moving for a judgment of ouster, as on default, it was decided, upon a submission of the facts to the trial term, that there should be a judgment prohibiting defendant from interfering with the office.

Under statute, in many states, judgment against a defendant guilty of usurping or intruding into or unlawfully holding any public office must be that such person be excluded or ousted from such office. Ala. Civ. Code (1896), § 3432; State *v.* Webb, 97 Ala. 111; Ariz. Rev. Stat. (1901), § 3798; Cal. Code Civ. Proc. (1897), § 809; Mills' Anno. Code Colo. (1896), § 295; Idaho Rev. Stat. (1887), § 4618; Horner's Stat. Ind. (1896), § 1141; Iowa Code (1897), § 4324; Mich. Comp. Laws (1897), §§ 9959, 9960; Mo. Rev. Stat. (1899), § 4461; Mont. Code Civ. Proc. (1895), § 1422; Neb. Comp. Stat. (1899), § 6303; Nev. Comp. Laws (1900), §§ 3421, 3794; N. J. Gen. Stat. (1895), p. 2632, § 2; Hammer *v.* State, 44 N. J. L. 667; N. Y. Code Civ. Proc., § 1956; N. Car. Code Civ. Proc. (1900), § 615; N. Dak. Rev. Codes (1895), § 5751; Bates' Anno. Stat. Ohio (1897), § 6774; Okla. Stat. (1893), § 4565; Hill's Anno. Laws Oregon (1892), § 365; Bright. Pur. Dig. Pa. (1894), p. 1775, § 11; S. Car. Code Civ. Proc. (1893), § 437; Dak. (S. Dak.) Comp. Laws (1887), § 5356; Tenn. Code (1896), § 5180; Tex. Rev. Stat. (1895), art. 4347; Ballinger's Anno. Codes & Stat. Wash. (1897), § 5789; Wis. Stat.

a. In General.[1]

(1898), § 3475; Wyo. Rev. Stat. (1887), § 3106.

Recovery of Costs — In General. — It is provided by statute, in many states, that where defendant is found guilty of usurping or intruding into or unlawfully holding any public office, judgment must be rendered that he pay the costs of the proceeding. Ala. Civ. Code (1896), § 3432; State *v.* Webb, 97 Ala. 111; Ariz. Rev. Stat. (1901), § 3798; Cal. Code Civ. Proc. (1897), § 809; Mills' Anno. Code Colo. (1896), § 295; Idaho Rev. Stat. (1887), § 4618; Horner's Stat. Ind. (1896), § 1141; Iowa Code (1897), § 4324; Mich. Comp. Laws (1897), §§ 9959, 9960; Miss. Anno. Code (1892), § 3529; Neb. Comp. Stat. (1899), § 6303; Nev. Comp. Laws (1900), §§ 3421, 3794; N. J. Gen. Stat. (1895), p. 2632, § 2; N. Y. Code Civ. Proc., § 1956; N. Car. Code Civ. Proc. (1900), § 615; N. Dak. Rev. Codes (1895), § 5751; Hill's Anno. Laws Oregon (1892), § 365; Bright. Pur. Dig. Pa. (1894), p. 1775, § 11; S. Car. Code Civ. Proc. (1893), § 437; Dak. (S. Dak.) Comp. Laws (1887), § 5356; Tenn. Code (1896), § 5180; Ballinger's Anno. Codes & Stat. Wash. (1897), § 5789; Wis. Stat. (1898), § 3475; State *v.* Pierce, 35 Wis. 93.

By Relator. — By statute, in several states, it is provided that the relator may recover his costs where judgment is against the defendant. Starr & C. Anno. Stat. Ill. (1896), c. 112, par. 6; Mo. Rev. Stat. (1899), § 4461; Mont. Code Civ. Proc. (1895), § 1422; N. J. Gen. Stat. (1895), p. 2632, § 2; N. Y. Code Civ. Proc., § 1956; Bates' Anno. Stat. Ohio (1897), § 5774; Tex. Rev. Stat. (1895), art. 4347; Utah Rev. Stat. (1898), § 3620; Wyo. Rev. Stat. (1887), § 3106.

Imposition of Fine. — By statute, in many states, it is provided that where a defendant is adjudged guilty of usurping or intruding into or unlawfully holding any public office, the court may, in its discretion, impose upon the defendant a fine. Ariz. Rev. Stat. (1901), § 3798; Cal. Code Civ. Proc. (1897), § 809; People *v.* Perry, 79 Cal. 105; Mills' Anno. Code Colo. (1896), § 295; Idaho Rev. Stat. (1887), § 4618; Starr & C. Anno. Stat. Ill. (1896), c. 112, par. 6; Mich. Comp. Laws (1897), §§ 9959, 9960; Miss. Anno. Code (1892), § 3529; Mo. Rev. Stat. (1899), § 4461; Nev. Comp. Laws (1900), § 3421; N. J. Gen. Stat. (1895), p. 2632, § 2; State *v.* Davis, 57 N. J. L. 203; State *v.* Haines, 48 N. J. L. 25; N. Y. Code Civ. Proc., § 1956; N. Car. Code Civ. Proc. (1900), § 615; N. Dak. Rev. Codes (1895), § 5751; Hill's Anno. Laws Oregon (1892), § 365; S. Car. Code Civ. Proc. (1893), § 437; Dak. (S. Dak.) Comp. Laws (1887), § 5356; Tex. Rev. Stat. (1895), art. 4347; Utah Rev. Stat. (1898), § 3630; Wis. Stat. (1898), § 3475; State *v.* Pierce, 35 Wis. 93. But it has been held that in the absence of statutory authority the court is not justified in imposing a fine. State *v.* Kearn, 17 R. I. 391.

1. **Precedents.** — In 6 Wentw. Pl., p. 13, is set out the following judgment:

"And hereupon all and in particular the matters above put in issue and tried by the country, being seen and fully understood by the court here, it appears in the said court from the verdict aforesaid, in form aforesaid, given against the said *John Scott*, that the said *John Scott* hath usurped and still doth usurp upon our said lord the king the place, office, liberties, privileges, and franchises in manner and form as by the said information is above charged upon him; therefore it is considered by the said court here, that the said *John Scott* no wise intermeddle with, nor in the said place, office, liberties, privileges, and franchises nor any of them, but that he be from henceforth wholly forejudged and excluded from exercising and using the same and every of them, and that the said *John Scott* be taken to satisfy our said lord the king for the usurpation aforsaid, and that the said *Charles Hope*, the relator above-named in this behalf, recover against the said *John Scott* the sum of £5 for his costs and charges, by him in and about his suit in this behalf expended, according to the form of the statute in such case made and provided," etc.

In State *v.* Gleason, 12 Fla. 190, is set out the following sufficient judgment:

"The court, after considering the question reserved as to the first ground presented by respondent to the rule, adjudge that the same is insufficient as a plea, and doth overrule the same, and the respondent having failed to file any plea as authorized and required by the court, it is now, on motion of the said Attorney-General of said state in this behalf for final judgment of ouster, considered by the court that the said

(1) Of County Attorney.

William H. Gleason do not in any manner intermeddle, or concern himself in and about the holding of, or exercising the said office of *Lieutenant-Governor* of the state of *Florida* in said information specified, but the said *William H. Gleason* be absolutely prejudged and excluded from holding or exercising the said office, and that the said state of *Florida* do recover costs to be taxed by the clerk in this behalf. And the court imposes no fine in this behalf."

In Com. *v.* Fowler, 11 Mass. 339, is set out the following sufficient judgment:

"It is considered by the court here that the said *Samuel Fowler*, Esq., does not in any manner intermeddle or concern himself in and about the holding of or exercising the said office of judge of probate of wills, and granting administration on the estates of persons deceased in the said county of *Hampden*, in the said information specified, in virtue of the supposed commission by him mentioned in his plea in bar aforesaid; but that the said *Samuel Fowler*, Esq., be absolutely forejudged and excluded from holding or exercising the same office, and that the said commonwealth recover costs taxed at," etc.

In St. Stephen Church Cases, (C. Pl. Tr. T.) 25 Abb. N. Cas. (N. Y.) 253, the material portion of the judgment was as follows, to wit:

"It is adjudged that the defendants, *Stephen R. Weeks*, *Thomas F. Cock*, *Edward K. Linen*, *Edmund Luis Mooney* and *Henry W. Mooney* and *S. Montgomery Pike*, are guilty of usurping, intruding into, and unlawfully holding and exercising the offices of churchwarden and vestrymen of the *Protestant Episcopal Church of St. Stephen*, in the city of *New York*, and that they be, and hereby are, and each of them hereby is, ousted and excluded from the said offices, under any title claimed by virtue of an alleged election for said offices, held *April* 7, 1890.

And it is further adjudged, *David Bennett King*, attorney for the defendant, *William G. Smith*, consenting thereto, that the said defendant, *William G. Smith*, be and hereby is, ousted and excluded from the office of vestryman of the *Protestant Episcopal Church of St. Stephen*, in the city of *New York*.

And on motion of *Booraem*, *Hamilton & Beckett*, attorneys for the relators:

It is further adjudged, that the said relators, *James Blackhurst*, *James Maclaury*, *Theodore E. Smith*, *William G. Gardner*, *William W. Warren*, *William J. Smith*, and *Woodruff Smith*, recover of the defendants, *Stephen R. Weeks*, *Thomas F. Cock*, *Edward K. Linen*, *Edmund Luis Mooney*, *Henry W. Mooney* and *S. Montgomery Pike*, $116.69, being the costs and disbursements of this action, and that they have an execution therefor."

In Com. *v.* Kilgore, 82 Pa. St. 396, is set out the following sufficient judgment: "And now, *October 23d*, 1876, it is ordered and adjudged by the court, that the judgment of the Court *of Common Pleas* be reversed and set aside, and that the defendant, *Samuel Kilgore*, be ousted and altogether excluded from the office of treasurer of the county of *Allegheny*, and that the Commonwealth do recover from the said defendant her costs in this behalf expended and incurred."

In State *v.* Smith, 17 R. I. 415, is set out the following judgment: "The above entitled information having on the *26th* and *27th* days of *June*, 1891, been tried before the court, and said court having ordered judgment entered in accordance with the opinion of said court on file in said cause; therefore it is adjudged that the defendant, *Edward B. Smith*, in and so far as his title to the office of town clerk of the town of *Lincoln* in said county shall depend upon the votes cast at the annual election in said town of *Lincoln* for the year 1891, do not in any manner intermeddle with or concern himself about the office, liberties, privileges, and franchises of town clerk of said town of *Lincoln* in respect of which said information has been filed; but that the said *Edward B. Smith* be absolutely forejudged and excluded, so far as his title to the office of town clerk of the said town of *Lincoln* shall depend upon said annual election, from exercising or using the same, or any of them, for the future. And it further appearing that under an election held in *June*, 1890, said *Edward B. Smith* duly qualified and held said office, and that he was, under said election, entitled to hold office until his successor is duly qualified to act, and it appearing that no successor has yet been qualified to act in said office, it is therefore ordered, adjudged, and decreed, that said

Form No. 16947.[1]

(Precedent in State *v.* Foster, 32 Kan. 37.)

[*State of Kansas*, on the relation of *W. A. Johnston*, Attorney General, plaintiff, against *John Foster*, defendant.][2]

Comes now said plaintiff, *the state of Kansas*, by *W. A. Johnston*, attorney general of said state of *Kansas*, and by *T. F. Garver*, *R. A. Lovitt* and *Edwin A. Austin*, of counsel for said plaintiff, and comes also said defendant in person and by *T. P. Fenlon*, *J. G. Waters* and *C. A. Hiller*, his attorneys; and said cause coming on to be further heard upon the defendant's motion for a new trial of said cause, and the court being fully advised in the premises, doth overrule said motion, filing in writing reasons therefor, to which ruling of the court defendant at the time excepted. And thereupon it is ordered and adjudged by the court, that said defendant, *John Foster*, has forfeited the office of county attorney of *Saline* county, state of *Kansas*, and that the said *John Foster*, defendant herein, be and he hereby is ousted and excluded from said office, and the powers, privileges and emoluments thereof, and that said defendant pay the costs of this suit, to be taxed at $———; to which judgment of the court the defendant at the time excepted.

(2) Of Recorder of City.

Form No. 16948.[3]

(Precedent in Com. *v.* Denworth, 145 Pa. St. 175.)[4]

[*Commonwealth of Pennsylvania*, at the relation of *William S. Kirkpatrick*, Attorney General, against *James B. Denworth.*] In the Court *of Common Pleas* of *Dauphin* County, *January* Term, 1890. No. *161.*][2]

And, now, *December 17*, 1890, it is ordered, adjudged and decreed that the defendant, *James B. Denworth*, hath unlawfully assumed and exercised the duties of the alleged office of recorder of the city of

Smith is entitled to hold said office as town clerk until his successor is duly qualified to act; and that said respondent, by virtue of his said last-named title, is not usurping the said office of town clerk, and, therefore, in so far as said information prays that said respondent be excluded and ousted from said office of town clerk of the town of *Lincoln* and from further holding and exercising said office, the same is denied."

There were no further proceedings in this case.

1. *Kansas.* — Gen. Stat. (1897), c. 96, § 100 *et seq.*

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 4, p. 399.

2. The matter enclosed by [ ] will not be found in the reported case.

3. *Pennsylvania.* — Bright. Pur. Dig. (1894), p. 1775, § 11.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 4, p. 399.

4. The judgment in this case was affirmed in the supreme court.

Williamsport; that the act of assembly of *March 24*, 1877, and its supplements, under which the respondent claims to exercise the said office, are unconstitutional and void; that the defendant is therefore without title to the said office; that he be ousted and forever excluded from the actual exercise thereof, and that the commonwealth have and recover from the respondent the costs of this proceeding.

[(*Signature as in Form No. 11874.*)][1]

b. And that Relator Recover Office.[2]

1. The matter to be supplied within [ ] will not be found in the reported case.

2. Requisites of Judgment, Generally. — For the formal parts of a judgment in a particular jurisdiction see the title JUDGMENTS AND DECREES, vol. 10, p. 645.

Determination of Rights. — When the action is brought against a person for usurping an office, if the name of the person rightfully entitled to the office, with a statement of his right thereto, be added, judgment may be rendered upon the right of the defendant and also upon the right of the party alleged to be entitled, or only upon the right of the defendant, as justice may require. Ala. Civ. Code (1896), § 3429; Ariz. Rev. Stat. (1901), § 3795; Cal. Code Civ. Proc. (1897), § 805; People *v.* Banvard, 27 Cal. 470; Mills' Anno. Code Colo. (1896), § 291; Idaho Rev. Stat. (1887), § 4614; Horner's Stat. Ind. (1896), § 1136; Kan. Gen. Stat. (1897), c. 96, § 100; Mich. Comp. Laws (1897), § 9942; Miss. Anno. Code (1892), § 3522; Mont. Code Civ. Proc. (1895), § 1415; Nev. Comp. Laws (1900), §§ 3417, 3789; N. Car. Code Civ. Proc. (1900), § 610; N. Dak. Rev. Codes (1895), § 5745; Bates' Anno. Stat. Ohio (1897), § 6766; Okla. Stat. (1893), § 5562; Hill's Anno. Laws Oregon (1892), § 361; R. I. Gen. Laws (1896), c. 263, § 2; S. Car. Code Civ. Proc. (1893), § 432; Dak. (S. Dak.) Comp. Laws (1887), § 5351; Utah Rev. Stat. (1898), § 3614; Vt. Stat. (1894), § 1620; Ballinger's Anno. Codes & Stat. Wash. (1897), § 5785; Wis. Stat. (1898), § 3470; Wyo. Rev. Stat. (1887), § 3098.

Recovery of Damages. — In some jurisdictions, it is provided by statute that the judgment shall include damages the relator may show himself entitled to, if any, to the time of judgment. Horner's Stat. Ind. (1896), § 1136; Kan. Gen. Stat. (1897), c. 96, § 100; Okla. Stat. (1893), § 5562; Ballinger's Anno. Codes & Stat. Wash. (1897), § 5785.

Precedents. — In People *v.* Banvard, 27 Cal. 470, is set out the following judgment: "Wherefore, it is considered and adjudged that the said relator, *J. W. Dickinson*, is the lawfully elected and duly qualified treasurer of said *Placer* County, and is entitled to use, hold, and exercise the said office and perform the duties thereof, and to receive the emoluments thereof for *two* years, commencing with the *1st* day of *March*, A. D. 18*64*, and that the defendant, *E. M. Banvard*, is guilty of usurping, holding, using, and executing the same, performing the duties and receiving the emoluments thereof unlawfully.

And it is ordered, adjudged, and decreed, that the said defendant, *E. M. Banvard*, be and he is hereby excluded from the said office of treasurer of said *Placer* County, and from exercising any of the duties pertaining thereto; and that he, the said defendant, do forthwith yield and deliver up to the said relator, *J. W. Dickinson*, the said office of treasurer of said *Placer* county, and all of the books, papers, keys, furniture, property, rooms, documents, moneys, records, belonging or pertaining to the said office or the business thereof, and all and everything or things of whatsoever name or nature which may belong to the said office or the business thereof; and that the said relator have and recover of the said defendant, *E. M. Banvard*, his costs and expenses herein, taxed at *twenty-seven* dollars and *sixty* cents, and that execution issue therefor."

Upon appeal, it was held that as the only objection under consideration was whether or not the finding was justified by the evidence, that objection could not be inquired into under an appeal, and could be reviewed only on motion for a new trial. The judgment was therefore affirmed.

In People *v.* Clayton, 4 Utah 421, the

(1) Of Keeper of Capitol.

Form No. 16949.[1]

(Precedent in State *v.* Burns, 124 N. Car. 761.)[2]

North Carolina — *Wake* County.
Superior Court, *April* Term, 1899.
State, *ex rel. C. C. Cherry*,
v.
J. L. Burns.

Judgment.

This cause came on to be heard before the court, *G. H. Brown, Jr.*, Judge presiding. It is admitted that following are the facts, a jury trial being waived:

At session of General Assembly of 1899, plaintiff was elected by that body in joint session, so far as it had power to elect a Keeper of the Capitol. Certificate thereof made a part of these findings.

Act of General Assembly ratified February 23, 1899, is in evidence and referred to as part of plaintiff's case.

Plaintiff elected *March 6*, 1899. Duly qualified *March 8*, 1899.

Record of election of defendant as Keeper of Capitol *March 8*, 1897, by Board of Public Buildings.

Gave Bond $*250*, and that is in evidence.

January 3, 1899, record of filing another bond by defendant in evidence, also the two official bonds of defendant in evidence and made a part of these findings.

Code, Sections *2301*, *2306* cited by defendant and made part of this case.

Upon considering the matters presented, the Court is of opinion that there is no fixed term of office for the office of Keeper of the Capitol.

That it was within the power of the General Assembly to amend The Code and to elect a Keeper of the Capitol.

That the fact that defendant filed another bond on *January 3*, 1899, does not give him a fixed or additional tenure of office.

judgment of the court, in part, was as follows: "And the said court, having heard the proofs offered and admitted *ex parte* upon the right of the said *Arthur Pratt* named in said complaint to be admitted into and hold the said office of territorial auditor of *Utah*, it is further considered, ordered, and adjudged that the said *Arthur Pratt* is the lawfully appointed and commissioned auditor of said territory, and is entitled, after taking the oath of office, and executing such official bond as by law required, to use, hold, and exercise the said office, and perform the duties thereof, and receive the emoluments thereto belonging, until his successor is duly appointed and qualified. And it is further ordered and adjudged that the said defendant, *Nephi W. Clayton*, do forthwith yield and deliver up to the said *Arthur Pratt* the said office of territorial auditor, and all the books, papers, keys, safes, furniture, property, moneys, and records belonging or pertaining to the said office, or the business thereof, and that the said plaintiff have and recover from the said defendant the costs herein, taxed at *twenty-two* dollars and *fifty* cents."

This judgment was affirmed.

1. *North Carolina.* — Code Civ. Proc. (1900), § 610.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 2, p. 403.

2. The judgment in this case was affirmed by the supreme court.

Wherefore upon pleadings and above facts it is adjudged and decreed that the plaintiff recover of the defendant the possession of office of Keeper of the Capitol, together with the salary and emoluments of said office since *March 8*, 1899, and the costs of this action to be taxed by the clerk, and that judgment be entered against defendant and his bondsmen accordingly.

April 25, 1899.

G. H. Brown, Jr., Judge.

(2) Of Railroad Commissioner.

Form No. 16950.[1]

(Precedent in State *v.* Wilson, 121 N. Car. 473.)

[*Supreme* Court, *September* Term, 1897.

State of North Carolina, ex rel. L. C. Caldwell,
against
James W. Wilson.
]²

This cause coming on to be heard in the *Supreme* Court and having been decided in favor of the plaintiff, it is adjudged and decreed:

1. That the defendant has been lawfully suspended from the office of Railroad Commissioner.

2. That the relator has been duly appointed to fill the vacancy caused by the suspension of the defendant.

3. That the defendant be ousted from, and the relator inducted into said office of Railroad Commissioner.

Therefore, let a writ issue out of this court directed to the Sheriff or other lawful officer of *Wake* county, commanding him to oust the defendant and put the relator in possession of the rooms occupied as offices by the Railroad Commissioners, in the Agricultural Building on *Edenton* Street in *Raleigh*, and known as the Railroad Commission offices, together with all property, papers and effects appertaining or belonging to said offices.

4. That the plaintiff relator recover the costs of this action to be taxed by the Clerk of this court.

Walter Clark, Justice *Supreme* Court.

XIX. Notice of Appeal.

Form No. 16951.[3]

Supreme Court, *Onondaga* County.

1. *North Carolina.* — Code Civ. Proc. (1900), § 610.
See also list of statutes cited *supra* note 1, p. 217; and generally, *supra*, note 2, p. 403.
The complaint in this case is set out *supra*, Form No. 16901.

2. The matter enclosed by [ ] will not be found in the reported case.

3. *New York.* — Code Civ. Proc., § 999.
See also list of statutes cited *supra*, note 1, p. 217.
This notice is copied from the records in People *v.* Tobey, 153 N. Y. 381.

The People of the State of New York,
ex rel. William Sears, respondent,
against
William R. Toby, appellant.

Notice of Appeal.

Take notice that the above named defendant appellant appeals to the appellate division of this court, *Fourth* Department, from the judgment entered herein in the *Onondaga* county clerk's office on the *twenty-second* day of *October*, 1896, and from any order denying the defendant's motion for a new trial upon the judge's minutes and upon the exceptions and upon the grounds stated in section 999 of the Code of Civil Procedure, which order was entered in the *Onondaga* county clerk's office on the *twenty-third* day of *October*, 1896, and from each and every part of said judgment and order, and that said defendant appellant will bring up upon review said order so entered as aforesaid.

Dated *November 5*, 1896.

Yours, etc.,
Thompson, Woods & Smith,
Attorneys for defendant appellant.

To Hon. *T. E. Hancock*, Attorney General,
and *James Butler*, County Clerk.

XX. SUGGESTION OF DAMAGES ON JUDGMENT AGAINST DEFENDANT USURPING OFFICE.[1]

Form No. 16952.[2]

In the *Circuit* Court for the County of *Wayne*, State of *Michigan*.

The People of the State of Michigan,
on the relation of *John Doe*,
against
Richard Roe.

And now, to wit, this *tenth* day of *June*, in the year of our Lord one thousand eight hundred and *ninety-nine*, comes the above named *John Doe*, by *Jeremiah Mason*, his attorney, and according to the form of the statute in such case made and provided gives this court here to understand and be informed that he, the said *John Doe*, hath sustained damages in the amount of *one thousand* dollars, by reason

1. **Suggestion of damages** by person entitled to office usurped by defendant is authorized upon judgment rendered in favor of plaintiff. Mich. Comp. Laws (1897), § 9945; Comstock *v.* Grand Rapids, 40 Mich. 397; People *v.* Miller, 24 Mich. 458; People *v.* Cicott, 15 Mich. 326; People *v.* Sackett, 15 Mich. 315; People *v.* Hartwell, 12 Mich. 508; People *v.* Miles, 2 Mich. 348.

And see list of statutes cited *supra*, note 1, p. 217.

2. *Michigan.* — Comp. Laws (1897), § 9945.

See also list of statutes cited *supra*, note 1, p. 217; and, generally, *supra*, note 1, this page.

Contents of Suggestion. — Suggestion shall aver that plaintiff has sustained damages to a certain amount by reason of the usurpation by the defendant of the office from which such defendant has been evicted, and shall pray judgment therefor. Mich. Comp. Laws (1897), § 9945.

of the usurpation by the above named defendant, *Richard Roe*, of the office of sheriff of the said county of *Wayne*, as in the information filed in this cause is mentioned and set forth, and from which said office said defendant has been evicted.

Wherefore he prays judgment for his damages as aforesaid, according to the form of the statute in such case made and provided.

(*Date, signature and office address of attorney as in Form No. 6954.*)

RAILROAD COMMISSIONERS.

See the title RAILROADS, post, p. 408.

RAILROAD POOLS.

See the titles CORPORATIONS, vol. 5, p. 523; *MONOPOLIES*, vol. 12, p. 381.

RAILROAD SECURITIES.

See the title RAILROADS, post, p. 408.

RAILROADS.

CROSS-REFERENCES.

For Forms of Indictments Against Railroad Corporation for Blacklisting Employees, see the title BLACKLISTING EMPLOYEES, vol. 3, p. 518.

For Form of Petition by Bridge Authorities Against a Railroad to Recover for Cost of Bridge Made Necessary by the Negligence of the Railroad Company, see the title BRIDGES, vol. 4, *Form No. 4835*.

For Form of Information and Bill for an Injunction to Remove a Railroad Bridge Obstructing Navigation, see the title BRIDGES, vol. 4, *Form No. 4847*.

For Forms in Actions by Carriers, see the title CARRIERS, vol. 4, p. 192.

For other Forms in Actions Against Carriers, see the title CARRIERS, vol. 4, p. 192.

For other Forms in Civil Actions Against Railroads for Injuries to Animals, see the title CATTLE AND DOMESTIC ANIMALS, vol. 4, p. 376.

For other Forms in Criminal Prosecutions Against Railroads for Injuries to Animals, see the title CATTLE AND DOMESTIC ANIMALS, vol. 4, p. 376.

For other Forms in Criminal Prosecutions Against Railroads for Refusing Equal Accommodations in Railroad Train, see the title CIVIL RIGHTS ACTS, vol. 4, p. 891.

For other Forms in Civil Actions Against Railroad to Recover for Damages Caused by Wrongful Act, Omission or Negligence, see the title DEATH BY WRONGFUL ACT, vol. 6, p. 1.

For Forms in Proceedings to Condemn Land for Railroad Purposes, see the title EMINENT DOMAIN, vol. 7, p. 561.

For Forms in Proceedings relating to the Transportation of Explosives by Railroad, see the title EXPLOSIONS AND EXPLOSIVES, vol. 8, p. 414.

For Forms in Proceedings Against Railroad for Damages Occasioned by Fires Caused by Negligence of Railroad Company, see the title FIRES, vol. 8, p. 598.

For Form of Indictment for Larceny from a Railroad Car, see the title LARCENY, vol. 11, *Form No. 12898.*

For Form of Indictment for Throwing Stones at Railroad Car, see the title MALICIOUS MISCHIEF AND WILFUL TRESPASS, vol. 11, *Form No. 13388.*

For other Forms in Proceedings Against Railroads for Injuries to Employees, see the title MASTER AND SERVANT, vol. 12, p. 1.

For other Forms in Proceedings Against Railroads for Negligence, see the title NEGLIGENCE, vol. 13, p. 1.

For other Forms in Civil Actions Against Railroads for Damages for Obstructing Highway, see the title NUISANCES, vol. 13, p. 226.

For other Forms in Criminal Prosecutions Against Railroads for Obstructing Highway, see the title NUISANCES, vol. 13, p. 226.

See also the titles CORPORATIONS, vol. 5, p. 523; *DIRECTORS AND CORPORATION OFFICERS*, vol. 6, p. 691; *ELEVATED RAILROADS*, vol. 7, p. 443; *FOREIGN CORPORATIONS*, vol. 8, p. 645; *INJUNCTIONS*, vol. 9, p. 822; *INTERSTATE COMMERCE ACT*, vol. 10, p. 403; *MANDAMUS*, vol. 11, p. 767; *MONOPOLIES*, vol. 12, p. 381; *MORTGAGES*, vol. 12, p. 390; *RECEIVERS; ROBBERY; STOCKS AND STOCKHOLDERS; STOCKYARDS; STREET RAILROADS; STREETS AND HIGHWAYS; STRIKES; TAXATION; TELEGRAPH AND TELEPHONE COMPANIES; and the GENERAL INDEX to this work.*

I. LOCATION.[1]

1. Statutes relating to railroads in general exist in the following states, to wit:

Alabama. — Laws (1899), p. 28, Nos. 329, 468; p. 44, No. 244; p. 60, No. 285; p. 153, No. 274; p. 154, Nos. 812, 813; p. 155, No. 667; p. 157, No. 365; Laws (1897), p. 844, No. 336; p. 956, No. 417; p. 1256, No. 564; p. 1375, No. 612; Civ. Code (1896), §§ 804, 867, 877, 1016–1018, 1166–1168, 1172, 1173, 1180, 1712–1726, 3275, 3440 *et seq.*, 4122; Crim. Code (1896), §§ 5359 *et seq.*, 5480 *et seq.*, 5549 *et seq.*

Arizona. — Civ. Code (1901), §§ 840 *et seq.*, 2979, 2985, 3039 *et seq.*

Arkansas. — Laws (1899), p. 4, No. 6; p. 6, No. 8; p. 17, No. 18; p. 41, No. 34; p. 78, No. 49; p. 110, No. 59; p. 142, No. 86; p. 145, No. 88; p. 152, No. 91; p. 159, No. 96; p. 202, No. 126; p. 244, No. 139; p. 365, No. 203; Laws (1895), p. 34, No. 30; p. 64, No. 51; p. 166, No. 112; p. 209, No. 143; p. 238, No. 153; p. 242, No. 155; Sand. & H. Dig. (1894), §§ 6148–6361.

California. — Laws (1901), c. 152; c. 157, §§ 133–138, 141–144; c. 158, §§ 91–95, 97, 97*a*, 97*b*, 150, 150 1-2; c. 194; Laws (1899), c. 142, § 1; Pol. Code (1897), §§ 2694, 3664–3671; Civ. Code (1901), § 454 *et seq.*; Pen. Code (1901), §§ 214, 218, 349, 355, 368, 369*b*, 369*d*, 369*e*, 369*g*, 369*h*, 369*i*, 369*j*, 390–392, 481, 482, 566, 567, 587, 587*a*, 600, 601, 601*a*, 783, 1541*a*.

Colorado. — Laws (1901), c. 52; § 11; c. 53, §§ 1, 2; c. 55, § 1; c. 74, § 1; c. 83, § 14; c. 87, § 24; c. 89, §§ 1, 2; Laws (1899), c. 88, § 1; c. 89, § 2; c. 115, §§ 3, 6; c. 98, §§ 12, 15; c. 125; c. 126, § 1; c. 150, § 4; Laws (1897), c. 31, § 1; c. 63, § 1; c. 63, § 16; c. 68, § 1; c. 69, § 2; c. 70, § 2; Laws (1895), c. 75, §§ 1, 2, 3; Mills' Anno. Stat. (1891), §§ 494 *et seq.*, 599 *et seq.*, 3700 *et seq.*

Connecticut. — Laws (1901), c. 156; Laws (1899), cc. 6, 8; Laws (1897), cc. 37, 70, 132, 160, 197; Laws (1895), cc. 87, 113, 123, 133, 139; Gen. Stat. (1888), §§ 3413 *et seq.*, 3427 *et seq.*, 3433 *et seq.*, 3454 *et seq.*, 3460 *et seq.*, 3501 *et seq.*, 3513 *et seq.*, 3523 *et seq.*, 3570 *et seq.*, 3581 *et seq.*, 3586 *et seq.*

Delaware. — Rev. Stat. (1893), p. 590, 13 Laws, c. 487; p. 592, 14 Laws, c. 416, 19 Laws, c. 186; p. 928, 15 Laws, c. 481; p. 939, c. 128, §§ 20, 22; p. 946, 16 Laws, c. 380; p. 987, 18 Laws, c. 685.

District of Columbia. — Comp. Stat. (1894), c. 15, § 102 *et seq.*; c. 16, §§ 125–128, 131–136.

Florida. — Laws (1901), c. 4988; Laws (1899), cc. 4702–4709; Laws (1895), cc. 4426, 4431; Laws (1893), cc. 4188, 4189, 4199–4205, 4207; Rev. Stat. (1892), §§ 1560, 1561, 2238 *et seq.*, 2263 *et seq.*, 2345, 2346, 2511 *et seq.*, 2685 *et seq.*

Georgia. — Laws (1899), p. 31, No. 187; p. 88, No. 253; Laws (1897), p. 38, No. 138; p. 116, No. 355; 2 Code (1895), §§ 2159 *et seq.*, 2219 *et seq.*, 2243 *et seq.*, 2247 *et seq.*, 2263 *et seq.*, 2298 *et seq.*, 2320 *et seq.*, 2326 *et seq.*, 2329 *et seq.*, 2334 *et seq.*; 3 Code (1895), §§ 145, 185, 420, 421, 512–531, 685, 690.

Idaho. — Laws (1901), pp. 87, 88, 214, 215; Laws (1899), pp. 12, 26, 113, 236, 237, 247, 521; Laws (1893), pp. 29, 68, 71, 75, 76, 77, 158, 159; Laws (1891), pp. 17, 32, 108, 124–127, 162; Rev. Stat. (1887), §§ 2580, 2583, 2663 *et seq.*, 2683, 2684, 6925, 7039, 7212, 7214, 7485.

Illinois. — Laws (1899), p. 332; Laws (1897), p. 204; Starr & C. Anno. Stat. (1896), cc. 113, 114.

Indiana. — Laws (1901), cc. 99, 159, 203; Laws (1899), cc. 14, 89, 212; Laws (1897), cc. 117, 157, 183; Horner's Stat. (1896), §§ 311, 1927, 1929, 1930, 1931, 1957, 1958, 1964, 2170–2177, 3885 *et seq.*

Iowa. — Code (1897), §§ 594, 769, 770, 964, 1563, 1616, 1995–1998, 2034 *et seq.*

Kansas. — Laws (1901), cc. 173, 174; Gen. Stat. (1897), c. 70; c. 100, §§ 111–114, 407–410.

Kentucky. — Laws (1900), cc. 3, 11; Laws (1896), c. 9; Stat. (1894), § 763 *et seq.*

Maine. — Laws (1901), cc. 153, 191; Stat. (Supp. 1895), c. 51; Rev. Stat. (1883), c. 51.

Maryland. — Laws (1896), cc. 99, 151; Laws (1892), cc. 17, 397, 540; Laws (1890), cc. 443, 498; Pub. Gen. Laws (1888), art. 23, § 158 *et seq.*, art. 27, §§ 150, 230, 231.

Massachusetts. — Stat. (1901), c. 371; Stat. (1900), cc. 154, 223, 318, 395; Stat. (1899), p. 575, c. 57; c. 252; Stat. (1898), c. 538; Stat. (1897), c. 264; Stat. (1896), c. 225; Stat. (1895), cc. 293, 362; Stat. (1894), c. 41; Stat. (1891), cc. 129, 204; Stat. (1890), cc. 173, 332; Stat. (1889), c. 371; Stat. (1888), cc. 176, 240; Stat. (1887), cc. 334, 362, 391; Stat. (1886), c. 120; Stat. (1885), cc. 194, 316; Stat. (1884), c. 5; Stat. (1883), cc. 32, 117, 125; Stat. (1882), cc. 54, 73, 135; Pub. Stat. (1882), c. 103, §§ 13–20, c. 112.

1. Notice to Nonresident Land-owner of Location of Route of Railroad.

Michigan. — Laws (1901), Nos. 80, 153; Laws (1899), Nos. 180, 260, 266; Comp. Laws (1897), §§ 3112, 3507, 3508, 5206 *et seq.*, 5500–5505, 5508, 5510, 5651–5653, 5699, 5707, 5708, 5791, 5800, 6223 *et seq.*, 11522, 11523, 11533, 11623, 11625, 11627, 11629–11632, 11634–11636, 11743.

Minnesota. — Laws (1901), c. 270, § 1; Laws (1899), c. 51, § 1; c. 99, § 1; c. 100, §§ 1–3; c. 170, § 1; c. 222, §§ 1, 2; c. 311, §§ 1, 2; c. 314, §§ 1–3; Laws (1895), cc. 60, 91, 149, § 11; cc. 150, 196, § 12; c. 271, Stat. (1894), §§ 379 *et seq.*, 403, 1670, 1678, 1680, 1866–1868, 2642–2766, 5202, 5877, 5899, 6608, 6635 *et seq.*, 6772, 6775, 6856, 6857, 6859, 6886–6789, 6885, 6891, 6892, 9895, 6941 *et seq.*, 6956–6958, 7257, 7653 *et seq.*, 7692 *et seq.*, 7730–7732, 7789.

Mississippi. — Laws (1900), c. 103; Laws (1898), c. 81; Laws (1896), cc. 61, 62; Anno. Code (1892), §§ 651, 1230, 1265–1280, 1291, 3546–3600, 4287, 4289, 4292–4295, 4298, 4306, 4307, 4313, 4320–4323.

Missouri. — Laws (1901), p. 100; Rev. Stat. (1899), §§ 1034 *et seq.*, 2864, 2867, 2873–2876, 3866, 4239 *et seq.*, 4251, 5222, 5231, 5508, 5854, 5855, 6084, 6448, 7679, 8455, 9554–9560.

Montana. — Civ. Code (1895), §§ 890–984; Pen. Code (1895), §§ 671–693, 720, 721, 851, 852, 922, 923, 980–1000, 1030, 1191, 1199.

Nebraska. — Laws (1901), c. 86; Comp. Stat. (1899), §§ 1747–1825, 4012 *et seq.*, 4612, 6798, 6918, 6919.

Nevada. — Laws (1901), c. 110, § 18; Comp. Laws (1900), §§ 971 *et seq.*, 4833, 4834, 4963, 5005, 5031–5035.

New Hampshire. — Pub. Stat. & Sess. L. (1901), cc. 155, 156, 157, 158, 159, 160, 161; Laws (1897), cc. 19, 51; Laws (1895), c. 27.

New Jersey. — Laws (1901), c. 20; Laws (1900), cc. 46, 123, 156; Laws (1899), cc. 102, 111; Laws (1898), cc. 11, 27, 66, 118, 150; Laws (1897), cc. 150, 162; Gen. Stat. (1895), pp. 2635–2719.

New Mexico. — Laws (1901), cc. 9, 15, 86; Laws (1899), c. 29; c. 33, § 13; cc. 53, 77; Comp. Laws (1897), §§ 241, 243, 1145–1159, 1761, 3804 *et seq.*

New York. — Heydecker's Gen. Laws & Rev. Stat. (1901), p. 1529, c. 21, § 10; p. 3250, c. 39; Laws (1899), c. 497; Laws (1898), c. 495; Laws (1897), c. 193; Laws (1895), cc. 700, 1027; Laws (1893), cc. 238, 239, 543, 544; Laws (1891), cc. 267, 360; Laws (1889), c. 38; Laws (1881), c. 452.

North Carolina. — Laws (1897), cc. 46, 418; Laws (1895), c. 88; Laws (1893), cc. 113, 214, § 16; cc. 331, 396, 495; Code (1883), §§ 1098, 1099, 1692, 1717, 2195, 2327.

North Dakota. — Laws (1901), cc. 130, 179, 195; Laws (1899), cc. 127–130; Laws (1897), cc. 115–118; Rev. Codes (1895), § 2944 *et seq.*

Ohio. — Laws (1900), pp. 25, 220, 231, 297, 345; Laws (1898), pp. 24, 154, 286, 334, 342; Bates' Anno. Stat. (1897), §§ 247*a*, 247*b*, 1692, 2143–2145, 2494, 2498, 2500*a*,–2500*c*, 3270 *et seq.*, 4732*d*, 6833, 6880*a*, 6880*b*, 6951, 6980*a*, 7093, 7094.

Oklahoma. — Laws (1901), c. 11, arts. 3, 4; Laws (1895), c. 24; Stat. (1893), §§ 67, 171, 449–452, 504, 511, 593, 595, 880, 974, 1002 *et seq.*, 2274–2276, 2466, 2473, 2474, 2668, 2671, 2909, 3946, 3943, 5606, 5608–5615, 5624.

Oregon. — Laws (1899), p. 188; Laws (1895), pp. 6, 125, 126, 127; Laws (1893), pp. 28, 85, 175; Hill's Anno. Laws (892), § 4002 *et seq.*

Pennsylvania. — Laws (1897), p. 126, § 6; Bright. Pur. Dig. (1894). p. 48, § 198 *et seq.*; p. 1780, § 1 *et seq.*

Rhode Island. — Laws (1900), cc. 741, 784; Laws (1899), c. 613; Laws (1897), c. 454; Gen. Laws (1896), c. 102; §§ 27, 28; c. 114, § 3; c. 177, § 16 *et seq.*; c. 187.

South Carolina. — Laws (1901), Nos. 405–410; Laws (1900), Nos. 217, 218; Laws (1899), No. 41; Laws (1898), Nos. 482–484, 510; Laws (1897), Nos. 245, 303, 307, 338; Laws (1896), Nos. 50–56; Rev. Stat. (1893), §§ 233–242, 554, 1526 *et seq.*, 1551, 1597 *et seq.*; Crim. Stat. (1893), §§ 179–181, 369–374; Code Civ. Proc. (1893), § 155.

South Dakota. — Laws (1901), cc. 128, 132, §§ 9, 13; Laws (1899), cc. 124, 125; Laws (1897), c. 110; Laws (1895), cc. 68, 156, 157; Laws (1893), cc. 90, 109, § 26; cc. 136, 137, 173; Dak. Comp. Laws (1887), §§ 137 *et seq.*, 1571–1576, 2311, 2312, 2900, 2972 *et seq.*, 3024, 5471, 5500, 5501, 6666, 6873, 6874.

Tennessee. — Laws (1899), cc. 100, 211, 356, 399; Code (1896), §§ 1488–1599, 2412 *et seq.*, 3060–3079, 3570–3589, 6020, 6051–6055, 6479–6495.

Texas. — Laws (1901), cc. 27, 89, 100; Laws (1899), cc. 48, 50, 118; 125; Rev. Stat. (1895), arts. 4350–4584.

Form No. 16953.[1]

(Iowa Code (1897), § 2002.)

To (*Here name each person whose land is to be taken or affectea*)[2] and all other persons having any interest in or owning any of the following real estate: (*Here describe the land by its congressional numbers, in tracts not exceeding one-sixteenth of a section, or, if the land consists of a lot in a town or city, by the number of the lot and block*).

You are hereby notified that the *Midland Railroad Company* has located its railway over the above-described real estate and desires the right of way over the same, to consist of a strip or belt of land *one hundred* feet in width, through the center of which the center line of said railway will run, together with such other land as may be necessary for bermes, waste-banks and borrowing-pits, and for wood and water stations (*or desires the same for any other purpose for which property is authorized by law to be taken*), and unless you proceed to have the damages as to the same appraised on or before the *first* day of *January*, A. D. 19*02* (*which time must be at least four weeks after publication of notice*), said company will proceed to have the same appraised on the *first* day of *February*, A. D. 19*02* (*which must be at least eight weeks after the first publication of the notice*), at which time you can appear before the appraisers that may be selected.

Dated *December 1*, 19*01*.

By *Jeremiah Mason*, Attorney (or *Nathan Hale, Agent*)
for the *Midland Railroad Company*.

Utah. — Laws (1901), cc. 2, 3, 26, 77, 86, 124, §§ 29, 32, 34, 35; Laws (1899), cc. 1, 17, 27; Rev. Stat. (1898), §§ 68, 69, 314, 315, 431 *et seq.*, 1416, 1417, 2513, 2536, 2559, 3588–3608, 4136, 4291–4293, 4341, 4342, 4423, 4471, 4581, 4638, 4650.

Vermont. — Laws (1898), No. 69; Stat. (1894), §§ 1073, 1114, 1140, 1146, 3743 *et seq.*, 3977–3997, 4996, 4997, 5042.

Virginia. — Laws (1901), c. 169; Laws (1900), cc. 545, 551, 710, 745, 880; Code (Supp. 1898), §§ 1073*a*, 1096*a*, 1189, 1202, 1215*a*, 1215*b*, 1220, 1230, 1234, 1243, 1258, 1259, 1264*a*, 1297*a*, 1599*a*, 2462, 2475, 2485, 2486, 2947*a*, 3725, 3729*a*, 4136–4138; Code (1887), §§ 1095, 1096, 1185 *et seq.*, 1298–1313, 2462, 2475, 2485, 2486, 3725–3728, 3801–3803, 3858, 4136–4141.

Washington. — Laws (1901), c. 144; Laws (1899), cc. 15, 23, 35; c. 46, §§ 1, 3; Ballinger's Anno. Codes & Stat. (1897), §§ 4303 *et seq.*, 5647, 7036, 7147, 7295.

West Virginia. — Code (1899), c. 52, § 2 *et seq.*, c. 54, §§ 31 *et seq.*, 82*a* *et seq.*

Wisconsin. — Laws (1901), cc. 179, 465; Laws (1899), cc. 306, 307, 357; Stat. (1898), §§ 1792 *et seq.*, 4342, 4358, 4386, 4392, 4393, 4397*b*, 4440*a*, 4598*a*.

Wyoming. — Laws (1899), c. 34; Laws (1891), cc. 34, 39; Laws (1888), c. 48; Rev. Stat. (1887), §§ 548, 549 *et seq.*, 919, 948, 1942 *et seq.*, 2416, 2431, 2813, 2819, 3778–3780, 3839–3842, 4195–4198.

1. *Iowa.* — If the owner of land to be taken for railroad purposes is a non-resident of the state, no demand of the land for a right of way or other purpose shall be necessary, except the publication of the notice, which may be in the form set out in the text. Code (1897), § 2002.

2. The person whose land has been taken or affected must be named in the notice. It is not sufficient that the notice is directed to all other persons who have an interest in the property described. Birge *v.* Chicago, etc., R. Co., 65 Iowa 440.

Notice shall be published in some newspaper in the county, if there is one; if not, then in a newspaper published in the nearest county to which the proposed railway is to be run, for at least eight successive weeks prior to the day fixed for the appraisement, at the instance of the railroad company. Iowa Code (1897), § 2003.

2. Change of Route of Railroad.

a. Petition.[1]

Form No. 16954.[2]

(*Title of court as in Form No. 5926.*)

In the matter of the application of *John Doe* for the appointment of commissioners to examine the route of the *Midland Railroad Company*.

To the Hon. *John Marshall*, a Justice of the *Supreme* Court of the State of *New York*, in the *Second* Judicial District:[3]

The petition of *John Doe*, of *Huntington*, in the county of *Suffolk* and state of *New York*, respectfully shows unto your honor:

That he is the owner (or *occupant* or *owner and occupant*) of a certain piece or parcel of land, situated in the town of *Huntington*, in the county of *Suffolk* and state of *New York*, and particularly described as follows, to wit: (*describing the land*).

That the *Midland Railroad Company*, on or about the *tenth* day of *June*, 1899, gave written notice to your petitioner that said *Midland Railroad Company*, on the *fifth* day of *June*, 1899, had filed in the clerk's office of the county of *Suffolk*, in the state of *New York*, a map and profile of the route of the railroad of said railroad company, and further notifying your petitioner that said route passes over the land of your petitioner above described; that the route of said railroad, as proposed by said *Midland Railroad Company*, is set forth in the map and profile hereto annexed, marked "Exhibit *A*."

That the aforesaid lands have not been purchased by or given to said *Midland Railroad Company*.

That your petitioner is aggrieved by the proposed location of said route as set forth in said map and profile, and states his objections to said route and location as follows: (*stating objections of petitioner*).[4]

That the alteration in the route of said railroad company proposed by your petitioner[5] is fully set forth in a survey, map and profile hereto annexed, marked "Exhibit *B*."

Your petitioner therefore prays that your honor will appoint *three* disinterested persons, *one* of whom shall be a practical civil engineer,

1. **Requisites of Petition, Generally.**— For the formal parts of a petition in a particular jurisdiction see the title PETITIONS, vol. 13, p. 887.

Who may Apply. — Any person aggrieved may apply to a justice of the supreme court for the appointment of commissioners. Norton *v.* Wallkill Valley R. Co., 61 Barb. (N. Y.) 476; People *v.* Tubbs, 59 Barb. (N. Y.) 401.

See also list of statutes cited *supra*, note 1, p. 412.

2. *New York.* — Heydecker's Gen. L. & Rev. Stat. (1901), p. 3255, c. 39, § 6.

See also list of statutes cited *supra*, note 1, p. 412.

3. **To Whom Addressed.** — Application shall be to a justice of the supreme court in the judicial district where the land is situated. Heydecker's Gen. L. & Rev. Stat. N. Y. (1901), p. 3255, c. 39, § 6.

See also list of statutes cited *supra*, note 1, p. 412.

4. **Objections to route** designated shall be stated. Heydecker's Gen. L. & Rev. Stat. N. Y. (1901), p. 3255, c. 39, § 6; People *v.* Tubbs, 59 Barb. (N. Y.) 401.

See also list of statutes cited *supra*, note 1, p. 412.

5. **Proposed alteration in route** must be designated. Heydecker's Gen. L. & Rev. Stat. N. Y. (1901), p. 3255, c. 39, § 6.

See also list of statutes cited *supra*, note 1, p. 412.

as commissioners to examine the route proposed by the aforesaid *Midland Railroad Company* and the route to which it is proposed by your petitioner to alter the same; to adopt the proposed alteration, if found to be consistent with the just rights of all parties and the public, including the owners or occupants of lands upon the proposed alteration, and that your honor will grant such other and further relief as may be proper.

Dated this *seventeenth* day of *June*, 1899.

John Doe, Petitioner.

(*Verification.*) [1]

(*Attach surveys, maps and profiles.*)[2]

b. Notice of Petition.[3]

Form No. 16955.[4]

(*Title of court and proceeding as in Form No. 16954.*)

Please take notice that upon the petition, survey, map and profile, copies of which are herewith upon you served, an application will be made by the undersigned to the Hon. *John Marshall*, a justice of the *Supreme* Court of the state of *New York*, in the *second* judicial district, at the chambers of said justice in the court-house in the village of *Riverhead*, in said county of *Suffolk*, on the *twenty-eighth* day of *June*, 1899, at *ten* o'clock in the *fore*noon, or as soon thereafter as counsel can be heard, for the appointment of *three* commissioners to examine the route proposed by the said *Midland Railroad Company*, as set forth in the survey, map and profile, copies of which are herewith served upon you, and the route to which it is proposed to alter the same by this petitioner, as set forth in the survey, map and profile, copies of which are herewith served upon you, and for such further order as may be proper.

Dated this *seventeenth* day of *June*, 1899.

Jeremiah Mason, Attorney for Petitioner,
P. O. and office address, No. *10 Main* Street,
Huntington, N. Y.

To *Midland Railroad Company*,
Richard Roe,
William West and
Samuel Short.

c. Order Appointing Commissioners.[5]

1. Verification. — Petition shall be duly verified. Heydecker's Gen. L. & Rev. Stat. N. Y. (1901), p. 3255, c. 39, § 6.

See also list of statutes cited *supra*, note 1, p. 412.

For form of verification in a particular jurisdiction see the title VERIFICATIONS.

2. Surveys, maps and profiles of the route designated by the corporation and of the proposed alteration must be filed with the petition. Heydecker's Gen. L. & Rev. Stat. (N. Y.), p. 3255, c. 39, § 6.

See also list of statutes cited *supra*, note 1, p. 412.

3. For the formal parts of a notice in a particular jurisdiction see the title NOTICES, vol. 13, p. 212.

4. *New York.* — Heydecker's Gen. L. & Rev. Stat. (1901), p. 3255, c. 39, § 6.

See also list of statutes cited *supra*, note 1, p. 412.

5. For the formal parts of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

Form No. 16956.[1]

(*Title of court and cause as in Form No. 16954.*)

Upon reading and filing the petition of *John Doe*, dated the *tenth* day of *June*, 1899, and duly verified, praying for the appointment of commissioners, together with notice of this application and satisfactory proof of service of said notice of application and of a copy of said petition upon the said *Midland Railroad Company* and upon *Richard Roe*, *William West* and *Samuel Short*, owners or occupants of land affected by the proposed alteration of the route of said railroad, and upon hearing *Jeremiah Mason*, attorney for said *John Doe*, in argument in support of said petition, and (*stating names of attorneys appearing*) in opposition, now, on motion of *Jeremiah Mason*, attorney for petitioner as aforesaid, it is

Ordered that *Nathan Hale*, a practical civil engineer, and *Francis Fern* and *Leonard Treat*, all of the village of *Riverhead*, in said county of *Suffolk*, *three* disinterested persons, be and they hereby are appointed commissioners to examine the route of the *Midland Railroad Company* proposed by said corporation and the route to which it is proposed by said petition to alter the same, and after hearing the parties, to affirm the route originally designated, or adopt the proposed alteration thereof as may be consistent with the just rights of all parties and the public, including the owners or occupants of land upon the proposed alteration, and to make and certify their written determination within *thirty* days from date hereof, as required by law.

Dated this *thirtieth* day of *June*, 1899.

John Marshall, Justice of the *Supreme* Court.

d. Oath of Commissioners.

Form No. 16957.

(*Title of court and proceeding as in Form No. 16954.*)

State of *New York*, } ss.
County of *Suffolk*. }

The undersigned, duly appointed by order of the Hon. *John Marshall*, a justice of the *Supreme* Court for the state of *New York*, made on the *thirtieth* day of *June*, 1899, to examine the proposed route of the *Midland Railroad Company* and the alteration of said route as proposed by the petitioner in the above entitled proceeding, do solemnly swear that we will support the constitution of the United States and the constitution of the State of *New York*, and that we will faithfully perform the duties of such commissioners and of the said office, according to the best of our understanding and ability.

(*Signatures and jurat as in Form No. 8805.*)

e. Report of Commissioners.

1. *New York.* — Heydecker's Gen. L. & Rev. Stat. (1901), p. 3255, c. 39, § 6. See also list of statutes cited *supra*, note 1, p. 412.

Form No. 16958.[1]

(*Title of court and proceeding as in Form No. 16954.*)

The undersigned duly appointed commissioners, by an order made in the above entitled proceeding by Hon. *John Marshall*, a justice of the *Supreme* Court of the state of *New York*, in the *second* judicial district, on the *thirtieth* day of *June*, 1899, hereby make and certify our written determination as follows, to wit, that in obedience to the terms of the aforesaid order, and of the statute, we examined the route of the *Midland Railroad Company* as proposed by said company and the alterations of said route as proposed by the petitioner in this proceeding, and having heard the parties in interest, we do hereby adopt the proposed alteration of said route as set out in the petition of said petitioner, and in the survey, map and profile annexed to the petition in this proceeding, marked "Exhibit *B*," (or *we do hereby affirm the route originally designated by the said railroad company*,) and we do hereby determine that the said route shall be and hereby is located accordingly, and that said route is consistent with the just rights of all the parties and the public.

The testimony taken before us in this proceeding is hereby annexed, marked "Exhibit *A*."

All of which is respectfully submitted.

Dated this *twentieth* day of *July*, 1899.

Nathan Hale,
Francis Fern, } Commissioners.
Leonard Treat,

f. Notice of Appeal from Report of Commissioners.[2]

Form No. 16959.[3]

(*Title of court and proceeding as in Form No. 16954.*)

Please take notice that *John Doe* hereby appeals to the *Appellate* Division of the *Supreme* Court of the state of *New York*, to be held in and for the *second* judicial department, from the decision and determination of the commissioners made in the above entitled proceeding and filed on the *twentieth* day of *July*, 1899, in the office of the clerk of the county of *Suffolk*.

Dated the *twenty-fifth* day of *July*, 1899.

Jeremiah Mason, Attorney for Appellant,
P. O. and office address, No. *10 Main* Street,
Huntington, *Suffolk* County, *New York*.

To *Oliver Ellsworth*, Esq., Attorney for the *Midland Railroad Company*, and

To *Calvin Clark*, Clerk of the County of *Suffolk*.

1. *New York*. — Heydecker's Gen. L. & Rev. Stat. (1901), p. 3255, c. 39, § 6. See also list of statutes cited *supra*, note 1, p. 412.

2. **For the formal parts** of a notice in a particular jurisdiction see the title NOTICES, vol. 13, p. 212.

3. *New York*. — Within twenty days after the filing of the determination of the commissioners, any person may, by written notice to the other, appeal to the general term (appellate division) of the supreme court from the decision of the commissioners, which appeal shall be heard and decided at the next term held in the department in which

g. Judgment on Appeal.[1]

Form No. 16960.[2]

At a term of the *Appellate* Division of the *Supreme* Court held in and for the *Second* Judicial Department, in the borough of *Brooklyn*, in the city of *New York*, on the *sixth* day of *April*, 1898:

Present: Hon. *John Mitchell*, Presiding justice; Hon. *John Hancock*, Hon. *John Adams*, Hon. *George Bartlett*, Hon. *Charles Elliott*, Justices.

In the matter of the application of *John Doe* for the appointment of commissioners to examine the route of the *Midland Railroad Company*.

The appeal of *John Doe*, the petitioner in the above entitled proceeding, from the determination of the commissioners appointed by an order of the Hon. *John Marshall*, a justice of the *Supreme* Court in the *second* judicial department, made and dated the *thirtieth* day of *June*, 1899, which said determination of said commissioners was, on the *twentieth* day of *July*, 1899, duly filed in the office of the clerk of the county of *Suffolk*, having been heard at this term, and *Jeremiah Mason*, attorney for the above named petitioner, having been heard in argument in support of said motion, and (*stating names of attorneys and for whom appearing*) in opposition, now, on motion of *Jeremiah Mason*, attorney for said petitioner, it is

Ordered, that the determination of the aforesaid commissioners be and the same is hereby reversed, and that the route of the road proposed by the said *John Doe*, petitioner, be and the same is hereby adopted (or *that the determination of the aforesaid commissioners be and the same is hereby affirmed, and the route of the said road as proposed by the Midland Railroad Company be and the same is hereby affirmed*).

It is further ordered, that the said *Midland Railroad Company* pay to the said *John Doe* the sum of *two hundred* dollars, compensation and expenses of the said commissioners, and *fifty* dollars, the costs of this appeal and disbursements for printing.

Enter: *John Mitchell*, P. J.

II. CROSSINGS AND INTERSECTIONS.

1. Petition or Complaint.[3]

a. To Determine Manner and Condition of Crossing of Highway by Railroad.

the lands of the petitioner or any of them are situated. Heydecker's Gen. L. & Rev. Stat. N. Y. (1901), p. 3255, c. 39, § 6.

See also list of statutes cited *supra*, note 1, p. 412.

1. For the formal parts of a judgment in a particular jurisdiction see the title JUDGMENTS AND DECREES, vol. 10, p. 645.

2. *New York.* — On the hearing of the appeal, the court may affirm the route proposed by the corporation or may adopt that proposed by the petitioner. Heydecker's Gen. L. & Rev. Stat. (1901), p. 3255, c. 39, § 6.

See also list of statutes cited *supra*, note 1, p. 412.

3. For the formal parts of a petition or complaint in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; PETITIONS, vol. 13, p. 887.

Form No. 16961.[1]

(Precedent in *In re* Railroad Com'rs, 87 Me. 247.)[2]

[(*Address as in Form No. 16963.*)][3]

The *Canadian Pacific Railway Company*, a corporation duly established by law, and operating and maintaining a line of railway across said State from *Mattawamkeag* to the western boundary of the State, respectfully represents that the county commissioners of *Piscataquis* county have laid out a highway in township *four* (*4*), range *eight* (*8*), north of *Waldo Patent*, an unincorporated town in said *Piscataquis* county, which crosses said company's railway at grade, said highway having been located and established by metes and bounds as follows, viz: (*description of highway*). And said company further represents that said highway is laid out through and across the land and right of way of said company used for station purposes at its station called *Lakeview* in said township No. *4*, range *8*, as it is so near the switch controlling the union of the main line of railway with the principal siding there that said switch may not be safely used; and so said company may not be able to set off or take on cars there, or cross trains, and thus be unable to do its business at said station. From the center of the head block of the switch to the southerly line of said highway, the distance is only *one* foot *ten and one-half* inches and the throw of the swing rail connected with said switch is *five* inches, so that a crossing there could not safely be planked if said switch is to be maintained.

Wherefore, said company requests your honorable board to give notice and hearing, and determine whether said highway shall be permitted to cross at grade said company's railway, and the land and right of way of said company used for station purposes as aforesaid or not; and if it shall be permitted to cross, to determine the manner and condition of crossing, and how the expense of building and maintaining so much of said highway as is within the limits of said company's railway location shall be borne.

November 10th, 1893.

[(*Signature of attorney.*)][3]

b. To Change Highway.

(1) Where Railway Crosses Highway.

Form No. 16962.[4]

Commonwealth of *Massachusetts*.

Norfolk, ss.

To the Honorable the Justices of the *Superior* Court in and for the County of *Norfolk*:

1. *Maine.* — Rev. Stat. (1883), c. 18, § 27; Laws (1889), p. 248, c. 282.
See also list of statutes cited *supra*, note 1, p. 412.

2. It was held that the railroad commissioners should have taken jurisdiction.

3. The matter to be supplied within [ ] will not be found in the reported case.

4. *Massachusetts.* — Stat. (1890), c. 428.
See also list of statutes cited *supra*, note 1, p. 412.
This petition is copied from the original papers in the case.

Respectfully represent the selectmen of the town of *Milton*, in said county, that the public way in said town and in *Boston*, in the county of *Suffolk*, known as *Central* Avenue, and the railroad of the *Old Colony Railroad Company*, lessor, and of the *New York, New Haven & Hartford Railroad Company*, lessee, cross each other at grade in the space adjoining and easterly of the *Central Avenue* station of said railroad companies, said crossing being in said *Milton* and *Boston*, and your petitioners are of opinion that it is necessary for the security and convenience of the public that an alteration should be made in said crossing, in the bridges thereof, in the location of said railroad or public way, or in the grades thereon, so as to avoid a crossing at grade, or that such crossing should be discontinued at grade, with or without building a new way in substitution therefor.

Wherefore they pray that after such notice as the court shall deem desirable a commission be appointed under chapter 428 of the Acts of the year 1890, and any acts in amendment thereof or in addition thereto, with the powers and duties as provided in said act.

J. Albert Simpson,
J. Walter Bradlee,
Jacob A. Turner,
Selectmen of the Town of *Milton.*

(2) Where Railway Crosses Street Railroad.

Form No. 16963.[1]

(Precedent in Maine Cent. R. Co. *v.* Bangor, etc., R. Co., 89 Me. 556.)[2]

To the Honorable Railroad Commissioners of the State of *Maine*:

Respectfully represents the *Maine Central Railroad Company*, a corporation exisiting under the laws of said state, and possessing and operating a line of railroad from *Portland* to *Vanceboro*, passing through the town of *Veazie* in the County of *Penobscot*, that its railroad is crossed in said town of *Veazie* by the electric railway of the *Bangor, Orono & Old Town Railway Company*, the location of the crossing in question being on the hill, near the top of which hill is a church, and the crossing being between said church and the watering-trough, said crossing being the *one* of the *two* crossings of this company's railroad with said electric railway which is nearer to *Bangor*; that the existing condition, construction and manner of such crossing are dangerous to the public safety, including travelers upon this company's railroad, on said electric railway, and in the highway along which said electric railway extends.

Whereupon this company prays and applies to your Honorable Board for a change in the existing condition, construction and manner of such crossing, and that your Honorable Board will determine what changes are necessary, and how such crossing shall be con-

1. *Maine.* — Rev. Stat. (1883), c. 18, § 27; Laws (1889), p. 248, c. 282, § 3; Laws (1895), c. 72. See also list of statutes cited *supra*, note 1, p. 412.

2. It was held that this petition was according to law.

structed and maintained, and how the expense thereof shall be borne.

And said *Maine Central Railroad Company* further represents that said electric railway is in and constructed along the main highway leading from *Bangor* to *Old Town* through said town of *Veazie*, and that to facilitate said crossing the course of said highway near the place of such crossing should be altered so that this company's railroad may pass under the same, and this company respectfully applies to your Honorable Board to alter the course of such highway so as to facilitate such crossing, and for such purpose to take such land as may be necessary, and to award damages therefor in accordance with the provisions of Sect. 3 of Chap. 282 of the Public Laws of 1889, and to apportion the expense of such alteration as your Honorable Board may determine in accordance with the provisions of law. And as in duty bound will ever pray.

July 24th, 1895.

Maine Central Railroad Company,
by *C. F. Woodward*, its Attorney.

c. To Compel Railroad to Construct Farm Crossing and for Damages.

Form No. 16964.

(Conn. Prac. Act, p. 166, No. 294.)

(*Commencement as in Form No. 5912.*)

1. The defendant before *March 1st*, 1878, had located its railroad in part upon the farm of the plaintiff, on which he lives, in *Berlin*, and on said day he agreed with it, by a writing, signed by both parties, to sell and convey to it the right of way across said farm, for its railroad, for $200, provided that, in case the construction of said railroad should require a fill across a certain meadow on said farm, then a farm crossing should be made and left, either over said embankment, or through the same and under the tracks.

2. On *April 10th*, 1878, the plaintiff received from the defendant $200, and executed and delivered to it a deed of said right of way, containing no reference to any agreement as to a farm crossing, which deed is recorded in *Berlin* land records, vol. 5, page 6.

3. Before *July 1st*, 1878, the defendant constructed its railroad across said farm, and made a fill across said meadow, *fifteen* feet high, but left no farm crossing either over or through the embankment thus constructed.

4. The plaintiff, on said day, requested the defendant to make or leave such a crossing, but the defendant, through *John Doe*, its Superintendent, refused so to do.

5. For want of such a crossing, the plaintiff has, ever since said day, been forced to drive his cattle daily, in going from his barn to the main part of his farm, around the side of said valley, and a *hundred* rods out of the direct and accustomed way, whereby he has been damaged to the amount of $100.

6. Unless a crossing is constructed, as agreed, the plaintiff's farm cannot be conveniently used as such, and will be irreparably injured.

The plaintiff claims:

1. A decree for the immediate construction of a proper farm crossing, as agreed.

2. $*100* damages.

(*Conclusion as in Form No. 5912.*)

2. Order for Notice of Hearing on Petition to Change Crossing.[1]

Form No. 16965.[2]

Commonwealth of *Massachusetts.*

Norfolk, ss. *Superior* Court.

Upon the foregoing petition, it is ordered that the petitioners give notice to the commonwealth of *Massachusetts*, the city of *Boston*, the *Old Colony Railroad Company*, the *New York, New Haven & Hartford Railroad Company*, and to all other parties interested, to appear before the justices of our said *Superior* Court to be holden at *Dedham*, within and for said county of *Norfolk*, on the *first Monday* of *December next*, by causing an attested copy of said petition and of this order thereon, to be fully served upon the attorney general of the commonwealth and upon the said city of *Boston*, the *Old Colony Railroad Company* and the *New York, New Haven & Hartford Railroad Company thirty* days at least before the said *first Monday* of *December next*, and by causing a like notice to be published once a week for *three* successive weeks in the "*Milton News*," a newspaper published in *Milton*, in our county of *Norfolk*, and the "*Boston Daily Advertiser*," a newspaper published in *Boston*, in our county of *Suffolk*, the last publication to be *fourteen* days at least before the said *first Monday* of *December next*, that all persons interested may then and there appear and show cause, if any they have, why the prayer of said petition should not be granted.

By the court, *Louis A. Cooke*, Clerk.

3. Report of Railroad Commissioners on Petition to Change Crossing.

Form No. 16966.[3]

(Precedent in Maine Cent. R. Co. *v.* Bangor, etc., R. Co., 89 Me. 557.)[4]

[To the Honorable The *Supreme Judicial* Court within and for the County of *Penobscot*.

In re Petition of the *Maine Central Railroad.*][5]

1. **For the formal parts** of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

2. *Massachusetts.* — Stat. (1890), c. 428. See also list of statutes cited *supra*, note 1, p. 412.

This form is copied from the original papers in the case.

3. *Maine.* — Rev. Stat. (1883), c. 18, § 27; Laws (1889), p. 248, c. 282, § 3; Laws (1895), c. 72. See also list of statutes cited *supra*, note 1, p. 412.

4. It was held that this report was according to law, except that the commissioners should have assessed the damages for the land taken. This defect has been remedied in the form set forth.

5. The matter enclosed by [ ] will not be found in the reported case.

The provisions of c. 282 of the statute of 1889 and c. 72 of the statute of 1895 seem to be embraced in this petition. Section 3 of c. 282 of the statute of 1889 is as follows: "Highways and other ways may be raised or lowered for the purpose of permitting a railroad to pass over or under the same, or the course of the same may be altered so as to facilitate such crossing or to permit the railroad to pass at the side thereof, on application to the railroad commissioners and proceeding as provided by Sec. 27 of Chap. 180 as amended by this act, and for such purpose land may be taken and damages awarded as provided for laying out highways and other ways."

It is very clear that, under this statute, the highway may be raised for the purpose of permitting the *Maine Central* Railroad to pass under the same, and the course of said highway may be changed to facilitate such crossing.

The question which naturally arises, however, is, how shall parties proceed to have this accomplished? Can any proceeding be had which is not first instituted by the town authorities in laying out or changing said highway? or can the board of Railroad Commissioners order the change to be made upon petition of the railroad company, as in this case?

The statute authorizes this change to be made by proceeding as provided by Sec. 27, Chap. 180 of the Revised Statutes as amended. That statute reads as follows: — "Town ways and highways may be laid out across, over or under any railroad track, in the same manner as other town ways and highways, except that before such way shall be constructed the railroad commissioners, on application of the municipal officers of the city or town wherein such way is located, or of the parties owning or operating the railroad, shall, upon notice and hearing, determine whether the way shall be permitted to cross such track at grade therewith or not, and the manner and condition of crossing the same, and the expense of building and maintaining so much thereof as is within the limits of such railroad shall be borne by such railroad company, or by the city or town in which such way is located, or shall be apportioned between such company and city or town as may be determined by said railroad commissioners. Said commissioners shall make a report in writing of their decision thereupon to the *Supreme Judicial* Court at its next succeeding term to be held in the county wherein such crossing is situated, and shall also make a report of such rulings, proofs and proceedings as either party desires, or as they deem necessary for a full understanding of the case.

The presiding justice at such term of court may accept, reject or recommit said report, or send the case to a new commission, or make such other order or decree as law and justice may require, and to his ruling or order either party may file exceptions.

The final adjudication in such cases shall be recorded as provided in section thirty of this chapter. Costs may be taxed and allowed to either party at the discretion of the court."

The board of Railroad Commissioners in this state has acted under a petition similar to the one in this case, and ordered the change to be made, and this we think is the general understanding of the provisions of this statute.

We do not feel sure that this is the right interpretation of the statute, but we shall *pro forma* assume jurisdiction of the matter upon this petition.

The *Bangor, Orono and Old Town Railway Co.* has, however, located its railroad along this highway and across the track of the *Maine Central Railroad Co.* under its charter obtained from the Legislature by chapter 116 of the Private and Special Laws of 1891. By chapter 72 of the statute of 1895, § 1, it is provided that "the board of Railroad Commissioners shall have authority to determine the manner and conditions of one railroad of any kind crossing another. Any corporation or party operating such railroad may apply to said board for the change in the then existing condition, construction and manner of any such crossing. Such application shall be in writing, giving the location of the crossing, and said board shall give a hearing thereon, after they have ordered such notice to be given by the applicant as to time, place and purpose of said hearing, as said board shall deem proper. Said board shall determine at such hearing what charges are necessary and how such crossing shall be constructed and maintained. The expense thereof shall be borne as the railroad commissioners may order."

The *Bangor, Orono & Old Town Railway Company* deny the authority of the board of railroad commissioners to order their railroad to cross the track of the *Maine Central Railroad Company* by any overhead bridge, and deny the authority of the board to apportion any part of the expense of said change upon said latter company.

If we have the authority to change the highway, under chapter 282 of the statute of 1889, § 3, it would seem to follow that we had the right to change also the location of the electric railroad which runs along said highway.

We find that public convenience and necessity, and the public safety, require that the said highway be raised so as to permit the *Maine Central* Railroad to pass under the same, and that the crossing of said highway be altered to facilitate such crossing. And we find, as a matter of fact, that this change of grade of said highway, and of the crossing of the *Bangor, Orono & Old Town* Railway with the *Maine Central* Railroad is necessary on account of the location of the *Bangor, Orono & Old Town* Railway along said highway.

We therefore determine that the said highway shall be changed as follows: [(*specifying change*).][1]

We also determine that the existing conditions, construction and manner of crossing of the *Bangor, Orono & Old Town* Railway with the *Maine Central* Railroad shall be changed so that said *Bangor, Orono & Old Town* Railway shall cross said *Maine Central* Railroad by the overhead bridge along the said highway when changed as herein specified, and along the said overhead bridge in said highway on the southerly side of said bridge. * * *

All of the above work for the change of said highway outside of the limits of the said *Maine Central* Railroad shall be done by the town of *Veazie.* And the land described in the aforesaid change of

1. The matter to be supplied within [ ] will not be found in the reported case.

location may be taken for the above named purposes, [and we do hereby award the damages for the lands so taken as follows: (*stating damages awarded*).]

The overhead bridge and abutments and such other portion of the said changed highway as is within the limits of the *Maine Central* Railroad shall be built by the *Maine Central Railroad Company*.

In consideration of the advantages which we believe will be derived by the *Bangor, Orono and Old Town Railroad Company*, by the change in the existing condition, construction and manner of crossing of the said *Bangor, Orono and Old Town* Railway with the *Maine Central* Railroad, we apportion the expense as follows: [(*stating portion of expense to be borne by each company*),] and decide that the said *Bangor, Orono and Old Town Railway Company* shall bear *two-fifths* of the whole expense of building the bridge and abutments and that portion of said way within the limits of the said *Maine Central* Railroad.

[*Signatures of commissioners.*][1]

4. Decree Granting Railroad an Easement to Cross Right of Way and Tracks of Another Railroad.[2]

Form No. 16967.[3]

(Precedent in Arkansas, etc., R. Co. *v.* St. Louis, etc., R. Co., 103 Fed. Rep. 748.)

[At a *stated* term of the *Circuit* Court *of the United States of America* for the *Western* District of *Arkansas*, in the *Eighth* Circuit, held at *the United States court-room* in the *United States Post-office building* in the city of *Fort Smith*, on *Monday*, the *sixth* day of *August*, in the year of our Lord one thousand *nine hundred*:

Present, the Hon. *John H. Rogers, District* Judge.

Arkansas & Oklahoma Railroad Company
against
St. Louis & San Francisco Railroad Company.][4]

On this day come on to be determined the above-entitled cause heretofore submitted, after argument by the respective attorneys of the parties, on the pleadings, exhibits, the depositions of witnesses reduced to writing and filed, maps, plats, profiles, written stipulations, and other proof, and the court, being now fully advised, doth make the following special findings of fact:

That the *Arkansas & Oklahoma Railroad Company* is a corporation duly organized under the general statutes of the state of *Arkansas* for the incorporation of railroads, and the *St. Louis & San Francisco Railroad Company* is also a corporation organized under the laws of the state of *Missouri*, and at the institution of this suit, and for many

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **For the formal parts** of a decree or judgment in a particular jurisdiction see the title JUDGMENTS AND DECREES, vol. 10, p. 645.

3. *Arkansas.* — Sand. & H. Dig. (1894), §§ 2270, 2781.
See also list of statutes cited *supra*, note 1, p. 412.

4. The matter enclosed by [ ] will not be found in the reported case.

years prior thereto, owned and operated a railroad running north and south through the eastern part of *Benton* county, *Arkansas*, and through the town of *Rogers*, in said county, which is a town of about *twenty-five hundred* inhabitants. That for many years prior to the institution of this suit an independent railroad line, about *six* miles in length, known as the "*Bentonville* Railroad," was operated between the towns of *Rogers* and *Bentonville*, in the same county, and by an arrangement between the *Bentonville* Railroad and the defendant company the former road intersected the latter about *three-quarters* of a mile north of the depot of the defendant company at the town of *Rogers*, and used the track of the defendant company from the point of intersection to said depot for its terminal facilities. On the *1st* day of *April* the plaintiff company, the *Arkansas & Oklahoma Railroad Company*, filed its articles of incorporation in the office of the secretary of state of *Arkansas*, said incorporation having been had under section 6148 of Sandels & Hill's Digest of the state of Arkansas, and in conformity thereto. That said railroad company was incorported, as stated in its charter, "for the purpose of constructing, acquiring, purchasing, owning, equipping and operating a railroad from a point at or near the southeast corner of section *thirty-one*, in township *twenty* north, range *29* west, in *Benton* county, *Arkansas*; thence in a westerly direction across the track of the *St. Louis & San Francisco* Railroad, and by the way of the town of *Bentonville*, in said county of *Benton*, and continuing in a westerly direction across the track of the *Kansas City, Pittsburg & Gulf* Railroad to the southeast corner of section *thirty-five*, in township *twenty* north, range *thirty-three* west, in said county of *Benton*," making the entire line of said proposed railroad between *twenty-four* and *twenty-five* miles in length. Before this suit was begun, the *Bentonville* Railroad was absorbed by the *Arkansas & Oklahoma Railroad Company*, and after its absorption, and up to the commencement of this suit, the *Arkansas & Oklahoma Railroad Company*, by an arrangement with the defendant company similar to that which had previously existed between the *Bentonville Railroad Company* and the defendant company, continued the use of the defendant company's tracks at *Rogers* for terminal purposes. That the defendant railroad company originally owned, laid off, and platted the town of *Rogers*, reserving certain properties for railroad purposes, including the right of way which plaintiff company now seeks to cross. That some time afterwards it acquired title to the *eighteen*-acre tract described in plaintiff's complaint by donation from the people of *Rogers*, in order to secure a roundhouse and the end of a division at that place. That a roundhouse was constructed on said *eighteen*-acre tract, and the end of a division also maintained at *Rogers* until 1*886* or 1*887*, when the end of the division was removed to *Chester*, and said roundhouse and *eighteen*-acre tract abandoned for railroad purposes. The roundhouse was left standing, and a single track running thereto was also left. All other tracks were taken up. That since the removal of the end of the division to *Chester* the roundhouse and the *eighteen*-acre tract have been abandoned for all railroad purposes. That at the commencement of this suit the walls of the roundhouse were

crumbling down, the roof had rotted off, and nothing remained except the dilapidated walls and the single track, which was used by an oil company which had an oil tank upon the premises alongside of the remaining track. That said *eighteen*-acre tract was not reserved, when the town was laid off, for railroad purposes. That it lies outside of the original plat of the town, and, since the end of the division was removed, has been an abandoned common, used by the defendant company for no railroad purpose whatever. That early in *1898* the plaintiff company entered upon negotiations with the proper officers of the defendant company for new arrangements for terminal facilities, either joint or otherwise, at *Rogers*, and was then notified that, after the extension of the plaintiff's road west from *Bentonville*, it must provide its own terminal facilities, and that joint facilities would not thereafter be entertained. That thereupon the plaintiff company began negotiations with the defendant company for the crossing of the defendant road at *Rogers*. That, as the result of personal interviews and correspondence with the general solicitor and the vice president and general manager of the road, Mr. *Yoakum*, as well as of correspondence with the latter, the plaintiff company was requested by Mr. *Yoakum* to designate a point for a crossing, and did so designate the very point at which it now seeks to cross; and the plaintiff company, looking to an amicable arrangement with reference to the point of crossing, made inquiry of the defendant company whether or not there was any other point at which it would prefer that plaintiff company should cross. To this inquiry Mr. *Yoakum*, the general manager of the defendant company, wrote the following letter:

"*St. Louis, January 28*, 1899.

Crossing at *Rogers*.

Mr. *J. M. Bayless*, President, etc., *Bentonville, Ark.* — Dear Sir: I have gone over, with Mr. *Bisbee*, the matter of the crossing of the *Arkansas & Oklahoma* line through our station grounds at *Rogers*, and we were unable to suggest a point of crossing that would be less objectionable than the one indicated by you. Whenever you are ready, after the contract is signed, Mr. *Bisbee* will come or send some one to *Rogers*, and definitely fix the grade and point of crossing. After the agreement is signed, the matter of details can be arranged between Mr. *Bisbee* and yourself, I think, without any difficulty.

Yours truly, *B. F. Yoakum*, by *C. H. B.*"

"*C. H. B.*," it is shown in the proof, was the clerk or secretary of Mr. *Yoakum*. Before this letter was written, the matter had been referred by Mr. *Yoakum* to Mr. *Bisbee*, who is a civil engineer in the employment of the *St. Louis & San Francisco Railroad Company*, and the superintendent of its tracks, bridges, and buildings at *Rogers*; and *Bisbee* had recommended the crossing at the point designated in the complaint, upon condition that an interlocking plant was provided for. That the plaintiff company, in *February*, 1899, notified the defendant company that it would not stand the expense of an interlocking plant, and would force its way through at that point. The disagreement, therefore, with reference to the point of crossing, mainly grew out of the refusal on the part of the plaintiff company

to stand the expense of an interlocking plant. Prior to this a contract had been prepared by the plaintiff company specifying the conditions and requirements which the defendant company required, and the plaintiff company had refused to sign it, and had prepared and tendered another contract, which was not accepted by the defendant company. There was no disagreement between the parties as to the point of crossing. It grew out of the controversy over the interlocking plant and the expense incident to its provision and maintenance; in short, a controversy over the amount of compensation that plaintiff company was required by the defendant company to bear in order to effect the crossing at the point specified. Immediately after receiving the *Yoakum* letter, above set forth, the plaintiff company, acting in good faith upon that letter, bought certain lands lying north and west of the defendant's said *eighteen*-acre tract on which to construct its railroad, switches, and wye, preparatory to crossing at the point agreed upon, and proceeded, at great expense, to construct its roadbed and wye thereon, which was constructed down to the point of intersection on the northern boundary of the *eighteen*-acre tract above referred to. It also proceeded to acquire the right from the town of *Rogers* to extend its roadbed east and south of the point designated for the crossing of the plaintiff company's line, down *Arkansas* street in the town of *Rogers*, to a point opposite the defendant company's depot, and only a very short distance therefrom, and at which depot for many years the plaintiff company had transacted all of its local business at *Rogers*, using the defendant company's track, as above stated, for *three-quarters* of a mile north of *Rogers* for its terminal facilities. After the said lands were purchased and said rights acquired by the plaintiff company, and the defendant company advised of it, and after the right of way on the east side of the defendant company's tract was procured from the town of *Rogers*, the defendant company permitted the plaintiff company to go on and construct its roadbed and wye down to the line of the said *eighteen*-acre tract, with the manifest purpose of crossing the said *eighteen*-acre tract and its right of way and track at the point designated, and never, up to the trial, withdrew, or attempted to withdraw, the said letter of Mr. *Yoakum*, agreeing to the point designated as the proper point for crossing, or even protested that it was not a proper point to cross, or that it would in any way interfere with its business, or detract from the usefulness of its yards; nor did it afterwards claim that any part of the *eighteen*-acre tract was necessary for trackage or future railroad purposes at the town of *Rogers*. When the defendant company saw that plaintiff company was constructing its roadbed and line and wye down to the line of the *eighteen*-acre tract at the point its contemplated line was to enter the *eighteen*-acre tract, and while the iron was being laid thereon, it at once extended a short spur track on the east side of the main track, south, a sufficient distance to become an obstruction to the crossing of the plaintiff's road at the point designated and agreed upon for a crossing, and constructed a long parallel switch on its right of way on the west side of its main line, the full length of the *eigheeen*-acre tract. At the time the point of crossing

was designated and agreed upon, neither of these switches constituted an obstruction at the point of crossing, and they were not put there until the plaintiff company began laying iron on its roadbed and wye just north of the *eighteen*-acre tract. Both of these switches were roughly and crudely laid down, and below the grade of the main track, and confessedly for obstructive purposes only, and not, as the court finds, because there was any real necessity, present or future, for their use. In truth, Mr. *Bisbee*, the superintendent of tracks, buildings, and bridges for the defendant company, and who is a civil engineer of many years' standing, and who extended the spur switch on the east side and constructed the long switch on the west side of defendant's line so as to obstruct the point of crossing, on cross-examination was forced to admit that the track of the switch on the west side is about *15* or *18* inches below the main track, and the east side about *4* feet below, and that the natural surface of the ground at that point on both sides is approximately on a grade with the main track, — not entirely so, — and that he constructed the switches in that way "simply to keep 'you folks' (meaning the plaintiff company) from crossing 'us' (meaning the defendant company);" that that was "protection for ourselves" (meaning the defendant company). On being asked if he did not put the switch in as an obstruction to the contemplated crossing by the plaintiff company, and for no other reason, he said: "I put those switches in because I had instructions to add what sidings were necessary to the *Rogers* yard, and use my judgment when and where to put them in. I put them in on a statement made by Mr. *Bayless* (who was the president of the *Arkansas & Oklahoma Railroad Company*) in *St. Louis*, in the general office, giving to understand that he was going to force a track over that. I took the matter in hand, and did it as protection to ourselves, as he would not accept our interlocking plant." It is clearly established, therefore, that the refusal of plaintiff company to execute the contract, among other things, providing for an interlocking plant, involving large expense which the plaintiff company was not willing to stand, was the real cause of the disagreement, and brought about a failure of the original agreement as to the terms of crossing. The court finds that on the *sixteen* hundred miles of railroad operated by the defendant company, on which there are *fifty* or *sixty* crossings by other roads, it has only *three* such interlocking plants as was required of the plaintiff company, — one at *Coburg*, just outside of *Kansas City*, where the defendant company crosses two other roads; one at *Fair Lawn*, in the immediate vicinity of *St. Louis*, and one about *half* a mile from *Oklahoma City*, which has some *six* or *eight thousand* people; that it has no interlocking plants at such places as *Neosho*, *Mo.*, *Nichols Junction*, and *Springfield*, *Mo.*, *Ft. Smith*, *Ark.*, *Vinita* and *Claremore*, *Ind. T.*, some of which are towns from *three* to *five* times as large as the town of *Rogers*; that they have several contracts for putting in interlocking plants at some of the points just named, and perhaps at other places, and, when inquired of as to the reason why interlocking plants had not been put in at those places, the witness *Bisbee* stated that that was a question for the transportation department to say when they needed inter-

locking plants, and not him. The court finds as a matter of fact that there is no real necessity for an interlocking plant at *Rogers*; that there is no unusual or extraordinary danger at *Rogers* in establishing an ordinary grade crossing there which is not incident to crossings at other places much larger in size, and at which there are no interlocking plants; that the effort to show the necessity there for an interlocking plant, and the necessity for an additional trackage on the *eighteen*-acre tract, is a mere subterfuge, having no foundation in fact, and is a part of the obstructive tactics employed by the defendant company to secure a contract for an interlocking plant, at their pleasure, at *Rogers*, at a place where one is now not required, and not likely ever to be required. The testimony fails to convince the court that the crossing of the plaintiff's road at the point designated will destroy or materially affect the value of its yard at *Rogers*, or impair its usefulness, or materially interfere with its business there beyond that which is incident to the crossing of a road at any point. The court further finds that before the institution of this suit the plaintiff company had surveyed and located its line of road across the *eighteen*-acre tract and across the line of the defendant company at the point designated in the complaint, and had made a map and profile of the route intended to be adopted by said company, which was duly certified and filed in the office of the clerk of *Benton* county, *Ark.*, as required, and in conformity to section 2765 of Sandels & Hill's Digest of the Statutes of Arkansas, and that the line surveyed and located runs across the *eighteen*-acre tract and the right of way and track of the defendant company as the same is described in the complaint. The court further finds that the eastern terminus of plaintiff's line, as designated on the map and profile of the plaintiff's road, is in the neighborhood of *one* mile southwest from the point designated in the charter, and is on the east side of the defendant company's road, as designated in its charter; that the proof does not show that the plaintiff company has ever made any other survey, map, or profile of its road, or made any changes whatever in this one since it was filed; that the surveyed line is a substantial compliance with the plaintiff's charter. The court further finds that the yards of the defendant company are about *one-half* mile from the point designated for the crossing of defendant company's road, and the depot of defendant company is a little less than *one-half* mile from the proposed crossing; that plaintiff's road is now constructed and operated west from *Bentonville* about *twenty* miles, and graded several miles further west in the direction of *Southwest City*, *Missouri*. The court further finds that the short spur switch on the east side of defendant company's main line, and which was extended so as to constitute an obstruction at the point of crossing, is not a switch in any general use; one of the witnesses who lived near by and passed the switch every day testifying that he never saw a car on that switch, and never had seen the switch open. The court further finds that the public convenience and necessity require that the road of the plaintiff company should cross the defendant's line of road at *Rogers*, and that the point designated in the plaintiff's complaint is a proper place for the crossing; that the necessity that the

plaintiff's line should be run to the point on *Arkansas* street opposite and near the depot of the defendant company is a public necessity was recognized by the defendant company, by its joint arrangement for the use of its own track for many years to its said depot near that point, as well as shown by other testimony, and especially by the *Yoakum* letter above quoted.

On the above findings of fact the court makes the following declarations of law:

1. That the *Arkansas & Oklahoma Railroad Company* is a corporation having power to exercise the right of eminent domain, and has in all things conformed to the statutes of the state of *Arkansas* giving it the right to the exercise thereof, and that this proceeding to condemn is for a necessary and public purpose.

2. That the defendant company is estopped from being heard to say that the point designated for the crossing by the plaintiff company is not a suitable and proper point for the crossing, or that there is no necessity therefor.

3. That, if it is not so estopped, the court declares that the point designated is a proper place for the crossing, and that there is a public necessity that the plaintiff company should cross the defendant's line so as to reach the point in *Arkansas* street opposite the depot of the defendant company in the town of *Rogers*, and that such necessity is shown by evidence and recognized by the defendant by the arrangement entered into by it with the *Bentonville Railroad* for the joint use of its tracks in order that the *Bentonville Railroad*, and afterwards the plaintiff company, might reach the depot of the defendant company.

4. That the *eighteen*-acre tract of land is in no proper or rightful sense a part of the yards of the defendant company, but is property now, and which has been for years past, held by the defendant railroad for no public purpose connected with its railroad business, and is, therefore, subject to condemnation for public purposes like the property of any other corporation or individual.

5. That the plaintiff company is entitled to the right of way as described in the complaint, through the *eighteen*-acre tract, and of *one hundred* feet in width, and that the same should be condemned for that purpose, and that the value thereof, and the damage to the remainder of the tract, is the sum of $*550*; that the plaintiff company should not be allowed to condemn for its sole and separate use any portion of the right of way or track of the defendant company, but is entitled to an easement over the same for the crossing at the point designated in the complaint for a single track of standard-gauge railway; and that the plaintiff company should pay all of the expenses necessary to the construction of an ordinary grade crossing across the defendant's main line at the point designated in the complaint, including the necessary grading, iron, frogs, switches, and other appurtenances for an ordinary crossing, as well as the labor and all material used in constructing the same. In short, that the crossing of the defendant's line should be made wholly at the expense of the plaintiff company, and that the defendant company should furnish such facilities therefor as the statute requires. The court further

declares that the switches on the east and west sides of said road at said point of crossing should be treated as mere obstructions, which the court finds they are, and are not switches constructed there for railroad purposes because necessary or desirable for defendant's business. The court further declares that the plaintiff company should have the right to cross what is designated in the complaint as the "mill switch" at a point in the center of *Arkansas* street, and that the plaintiff company should furnish the material, including the grading, iron, frogs, switches, and other necessary appurtenances for an ordinary grade crossing, as well as all other labor and material in constructing the same. In short, that the crossing of defendant's main line and mill switch should be made wholly at the expense of the plaintiff, and that the defendant company should furnish such facilities therefor as the statute requires. The court further finds the damages of the defendant company for such easement over its said right of way, track, and mill switch, as well as the damages which the defendant company sustains by reason of the crossing thereof, to be the sum of $450; making the total damage to be paid by the plaintiff the sum of $1,000.

It is therefore considered, ordered, and adjudged that a right of way *one hundred* feet in width be, and the same is hereby, adjudged and condemned in favor of the plaintiff company, the *Arkansas & Oklahoma Railroad Company*, and against the *St. Louis & San Francisco Railroad Company*, across the following described real estate, situate in the county of *Benton*, and state of *Arkansas*, to wit: "A part of the northwest quarter of the northwest quarter of section 7, township 19 north, range 29 west, and more particularly described as follows, that is to say: Beginning at the northwest corner of said northwest quarter of said section 7, township 19 north, range 29 west, and running east with the line of said section 7, 535 feet, and to the western boundary line of the right of way of the *St. Louis & San Francisco Railroad*; then in a southwesterly direction along the west boundary line of said right of way, and 50 feet from and parallel with the center of the railroad track of the said *St. Louis & San Francisco Railroad*, 2,016 feet to the north boundary line of *Maple* street, in the town of *Rogers*, *Arkansas*; then west along said north boundary line of *Maple* street 86 feet, more or less, to the northeast corner of *Maple* and *Douglas* streets, *Sikes'* addition to said town of *Rogers*; thence north along the east boundary line of said *Douglas* street a distance of 380 feet to the northeast corner of *Douglas* and *Cedar* streets, in said town of *Rogers*; thence in a westerly direction along the north boundary line of said *Cedar* street to the point of intersection of the west boundary line of said section 7; thence north along said western line of said section 7 to the place of beginning, containing *eighteen* acres, more or less." And that said right of way hereinbefore referred to is described as follows, that is to say: That the center of said right of way enters upon the said *eighteen* acres of land hereinbefore described at a point 31 feet east of the northwest corner of said section 7, township 19 north, of range 29 west; then running in a southeasterly direction to a point of intersection of the western boundary line of the defendant's right

of way *1,060* feet south of a portion of the north boundary line of the northwest quarter of the northwest quarter of said section 7. The said right of way so condemned shall embrace *50* feet on either side of said above-described line across said entire tract of *eighteen* acres of land, the said right of way being more accurately described in plaintiff's complaint, to which reference is made, but not to interfere with the roundhouse or switch thereto. It is further considered, ordered, and adjudged that the plaintiff company is entitled to an easement for a standard-gauge railroad track across the entire right of way of the defendant railroad company at a point fixed by continuing the line heretofore described as the center of the right of way across said *eighteen*-acre tract in a southeasterly direction across the defendant's right of way, and across the defendant's railroad track, at a point thereon *1,159* feet south of the point where said track is crossed by the north boundary line of the said northwest quarter of the northwest quarter of said section 7; then continuing in a southeasterly direction over and across the defendant's right of way on the east side of its track a distance of *169* feet to a point of intersection of the eastern boundary of the street known and designated as "*Arkansas* Street," in said town of *Rogers*, which street runs south parallel and contiguous with defendant's right of way, said easement across said right of way and railroad track of the defendant company being of sufficient width only to construct and grade a track of a standard-gauge railway, and not to exceed at any point *20* feet. It is further considered, ordered, and adjudged that an easement be, and the same is hereby, condemned in favor of the plaintiff company across what is known and described in the complaint as the "mill switch," at a point in the center of said *Arkansas* street, and in the middle of said street, where said switch crosses the same, and that such easement be of such width only as is necessary for the construction of the track and bed of said plaintiff railway company. It is further considered, ordered, and adjudged that all the expense of said crossings, including the necessary grading, iron, frogs, switches, and other appurtenances for an ordinary grade crossing, as well as the labor and all material used in constructing the same, be supplied and furnished by the plaintiff company, and that the plaintiff company pay into the treasury of this court, for the use and benefit of the defendant company, or to the defendant company, or its attorney of record, by way of compensation for damages sustained by the defendant company, as stated in the special findings of fact hereinbefore recited, the sum of $*1,000*, for the sole use and behoof of the defendant company. It is further considered, ordered, and adjudged that each of the parties to this proceeding pay its own costs incurred herein. It is further considered, ordered, and adjudged that, upon the plaintiff company complying with the terms of this judgment, the proper lands and easements hereinbefore described be, and the same are hereby, condemned to the use of the plaintiff as hereinbefore more particularly stated, and that the plaintiff company have the right to enter upon and construct its line of railway over and across said property and defendant's right of way and railroad track and switches as the same are hereinbefore

described, and, upon the failure of the plaintiff company to pay the amount hereinbefore stated within *thirty* days next after the rendition of this judgment, that all of its rights herein described be, and the same are hereby, forfeited, and this judgment held for naught.

[(*Signature as in Form No. 12117.*)][1]

III. CIVIL ACTIONS AGAINST RAILROAD.

1. For Injury to Animals.

a. At Common Law.[2]

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **Requisites of Complaint, Declaration or Petition, Generally.** — For the formal parts of a complaint, declaration or petition in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, vol. 6, p. 244; PETITIONS, vol. 13, p. 887.

Negligence or Wilfulness. — Negligence on the part of defendant must be stated. Stanton *v.* Louisville, etc., R. Co., 91 Ala. 382; East Tennessee, etc., R. Co. *v.* Watson, 90 Ala. 41; Western R. Co. *v.* Lazarus, 88 Ala. 453; East Tennessee, etc., R. Co. *v.* Carloss, 77 Ala. 443; South, etc., Alabama R. Co. *v.* Hagood, 53 Ala. 647; South, etc., Alabama R. Co. *v.* Brown, 53 Ala. 651; South, etc., Alabama R. Co. *v.* Thompson, 62 Ala. 494; Jacksonville, etc., R. Co. *v.* Garrison, 30 Fla. 557; Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669; Terre Haute, etc., R. Co. *v.* Augustus, 21 Ill. 186; Jeffersonville, etc., R. Co. *v.* Lyon, 72 Ind. 107; Baltimore, etc., R. Co. *v.* Anderson, 58 Ind. 413; Toledo, etc., R. Co. *v.* Lurch, 23 Ind. 10; Terre Haute, etc., R. Co. *v.* Smith, 19 Ind. 42; Wright *v.* Indianapolis, etc., R. Co., 18 Ind. 168; Indianapolis, etc., R. Co. *v.* Fisher, 15 Ind. 203; Indianapolis, etc., R. Co. *v.* Sparr, 15 Ind. 440; Indianapolis, etc., R. Co. *v.* Williams, 15 Ind. 486; Jeffersonville R. Co. *v.* Martin, 10 Ind. 416; Dyer *v.* Pacific R. Co., 34 Mo. 127; West *v.* Hannibal, etc., R. Co., 34 Mo. 177; Orange, etc., R. Co. *v.* Miles, 76 Va. 773. Or wilful misconduct on the part of the defendant must be alleged. Jeffersonville R. Co. *v.* Martin, 10 Ind. 416; Dyer *v.* Pacific R. Co., 34 Mo. 127; West *v.* Hannibal, etc., R. Co., 34 Mo. 177. Or facts from which the law raises the inference of negligence or wilfulness must be stated. Dyer *v.* Pacific R. Co., 34 Mo. 127; West *v.* Hannibal, etc., R. Co., 34 Mo. 177. Gross negligence need not, however, be alleged. Chicago, etc., R. Co. *v.* Carter, 20 Ill. 390.

A general averment of negligence on the part of the defendant is sufficient, without a statement of the particular facts constituting the negligence. Stanton *v.* Louisville, etc., R. Co., 91 Ala. 382. But where the facts constituting the negligence are stated, they must show that the injury was the natural consequence thereof. Stanton *v.* Louisville, etc., R. Co., 91 Ala. 382.

Where the complaint states that the defendant did, "because of the negligence or want of skill of its employees in the management or running of said train, locomotive or cars, run over, kill or disable" said animal, or "did, because of the negligence or want of skill of the employees of said defendant, run over, kill or injure" said animal, it is sufficient in its statement of facts constituting the negligence. East Tennessee, etc., R. Co. *v.* Watson, 90 Ala. 41. An allegation that the engine was "so negligently operated by defendant's agents that plaintiff's cow was killed," and "that said cow was killed on account of said negligence," is sufficient. Western R. Co. *v.* Lazarus, 88 Ala. 453.

Where the complaint alleges that three of the plaintiff's cattle "were killed, and the other was injured or damaged to the value of *ten* dollars by the negligence of defendant in running a train of cars and locomotive on said railroad, and thus became wholly lost to the plaintiff," it is sufficient averment of negligence. East Tennessee, etc., R. Co. *v.* Carloss, 77 Ala. 443.

That the engine and cars of the defendant company were so negligently

and carelessly operated by the agents and servants of the company that the engine struck an animal described in the declaration, by means whereof it died, is sufficient. Jacksonville, etc., R. Co. *v.* Garrison, 30 Fla. 557.

Where the complaint averred "that the defendant without any fault or negligence on plaintiff's part carelessly, negligently and wrongfully ran its train over and upon the plaintiff's brown horse mule," it was held to allege sufficiently the particular act of negligence complained of to withstand a motion to make more specific. Ohio, etc., R. Co. *v.* Craycraft, 5 Ind. App. 335.

An allegation "that the defendant, by its agents and servants, did run and manage one of their engines in such a grossly negligent and careless manner that the same ran against and over said cow and killed her," is sufficient against a motion to make more specific. Grinde *v.* Minneapolis, etc., R. Co., 42 Iowa 376.

That the act was done carelessly and negligently is sufficient. McPheeters *v.* Hanibal, etc., R. Co., 45 Mo. 22.

Where the petition states that defendant while running its locomotive, etc., negligently struck the cattle of the plaintiff, etc., it states an action at common law. Garner *v.* Hannibal, etc., R. Co., 34 Mo. 235.

Negativing Contributory Negligence — *Generally.* — Where the action is based upon negligence on the part of the defendant, the pleading must negative negligence on the part of the plaintiff. Jeffersonville, etc., R. Co. *v.* Lyon, 72 Ind. 107; Indianapolis, etc., R. Co. *v.* Caudle, 60 Ind. 112; Jeffersonville, etc., R. Co. *v.* Lyon, 55 Ind. 477; Toledo, etc., R. Co. *v.* Harris, 49 Ind. 119; Jeffersonville, etc., R. Co. *v.* Underhill, 40 Ind. 229; Indianapolis, etc., R. Co. *v.* Robinson, 35 Ind. 380; Toledo, etc., R. Co *v.* Bevin, 26 Ind. 443.

Where injury was wilful or intentional on the part of the defendant, contributory negligence on the part of the plaintiff need not be negatived. Indianapolis, etc., R. Co. *v.* Petty, 30 Ind. 261; Lafayette, etc., R. Co. *v.* Adams, 26 Ind. 76; Chicago, etc., R. Co. *v.* Nash, 1 Ind. App. 298.

That negligence or wilful misconduct was proximate cause of the injury must be stated. Jeffersonville R. Co. *v.* Martin, 10 Ind. 416.

Place where injury occurred must be stated. Western R. Co. *v.* Sistrunk, 85 Ala. 352; South, etc., Alabama R. Co. *v.* Schafner, 78 Ala. 567; East Tennessee, etc., R. Co. *v.* Carloss, 77 Ala. 443; Jacksonville, etc., R. Co. *v.* Wellman, 26 Fla. 344.

Stating county is not sufficient. East Tennessee, etc., R. *v.* Carloss, 77 Ala. 443. But see Jacksonville, etc., R. Co. *v.* Wellman, 26 Fla. 344, holding that where the declaration specifies the county in which the injury occurred it is sufficient.

Where the complaint states that the injury was done "at a place on said railroad about *75* or *100* yards distant from *Cowles* station in said county," it is sufficient. Western R. Co. *v.* Sistrunk, 85 Ala. 352.

Time when injury occurred must be stated. Western R. Co. *v.* Sistrunk, 85 Ala. 352; South, etc., Alabama R. Co. *v.* Schafner, 78 Ala. 567; East Tennessee, etc., R. Co. *v.* Carloss, 77 Ala. 443.

Stating month is not sufficient. East Tennessee, etc., R. Co. *v.* Carloss, 77 Ala. 443.

Where the complaint states that the injury was done "on or about the *20th September*, 1*887*," it is sufficient. Western R. Co. *v.* Sistrunk, 85 Ala. 352.

Wilful or Intentional Injury. — Where the act was wilful or intentional, an actual or constructive intent to commit the injury must be alleged. Hanna *v.* Terre Haute, etc., R. Co., 119 Ind. 316; Louisville, etc., R. Co. *v.* Hart, 2 Ind. App. 130; Chicago, etc., R. Co. *v.* Nash, (Ind. 1890) 24 N. E. Rep. 884.

Where the complaint charges that the defendant, by its servants, purposely and wilfully ran its locomotive and train of cars upon the plaintiff's cattle, thereby killing and injuring them, it is sufficient. Louisville, etc., R. Co. *v.* Hart, 2 Ind. App. 130.

Where the complaint alleges that defe dant's servants "wilfully and knowingly" killed a horse by running upon it with a locomotive, it is sufficient. The word "wilfully" implies that the killing was done purposely. Chicago, etc., R. Co. *v.* Nash, (Ind. 1890) 24 N. E. Rep. 884.

Where a bill of particulars before a justice of the peace alleges that the defendant's engineer did, at the place described, upon the defendant's road, carelessly, wantonly, maliciously, and with gross negligence, run its locomotive engine and cars against and over

and killed two colts of the plaintiff, it is sufficient to charge the company with a common-law action. Atchison, etc., R. Co. *v.* Bartlett, 2 Kan. App. 167.

To charge railroad company with negligence in not exercising proper effort to avoid killing stock after they were observed to be on the track it is sufficient to charge negligence generally. Galveston, etc., R. Co. *v.* Dyer, (Tex. Civ. App. 1896) 38 S. W. Rep. 218.

Precedents. — Where the declaration alleged that it was the duty of the defendant to use good care in managing and running its locomotive and trains, and disregarding its duty in that respect it so negligently and carelessly ran and operated a locomotive and train of cars, on a specified day, through a designated town on the road, as to strike and kill a mule of plaintiff, it was held to state a good cause of action. Jacksonville, etc., R. Co. *v.* Jones, 34 Fla. 286.

In Western, etc., R. Co. *v.* Kirkpatrick, 66 Ga. 86, the complaint, which was held sufficient, was as follows:

"*Georgia* — *Bartow* County.

To the justice's court of the *32nd* district G. M., said county:

The petition of *T. S. Kirkpatrick* showeth that the *Western and Atlantic Railroad Company*, a corporation of said state, and doing business, and having a place of business, in said state, county and district, has injured and damaged your petitioner in the sum of *one hundred* dollars in this, that on or about *January 5th*, 1878, said railroad company killed, by the running of a car, or engine, or locomotive or other machinery on said railroad in said district, *one* dark brown horse mule, about *nine* years old, the property of your petitioner, and of the value of *one hundred* dollars, the value of which property said defendant refuses to pay.

Wherefore petitioner prays process as above set forth, may issue requiring said defendant to appear at the time and place above set forth to answer your petitioner's complaint in damages.

R. P. Trippe,
Plaintiff's Attorney.

Served a copy of the within on *J. C. Wofford*, agent for *Western and Atlantic Railroaa Company*, at *Cartersville, Ga.*, in person, this *November 28th*, 1873.

John W. Hill, L. C."

Where the declaration alleged that the defendant was the owner of the railroad and operating it by running locomotives and trains thereon; that the plaintiff's horse strayed and got upon defendant's railroad; and that defendant so carelessly, negligently and improperly ran, conducted and directed the locomotive and train of defendant as that said locomotive struck plaintiff's horse with great force and violence, and killed it, it stated a cause of action at common law. Rockford, etc., R. Co. *v.* Phillips, 66 Ill. 548.

Where the declaration averred that on the first day of December, 1867, the defendant was possessed and had entire control of the St. Louis, Jacksonville & Chicago Railroad, a portion of which was then run and operated in said county; that at the time aforesaid it became and was the duty of the defendant, its employees and servants, carefully and skilfully to operate and run said railroad in and through said county; and that said defendant, by its agents, employees and servants, so carelessly, negligently and unskilfully ran and operated said railroad in pursuit of their duties as such employees, etc., that at the time and place aforesaid, they opened the close in which a certain horse of plaintiff was confined, and carelessly and negligently left the fence surrounding said close down, by reason of which said negligence and carelessness on the part of the defendant, its employees, etc., the horse aforesaid escaped from said close, the horse being the property of the plaintiff, of the value, etc., and at the time and place aforesaid, strayed and got on said railroad, and the defendant, by its servants, etc., on the day aforesaid, at the place aforesaid, so conducted and directed the locomotive and train of defendant on said railroad that the locomotive and train aforesaid struck the horse, he being on said railroad by and through the neglect of defendant in opening the close in which the horse was confined and leaving the fence down, it was held that the time and place when and where the injury was committed was laid with sufficient certainty and that the declaration was not subject to demurrer. St. Louis, etc., R. Co. *v.* Kilpatrick, 61 Ill. 457.

Where a complaint averred that "on the *19th* day of *June*, 1881, defendant was owning and operating a railroad in said county, and at said time was running a locomotive and train of cars thereon in *Bartholomew* county, *Indiana*,

and while being run as aforesaid said locomotive and train of cars struck, passed over and wounded and broke the leg of a certain mule, the property of the plaintiff, of the value of $*200*; that the servants, agents and employees of said defendant afterward, while the said mule was so wounded, wrongfully and unlawfully and purposely did kill said mule, when it was wholly unnecessary to kill said mule, as by proper care and attention he would have been saved; that said servants and employees, in killing said wounded mule, acted in the line of their duty and within the scope of their employment, and under the directions and instructions of defendant. Wherefore he prays judgment for $*200* and other proper relief," it was held sufficient. Banister *v.* Pennsylvania Co., 98 Ind. 220.

In Ohio, etc., R. Co. *v.* Craycraft, 5 Ind. App. 335, the complaint, which was held sufficient, was as follows: 'Plaintiff complains of the defendant, and says that defendant is a corporation duly organized under the laws of the state of ——, and the owner of a railroad running into and through *Clark* county, State of *Indiana*, and says that the defendant on the *31st* day of *May*, 1889, without any fault or negligence on plaintiff's part, carelessly, negligently and wrongfully ran its train over and upon the plaintiff's brown horse mule, in *Clark* county, whereby he was then and there killed, to the damage of the plaintiff *one hundred* dollars, for which he demands judgment and other proper relief."

In Toledo, etc., R. Co. *v.* Milligan, 2 Ind. App. 578, the complaint, which was held sufficient, alleged that the defendant's railroad track was constructed through Studabaker's west addition to the town of Bluffton, in Wells county, Indiana; that said railroad, and track thereon, ran across and over a public highway, known as Wabash street, and upon which it was the duty of the defendant to construct and keep in repair a safe and proper crossing for the use of the traveling public; that defendant so negligently and carelessly constructed said crossing of said street over its said railroad track that the same was dangerous and unsafe for teams hauling wagons, horses, and other animals and vehicles, to pass over it, and permitted the same negligently so to remain, and being in that condition on the twenty-seventh day of May, 1889, plaintiff on said day not knowing the dangerous and unsafe condition thereof, plaintiff's horse was being ridden across said railroad track, on, over and upon said street crossing by his employee and servant in a proper and careful manner, when, without any fault of plaintiff or his said employee, and on account of said defective and dangerous crossing, one of the feet of said horse of the plaintiff was caught in a space improperly between the iron on one side of the railroad track and the boards of the said crossing and became fast therein, and in trying to extricate itself therefrom, without any fault of plaintiff or his said employee, was violently thrown down, by reason of which his foot was violently wrenched, torn and injured, and said horse, which was of the value of one hundred and fifty dollars, was thereby rendered wholly worthless, to plaintiff's damage of one hundred and fifty dollars, which was caused by the negligence and carelessness of the defendan as aforesaid, and wholly without any fault or negligence of the plaintiff.

In Calvert *v.* Hannibal, etc., R. Co., 34 Mo. 242, the following petition was held sufficient:

"Plaintiff states that defendant is a corporation created by an act of the General Assembly of the state of Missouri, entitled 'An act to incorporate the Hannibal and St. Joseph Railroad Company,' approved February 16, 1847; and as such did, on or about the *15th* day of *April*, 1859, in the county of *Shelby* aforesaid, by their agents, servants, locomotives and railroad cars, negligently and carelessly run over, maim and kill, certain cattle belonging to plaintiff, to wit, *one* cow of the value of *twenty-five* dollars, and *one* heifer of the value of *ten* dollars; for which he asks judgment."

In Cooper *v.* Grand Trunk R. Co., 49 N. H. 209, the declaration alleged that plaintiffs on the sixteenth day of November, A. D. 1866, at Stratford, in this county, were driving with due care and prudence their flock of sheep, consisting of about four hundred in number, over and across the defendant's railroad track at the farm crossing of Guy C. Burnside, of Stratford, aforesaid, as they lawfully might do, and that the defendants then and there had a train of freight cars and a locomotive, under the management and control of their servants, and that

Form No. 16968.

(Precedent in Indianapolis, etc., R. Co. *v.* McBrown, 46 Ind. 229.)[1]

[(*Title of court and cause as in Form No. 5947.*)][2]

Elias S. McBrown, the above named plaintiff, complains of the *Indianapolis, Bloomington and Western Railway Company*, defendant herein, and says that on the *10th* day of *April*, 1872, the defendant was the owner of a line of railroad between *Indianapolis, Indiana* and *Peoria*, in the state of *Illinois*, passing through said county of *Fountain* and across the lands of said plaintiff, and defendant is also the owner of the engines and cars running on said railroad, which at the date above mentioned was not fenced; and plaintiff's mare at said date was running at large on plaintiff's own unfenced lands, and then and there wandered upon the track of said defendants at a point at the west end of a cut, ranging from *three* to *ten* feet deep, and *fifteen* feet in width, and *eighty* rods long, made by defendant to construct their track in, and in which they constructed their said track; and while said mare was at the west end of said cut on said track as aforesaid, without any fault or negligence on the part of plaintiff, there came an engine drawing a tender, eastward bound, each belonging to the defendant and in their employ, managed by, and in the care and custody of, an engineer and fireman, each of whom was at the time in the employ and service of defendant; and that said engineer and fireman, on approaching near the point where said mare was standing, sounded the whistle on said engine and hallooed loudly, and by reason of the sounding of said whistle and said hallooing, said mare became greatly frightened and ran eastward along and on said track in said cut; and that said engineer and fireman continued to sound said whistle, and continued hallooing, and then and there carelessly and negligently failed to check said engine, which they could easily have done many times during the time, from the time said mare took fright and the time she was killed, as hereinafter set forth; and that said engineer and fireman then and there negligently and carelessly continued to sound said whistle and continued said hallooing, and thereby caused said mare to continue frightened while she ran on said track in said cut at her greatest speed, and could not then and there get out of said cut on either side, until arriving immediately at the east end of said cut, at which place there was a trestle-work over a drain, of the existence of which said engineer and fireman had full knowledge at the time; and that by reason of said engineer and fireman negligently and carelessly failing to check the speed of said engine, which they could easily have done as above stated, and also by reason of the continuation of the sounding of said whistle and said hallooing, thereby caused said

said servants so carelessly and negligently guarded, managed and controlled their said engine and cars that they ran into said flock of sheep while crossing their track as aforesaid and killed and destroyed thirty-two of them.

Judgment for plaintiff was sustained.

1. It was held that this complaint stated a good cause of action for wilful negligence at common law.

See also *supra*, note 2, p. 435.

2. The matter to be supplied within [ ] will not be found in the reported case.

mare to run into said trestle-work, in which she then and there became entangled and fell, which fall caused her death.

That said mare was of the value of *one hundred and fifty* dollars, for which amount plaintiff demands judgment, and other proper relief.

[(*Signature and verification as in Form No. 5915.*)][1]

Form No. 16969.

(Precedent in Hill *v.* Missouri Pac. R. Co., 49 Mo. App. 521.)[2]

[(*Title of court and cause as in Form No. 5921.*)][1]

Plaintiff, *I. W. Hill*, complaining of the defendant, the *Missouri Pacific Railway Company*, states that said defendant is, and at all times hereinafter mentioned was, a railroad corporation duly organized and existing under the laws of the state of *Missouri* by the corporate name of the *Missouri Pacific Railway Company*.

That, on the *eighth* day of *November*, 1889, and for many years theretofore, said defendant owned and operated a railroad in the state of *Missouri*, known as the *Missouri Pacific* Railroad, in part located within the corporate limits of the city of *Pacific*, in the county of *Franklin* and state of *Missouri*, and thence extending westward through the county of *Franklin*; and the said railroad, where the same crosses the west boundary line of said city, was inclosed by fences along and on the right of way of defendant, on which right of way said railroad was located; and, for a considerable distance from said boundary line into and within the corporate limits of said city, said railroad was, in like manner, inclosed by fences on and along said right of way.

That at the place where, in said town, the said road was so fenced during all said time the lands adjoining the said railroad and the right of way thereof, on the south side of said right of way, were used for farming purposes, through which on the south side of said railroad a narrow lane ran up to the line of the right of way of said railroad; and, at the point where said line terminated on the south side of said right of way, a gate, forming a portion of said railroad fence, opened into and upon the right of way of said railroad, through which, when open, horses and other domestic animals could pass from said lane into and upon said railroad and right of way, and being on said railroad and right of way, could not escape therefrom, except by returning through said gate or passing over defendant's said fences and cattle-guards connected therewith.

That defendant was not required by law to maintain said fences or gate at said point, but maintained the same of its own volition; and so maintaining the same it was the duty of the defendant to keep said fences and gate in such condition and so connected with cattle-guards as to prevent horses and other domestic animals from getting on said road between said fences. That, by reason of the maintenance of said fences at said place, horses and other domestic animals,

1. The matter to be supplied within [ ] will not be found in the reported case.

2. This petition was held sufficient at common law.
See also, *supra*, note 2, p. 435.

being on said railroad between said fences, had less chance to escape from being injured by defendant's engines and trains than they would have had if, being on said railroad at said point, said fences had not existed to interfere with their escape from said railroad and right of way onto said adjoining lands; and, therefore, it was the duty of defendant, while it maintained said fences and gate, to use more than ordinary care to keep the same in such condition as to prevent horses and other domestic animals from getting on said railroad through said gate and fences; yet said defendant, on said day and for many years theretofore, maintained said fences and said gate in said fence on said south side of said railroad in a careless and negligent manner, and repeatedly suffered said gate to stand open and unfastened, and to be without suitable latches and fastenings to hold the same closed. That during all said time said gate had thereon insufficient fastenings, that it would open by natural causes independent of being operated by any person, and by reason of its proximity to said city said gate was peculiarly subject to being left open by persons passing either from said adjoining lands to said railroad, or from said railroad to said adjoining lands, through said gate; and during all of said time said gate was often left open and unfastened, so that horses and other domestic animals could, by passing through the same, get on said railroad; and on said day and during all said time defendant had notice of said facts.

That the maintenance of said gate at said place, as the same was so maintained by defendant, was negligence on the part of defendant, liable to occasion injuries of the character of the injury hereinafter complained of.

That, on the *eighth* day of *November*, 1889, by reason of said negligence of defendant, *three* horses, the property of plaintiff and of the value of $*500*, then lawfully running at large on the south side of said railroad, passed through said lane, and, the said gate not then being securely fastened, passed through said gate and so got upon said railroad at a point within the corporate limits of said city; and, having so gotten upon said railroad and being on said railroad between said fences, were frightened by an engine and train of cars then and there being run and operated on said railroad, and ran before said engine and train of cars along said railroad until they were caught, struck and killed on said railroad, in said county of *Franklin*, by defendant, by its said engine and train of cars, on said *eighth* day of *November*, 1889.

And plaintiff avers that defendant, by its agents and employees, then and there running said engine and train of cars, by the exercise of reasonable care could have seen the said horses and have stopped the said engine and train of cars before overtaking or striking any of said horses, but did carelessly and negligently then and there run said engine and train of cars upon said horses, and killed the same.

And defendant having so negligently maintained said gate in said fence, in manner and form as aforesaid, for many years and until the injury aforesaid was done to plaintiff, did within a few days thereafter close up and stop said gate by making a permanent fence

along and across the same, as before the killing of plaintiff's said horses it might lawfully have done, and ever since that time defendant has maintained said fence across said gate. And plaintiff avers that, by killing his said horses in manner and form as aforesaid, defendant has damaged plaintiff in the sum of $*500*, for which said sum with costs plaintiff asks judgment.

[(*Signature as in Form No. 5921.*)][1]

b. Under Statute.

(1) Notice to Railroad Company of Injury to Animal.[2]

Form No. 16970.[3]

(2 Ga. Code (1895), § 2254.)

Georgia — Bibb County.

The *Southern Railroad Company*:

You are hereby notified that within the last *three* months, to wit, on the *tenth* day of *June* (or *night of the tenth day of June*), A. D. 1899, you damaged the subscriber by killing (or *destroying*, as the case may be) (*Here mention the particular damage done and the kind or species of property injured or destroyed*) belonging to him (or *her*) by the running of a car, engine or locomotive, or other machinery on your road; and desiring that the amount of damages may be legally assessed, you are hereby required, by agent or attorney, or in person, to appear at the justice court-ground in the *564th* District G. M. (*inserting the number of the district in which the damage was done*), by *ten* o'clock *A.* M., on the *twentieth* day of *June next*, then and there to show cause, if any exist, why the damage should not be assessed according to law.

This *twelfth* day of *June*, 1899. *John Doe.*

Form No. 16971.[4]

(Precedent in Keyser *v.* Kansas City, etc., R. Co., 56 Iowa 441.)

To the *Kansas City, St. Joseph & Council Bluffs Railroad Company*:

You are hereby notified that the locomotive and cars of your railroad, in the latter part of the month of *January*, A. D. 1877, in *Benton* township, *Fremont* county, *Iowa*, did strike and kill a mare, being my property, of the value of $*150*, and that unless you pay me the value of said mare, being $*150*, within *thirty* days from this date, I will

1. The matter to be supplied within [ ] will not be found in the reportedcase.

2. **Requisites of Notice, Generally.** — For the formal parts of a notice in a particular jurisdiction see the title Notices, vol. 13, p. 212.

Place where stock were killed must be specified in the notice. Ryan *v.* Chicago, etc., R. Co., 101 Wis. 506. And where the notice states that the stock were killed in township 33, range 11, it is insufficient. Ryan *v.* Chicago, etc., R. Co., 101 Wis. 506.

3. *Georgia.* — 2 Code (1895), §§ 2253 2254.

See also list of statutes cited *supra*, note 1, p. 412; and, generally, *supra*, note 2, this page.

4. *Iowa.* — Code (1897), § 2055.

See also list of statutes cited *supra*, note 1, p. 412; and, generally, *supra*, note 2, this page.

claim of you double the value of said mare, as provided by the Statutes of the State of *Iowa*.

Percival, Iowa, March 14, 1877. *Christopher Keyser.*

[(*Jurat as in Form No. 8841.*)][1]

Form No. 16972.[1]

(Precedent in May *v.* Chicago, etc., R. Co., 102 Wis. 674.)[2]

To the *Chicago & Northwestern Railway Company*:

You will please take notice that on the *2d* day of *August*, 1897, *two* Jersey cows, owned by *James May*, of the town of *Blooming Grove*, *Dane* county, *Wisconsin*, were killed, and a *third* Jersey cow belonging to the above-named *May* was injured, through the negligence of the *Chicago & Northwestern Railway Company* in failing to keep the gate in the fence separating the right of way of said railway company from a portion of the farm of *John Walterscheit*, in said town of *Blooming Grove*, closed, and on account of the careless and negligent management of the said railway company in running its engine and train upon and along said right of way on the said *2d* day of *August*, 1897; and that for the damage occasioned by said killing and injury of the above-mentioned cattle of said *James May*, the said *James May* demands satisfaction, in the sum of $*150*.

Dated *December 6*, 1897.

James May,
by *Olin & Butler*, his Attys.

(2) Complaint, Declaration, Petition or Statement.[4]

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *Wisconsin.* — Stat. (1898), § 1816*b*.

See also list of statutes cited *supra*, note 1, p. 412; and, generally, *supra*, note 2, p. 442.

3. This notice was held sufficient.

4. **Requisites of Complaint, Declaration or Petition, Generally.** — For the formal parts of a complaint, declaration or petition in a particular jurisdiction see the titles Complaints, vol. 4, p. 1019; Declarations, vol. 6, p. 244; Petitions, vol. 13, p. 887.

To recover upon the statutory liability the pleading must state facts which bring the case substantially within the provisions of the statute. Rockford, etc., R. Co. *v.* Phillips, 66 Ill. 548; Lainiger *v.* Kansas City, etc., R. Co., 41 Mo. App. 165; Young *v.* Kansas City, etc., R. Co., 39 Mo. App. 52. And upon which the company's liability depends. Baltimore, etc., R. Co. *v.* Wilson, 31 Ohio St. 555. And which show the neglect of the duty imposed by the statute. Schneider *v.* Missouri Pac. R. Co., 75 Mo. 295; Goodwin *v.* Chicago, etc., R. Co., 75 Mo. 73. But the pleadings need not be framed upon the statute. Grand Rapids, etc., R. Co. *v.* Southwick, 30 Mich. 444. Nor need the statute be referred to specifically. Morrison *v.* Burlington, etc., R. Co., 84 Iowa 663; Grand Rapids, etc., R. Co. *v.* Southwick, 30 Mich. 444.

Negligence need not be averred, where the action is upon a statute imposing *prima facie* or absolute liability. St. Louis, etc., R. Co. *v.* Brown, 49 Ark. 253; Terre Haute, etc., R. Co. *v.* Augustus, 21 Ill. 186; Bates *v.* Fremont, etc., R. Co., 4 S. Dak. 394. And to allege the fact of the injury is sufficient. St. Louis, etc., R. Co. *v.* Brown, 49 Ark. 253; Terre Haute, etc., R. Co. *v.* Augustus, 21 Ill. 186; Bates *v.* Fremont, etc., R. Co., 4 S. Dak. 394.

Insufficient Cattle-guard. — Where the action is for damages caused by the insufficiency of a cattle-guard, the pleading must specify in what particular the guard was insufficient. Smead *v.* Lake Shore, etc., R. Co., 58 Mich. 200.

(*a*) *By Reason of Failure to Give Signal at Railroad Crossing.*

Form No. 16973.[1]

(Precedent in Finley *v.* St. Louis Southwestern R. Co., 73 Mo. App. 644.)[2]

[State of *Missouri*, } ss.
County of *Mississippi*. }

Before *Abraham Kent*, a justice of the peace in *Tywappity* township, *Mississippi* county, state of *Missouri*.

L. E. Finley, plaintiff,
against
The St. Louis Southwestern Railway Company, a corporation, defendant.]3

Plaintiff states that defendant is a corporation organized under the laws of *Missouri*, and is now engaged in operating a railroad through *Ohio* and *St. John* townships in *Mississippi* county, *Missouri*.

That heretofore, to wit, on or about the *8th* day of *August*, 1896, in *St. John* township, *Mississippi* county, *Missouri*, and in an adjoining township to *Tywappity* township, in which the suit is brought, defendant, by means of his engines and cars operated by its agents and employees, carelessly and negligently ran said engine and cars against and killed *one* horse of the value of *one hundred* dollars of the property of the plaintiff, thereby killing said mare and damaging plaintiff in the sum of *one hundred* dollars, and that at the place where said mare came upon the road and was killed was at the *Edwards* crossing, and that defendant's agents and employees operating its said cars negligently ran its train at a greater rate of speed, and negligently failed to sound its whistle or sound its bell, and that in consequence thereof plaintiff's mare was killed, wherefore he prays judgment for *one hundred* dollars and his costs.

[*Jeremiah Mason*, Attorney for Plaintiff.][3]

(*b*) *By Reason of Negligence in Constructing Railroad Crossing.*

Form No. 16974.[4]

(Precedent in Ellis *v.* Wabash, etc., R. Co., 17 Mo. App. 128.)[5]

[(*Title of court and cause as in Form No. 16973.*)

Plaintiff states][6] that the defendant is a corporation organized and existing under the laws of the State of *Missouri*.

That it is engaged in running and operating a railroad in the township of *Grand River*, county of *Daviess*, and state of *Missouri*.

That the plaintiff was the owner of a certain cow, which, on or

1. *Missouri*. — Rev. Stat. (1899), § 1103.

See also list of statutes cited *supra*, note 1, p. 412; and, generally, *supra*, note 4, p. 443.

2. Judgment for plaintiff in this case was affirmed.

3. The matter enclosed by [ ] will not be found in the reported case.

4. *Missouri*. — Rev. Stat. (1899), § 1102.

See also list of statutes cited *supra*, note 1, p. 412; and, generally, *supra*, note 4, p. 443.

5. It was held that the plaintiff could not recover because the proof did not sustain the allegation.

6. The matter enclosed by and to be

about the *1st* day of *July*, 1*881*, strayed upon defendant's railroad in said township, at a point where the same crosses a public road. That defendant, by its servants and agents, carelessly and negligently ran one of defendant's locomotive engines against and upon said cow, without ringing a bell or sounding a whistle, to plaintiff's damage in the sum of $*35.00*.

That said crossing had been so negligently and defectively constructed by defendant that said cow became entangled therein and was unable to escape therefrom.

Wherefore plaintiff prays judgment in the sum of $*35.00* and costs.

[*Jeremiah Mason*, Attorney for Plaintiff.][1]

(*c*) *Under Statute Relating to Fences.*[2]

supplied within [ ] will not be found in the reported case.

1. The matter enclosed by [ ] will not be found in the reported case.

2. Requisites of Complaint, Declaration or Petition, Generally. — See *supra*, note 4, p. 443.

Failure of Defendant to Fence. — That road was not fenced must be alleged. St. Louis, etc., R. Co. *v.* Dudgeon, 28 Kan. 283; Missouri Pac. R. Co. *v.* Piper, 26 Kan. 58; Kansas City, etc., R. Co. *v.* Neville, 25 Kan. 632; St. Louis, etc., R. Co. *v.* Ellis, 25 Kan. 108; St. Louis, etc., R. Co. *v.* McReynolds, 24 Kan. 368. Or that road was not securely fenced. Toledo, etc., R. Co. *v.* Eidson, 51 Ind. 67; Ohio, etc., R. Co. *v.* McClure, 47 Ind. 317; Indianapolis, etc., R. Co. *v.* Robinson, 35 Ind. 380; Toledo, etc., R. Co. *v.* Weaver, 34 Ind. 298; Indianapolis, etc., R. Co. *v.* Bishop, 29 Ind. 202; Toledo, etc., R. Co. *v.* Lurch, 23 Ind. 10; Toledo, etc., R. Co. *v.* Reed, 23 Ind. 101; Missouri Pac. R. Co. *v.* Morrow, 36 Kan. 495. That railroad track was not "sufficiently fenced" is a sufficient allegation that the track was not "securely fenced." Evansville, etc., R. Co. *v.* Tipton, 101 Ind. 197. That the track was not fenced is sufficient. Louisville, etc., R. Co. *v.* Shanklin, 94 Ind. 297; Louisville, etc., R. Co. *v.* Pixley, 94 Ind. 603. That the railroad "was not securely fenced" is sufficient. Terre Haute, etc., R. Co. *v.* Penn, 90 Ind. 284. That "the road was not securely fenced as required by law" is sufficient, being a statement of fact and not of a conclusion of law. Indianapolis, etc., R. Co. *v.* Lyon, 48 Ind. 119. That the animal was killed by a locomotive of the defendant at a point where the railroad was by law required to be fenced, where the same was not fenced, is sufficient. It is not necessary to aver that the animal went upon the track at a place where the road was not fenced, the inference being that the road was not securely fenced at the place where it went upon the track and was killed. Ohio, etc., R. Co. *v.* Miller, 46 Ind. 215. That at the place and time said animal was killed by the defendant's locomotive and cars "same was not securely fenced as required by law" is sufficient. Indianapolis, etc., R. Co. *v.* Adkins, 23 Ind. 340.

Where the complaint alleges that "said railroad was not, at the time and place where said animals were killed, fenced in by said defendant in manner and form as in the statute provided," it is not sufficient. Pittsburgh, etc., R. Co. *v.* Keller, 49 Ind. 211. That road was not fenced "according to law" is insufficient. Jeffersonville, etc., R. Co. *v.* Underhill, 40 Ind. 229; Indianapolis, etc., R. Co. *v.* Robinson, 35 Ind. 380; Indianapolis, etc , R. Co. *v.* Bishop, 29 Ind. 202.

Duty to Fence. — That defendant was required to fence its track and failed to comply with that duty must be stated. Galena, etc., R. Co. *v.* Sumner, 24 Ill. 631; Ohio, etc., R. Co. *v.* Brown, 23 Ill. 94; Chicago, etc., R. Co. *v.* Carter, 20 Ill. 390. *Contra*, in *Indiana*, that defendant was required to provide a fence need not be stated. Terre Haute, etc., R. Co. *v.* Penn, 90 Ind. 284; Louisville, etc., R. Co. *v.* Kious, 82 Ind. 357; Fort Wayne, etc., R. Co. *v.* Mussetter, 48 Ind. 286.

That Road Might have been Fenced. — In *Missouri*, it is held that the com-

plaint must allege that the stock entered at a place where the railroad might have been enclosed by a lawful fence. Clarkson *v.* Wabash, etc., R. Co., 84 Mo. 583; Russell *v.* Hannibal, etc., R. Co., 83 Mo. 507; Edwards *v.* Hannibal, etc., R. Co., 66 Mo. 567; Smith *v.* Missouri Pac. R. Co., 29 Mo. App. 65; Vail *v.* Kansas City, etc., R. Co., 28 Mo. App. 372; Boyle *v.* Missouri Pac. R. Co., 21 Mo. App. 416.

In *Indiana*, however, that the road might have been fenced where the stock entered upon it need not be alleged. Louisville, etc., R. Co. *v.* Hall, 93 Ind. 245; Terre Haute, etc., R. Co. *v.* Penn, 90 Ind. 284; Jeffersonville, etc., R. Co. *v.* Vancant, 40 Ind. 233; Chicago, etc., R. Co. *v.* Brannegan, 5 Ind. App. 540; Lake Erie, etc., R. Co. *v.* Fishback, 5 Ind. App. 403; Terre Haute, etc., R. Co. *v.* Schaefer, 5 Ind. App. 86.

Entry of Animals at Place Not Fenced. — That animals got upon the track at a point where the railroad was not fenced should be stated. Fields *v.* Wabash, etc., R. Co., 80 Mo. 203; Nance *v.* St. Louis, etc., R. Co., 79 Mo. 196. Or that road was not fenced at the point where the animals entered. Toledo, etc., R. Co. *v.* Darst, 51 Ill. 365; Louisville, etc., R. Co. *v.* Goodbar, 102 Ind. 596; Louisville, etc., R. Co. *v.* Quade, 91 Ind. 295; Louisville, etc., R. Co. *v.* Detrick, 91 Ind. 519; Louisville, etc., R. Co. *v.* Spain, 61 Ind. 460; Detroit, etc., R. Co. *v.* Blodgett, 61 Ind. 315; Indianapolis, etc., R. Co. *v.* Bishop, 29 Ind. 202; Bellefontaine R. Co. *v.* Suman, 29 Ind. 40. And to aver that the road was not fenced at the place where the injury occurred is not sufficient. Toledo, etc., R. Co. *v.* Darst, 51 Ill. 365.

Where the complaint avers that "where said mare entered upon said defendant's railway and was killed, said railway was not fenced at all," it is sufficient. Louisville, etc., R. Co. *v.* Detrick, 91 Ind. 519. An allegation that at the place where the animals entered upon the track the road was not fenced is sufficient. Jefferson, etc., R. Co. *v.* Lyon, 72 Ind. 107. That the cattle came upon the road at a point where it was not securely fenced and were there injured by being run over is sufficient. Toledo, etc., R. Co. *v.* Harris, 49 Ind. 119. That cattle entered on defendant's "track and right of way at a place where the same was not fenced" is sufficient. Terre Haute, etc., R. Co. *v.* Schaefer, 5 Ind. App. 86. A complaint which alleges that the animals entered upon the railroad "at a point where said railway was not securely fenced" is sufficient. Louisville, etc., R. Co. *v.* Overman, 88 Ind. 115.

Where the complaint avers that, "at the time and place when and where said stock was so run over and killed as aforesaid, the said railroad was not securely fenced as required by law," the inference is that the road was not securely fenced where the animals entered upon it, and it is sufficient. The words "not securely fenced as required by law" are an allegation of a fact and not a conclusion of law. Jeffersonville, etc., R. Co. *v.* Chenoweth, 30 Ind. 366. That the animals went upon the railroad by reason of defendant's failure to maintain sufficient fences and cattle-guards has been held to be equivalent to the allegation that they went upon the railroad at a point where it was not securely fenced. Wabash R. Co. *v.* Ferris, 6 Ind. App. 30.

Where the complaint failed to state that the cattle came upon the track at a point where it was not fenced, but did state that the injury was occasioned "solely on account of defendant's failure to maintain fences," it was held that this averment excluded every other implication than the one that the cattle came upon the track where it was not fenced, and was sufficient. Fields *v.* Wabash, etc., R. Co., 80 Mo. 203.

Entry or Injury at Place Where Fence was Required. — The pleading should allege that the animal entered upon the track or was injured at a point where by law the railroad was required to maintain a fence. Ward *v.* St. Louis, etc., R. Co., 91 Mo. 168; Manz *v.* St. Louis, etc., R. Co., 87 Mo. 278; Morrow *v.* Missouri Pac. R. Co., 82 Mo. 169; Asher *v.* St. Louis, etc., R. Co., 79 Mo. 432; Nance *v.* St. Louis, etc., R. Co., 79 Mo. 196; Johnson *v.* St. Louis, etc., R. Co., 76 Mo. 553; Bates *v.* St. Louis, etc., R. Co., 74 Mo. 60; Norton *v.* Hannibal, etc., R. Co., 48 Mo. 387; Cecil *v.* Pacific R. Co., 47 Mo. 246; Jones *v.* St. Louis, etc., R. Co., 44 Mo. App. 15; Wood *v.* Kansas City, etc., R. Co., 39 Mo. App. 63; McIntosh *v.* Hannibal, etc., R. Co., 26 Mo. App. 377; Briscoe *v.* Missouri Pac. R. Co., 25 Mo. App.

468; Blomberg *v.* Stewart, 67 Wis. 455. Or state facts from which such fact may be inferred. Morrow *v.* Missouri Pac. R. Co., 82 Mo. 169. And a mere statement that the railroad was not fenced and that there was no crossing at the place of injury is not sufficient. Bates *v.* St. Louis, etc., R. Co., 74 Mo. 60.

Where the complaint by fair intendment contains an averment that the animal came upon the right of way at a place where it was defendant's duty to fence, it is sufficient. Henson *v.* St. Louis, etc., R. Co., 34 Mo. App. 636.

That the animals strayed upon the track of defendant's road at times and places stated, where the road was not fenced with a good and sufficient fence, and not at any public or private crossing, is not sufficient. Morrow *v.* Missouri Pac. R. Co., 82 Mo. 169.

Failure to Fence Cause of Injury. — That injury occurred by reason of the failure of defendant to maintain a fence must be averred. Dryden *v.* Smith, 79 Mo. 525; Morris *v.* Hannibal, etc., R. Co., 79 Mo. 367; Hudgens *v.* Hannibal, etc., R. Co., 79 Mo. 418; Kronski *v.* Missouri Pac. R. Co., 77 Mo. 362; Bowen *v.* Hannibal, etc., R. Co., 75 Mo. 426; Williams *v.* Missouri Pac. R. Co., 74 Mo. 453; Edwards *v.* Kansas City, etc., R. Co., 74 Mo. 117; Sloan *v.* Missouri Pac. R. Co.,74 Mo. 47; Bates *v.* St. Louis, etc., R. Co., 74 Mo. 60; Rowland *v.* St. Louis, etc., R. Co., 73 Mo. 619; Cunningham *v.* Hannibal, etc., R. Co., 70 Mo. 202; Luckie *v.* Chicago, etc., R. Co., 67 Mo. 245; Jones *v.* St. Louis, etc., R. Co., 44 Mo. App. 15; Briscoe *v.* Missouri Pac. R. Co., 25 Mo. App. 468; Boyle *v.* Missouri Pac. R. Co., 21 Mo. App. 416.

However, the complaint need not allege specifically that the injury was occasioned by failure of defendant to maintain a fence. It is sufficient that this fact may be inferred from other parts of the pleading. Thomas *v.* Hannibal, etc., R. Co., 82 Mo. 538; Campbell *v.* Missouri Pac. R. Co., 78 Mo. 639; Terry *v.* Missouri Pac. R. Co., 77 Mo. 254; Williams *v.* Missouri Pac. R. Co., 74 Mo. 453.

Where the statement alleged that where the animals were killed the railroad passed through unenclosed timber lands, and where there were not any crossings of said railroad by any highway; that defendant failed and neglected to keep and maintain a lawful fence at the point where the animals got upon the track and were killed; and that the killing of the animals was occasioned then and there by the failure of the defendant to erect and maintain such lawful fence on the sides of its road, it was held sufficient. Tickell *v.* St. Louis, etc., R. Co., 90 Mo. 296.

Where the complaint alleges that the animal went on the track where the road runs adjoining enclosed fields and through unenclosed prairie lands, it is sufficient, although it does not aver that the animal went upon the track by reason of the same being unfenced. Briggs *v.* Missouri Pac. R. Co., 82 Mo. 37.

Time During Which Road has been in Operation. — Where the statute provides that the railroad shall be liable for damages occasioned by failure to fence only in cases where the road has been in operation longer than a specified time, the pleading must allege that the road has been in operation more than that time. Toledo, etc., R. Co. *v.* Bookless, 55 Ill. 230; Chicago, etc., R. Co. *v.* Taylor, 40 Ill. 280; Cannon *v.* Louisville, etc., Consol. R. Co., 34 Ill. App. 640. And an averment that the defendants, "more than *six* months after said railroad was in use," is not sufficient, the allegation being argumentative. Toledo, etc., R. Co. *v.* Bookless, 55 Ill. 230.

Under an act requiring every railway company, "within six months after the lines of such railroad or any part thereof are open," to erect and thereafter maintain fences on the sides of its road, a declaration that "nevertheless more than *six* months after said railroad was in use, to wit, on the *first* day of *May*, 1864, said defendant neglected to erect," etc., is sufficient on general demurrer. Great Western R. Co. *v.* Hanks, 36 Ill. 281.

That animal was running at large when killing occurred should be stated. Daugherty *v.* Chicago, etc., R. Co., 87 Iowa 276.

Negligence need not be alleged in an action instituted for failure to maintain a fence. Louisville, etc., R. Co. *v.* Belcher, 89 Ky. 193; Talbot *v.* Minneapolis, etc., R. Co., 82 Mich. 66; Bigelow *v.* North Missouri R. Co., 48 Mo. 510.

Negativing Exceptions — *Generally.* — All exceptions of the enacting part of the statute must be negatived. Great Western R. Co. *v.* Bacon, 30 Ill. 347; Galena, etc., R. Co. *v.* Sumner, 24 Ill.

631; Ohio, etc., R. Co. *v.* Brown, 23 Ill. 94; Chicago, etc., R. Co. *v.* Carter, 20 Ill. 390. And that the cattle were not injured at a point on the road within the exception must be shown. Galena, etc., R. Co. *v.* Sumner, 24 Ill. 631; Ohio, etc., R. Co. *v.* Brown, 23 Ill. 94; Chicago, etc., R. Co. *v.* Carter, 20 Ill. 390. It is only necessary, however, to negative the killing at the excepted places enumerated in the enacting clause, and not at those at the end of the statute. Great Western R. Co. *v.* Hanks, 36 Ill. 281.

Where the declaration negatives in substance all the exceptions in the statute, although not in the most formal manner, it is not demurrable on that ground alone. St. Louis, etc., R. Co. *v.* Thomas, 47 Ill. 116.

Where the declaration, in stating the excepted place, used the words "unimproved land," whereas the statute used the words "uninclosed land," it was held to be sufficient, as the declaration stated the exception as larger than it really was, and the obligation of the company as less than it was. Illinois Cent. R. Co. *v.* Wade, 46 Ill. 115.

Within Limits of Incorporated Town. — That the injury did not occur within the limits of an incorporated village or town should be shown. Chicago, etc., R. Co. *v.* Carter, 20 Ill. 390; Schulte *v.* St. Louis, etc., R. Co., 76 Mo. 324; Rowland *v.* St. Louis, etc., R. Co., 73 Mo. 619. That the injury was not within the limits of an incorporated city or town need not, however, be specifically alleged. If such fact may be inferred from the allegations of the pleadings, it is sufficient. Rozzelle *v.* Hannibal, etc., R. Co., 79 Mo. 349; Williams *v.* Hannibal, etc., R. Co., 80 Mo. 597; Ringo *v.* St. Louis, etc., R. Co., 91 Mo. 667; Jantzen *v.* Wabash, etc., R. Co., 83 Mo. 171; Perriquez *v.* Missouri Pac. R. Co., 78 Mo. 91; Lainiger *v.* Kansas City, etc., R. Co., 41 Mo. App. 165; Kinney *v.* Hannibal, etc., R. Co., 27 Mo. App. 610; Dorman *v.* Missouri Pac. R. Co., 17 Mo. App. 337.

Where the declaration states that "by means whereof *one* steer strayed and got on said railroad without the limits of towns, cities and villages, and not at the road crossings or public highways," it is sufficient, as the place where it got on the track, and not where it was killed, is material. Great Western R. Co. *v.* Hanks, 36 Ill. 281.

An allegation that the cattle "came upon the track and were run over and killed at a point on the same where it passes through unenclosed lands, and at a point on said road where there was no public or private crossing," sufficiently negatives the possibility that the killing took place in a city or town or village or at a station. Rozzelle *v.* Hannibal, etc., R. Co., 79 Mo. 349.

That the killing occurred at a point where the road passes along, through and adjoining enclosed or cultivated fields or unenclosed lands, negatives the idea that the animal might have been killed in an incorporated town. Williams *v.* Hannibal, etc., R. Co., 80 Mo. 597.

Where the statement alleges that the animal strayed upon the track at a point "*one* mile easterly from *Harlem* depot, where the road passes through and along unenclosed lands where there were no fences on the sides of the road as required by law and where said defendant has not erected or maintained lawful fences on the sides of said railroad," and was there killed, it excludes any inference that the animal was killed upon a public crossing or in an incorporated city or town, and sufficiently avers that she was killed by the failure of the defendant to fence the road. Jantzen *v.* Wabash, etc., R. Co., 83 Mo. 171.

That the cattle came upon the railroad where it passes along enclosed and cultivated fields, and not at any road crossing, sufficiently negatives the idea that the point was within the limits of an incorporated town. Lainiger *v.* Kansas City, etc., R. Co., 41 Mo. App. 165.

Where the complaint distinctly avers that the point in controversy is where defendant's road "passes through, along and adjoining enclosed and cultivated fields," it ufficiently negatives the idea that the point was either at the crossing of a public highway or within the limits of an incorporated town. Kinney *v.* Hannibal, etc., R. Co., 27 Mo. App. 610; Dorman *v.* Missouri Pac. R. Co., 17 Mo. App. 337.

Farm Crossing. — The declaration need not negative the possibility that the animals may have been killed at a farm crossing. Great Western R. Co. *v.* Helm, 27 Ill. 198.

Public Crossing. — That the animal did not get upon the track at the cross-

Form No. 16975.[1]

(Precedent in Louisville, etc., R. Co. *v.* Overman, 88 Ind. 116.)[2]

[(*Title of court and cause as in Form No. 5947.*)][3]

Oliver Overman complains of the defendant, *The Louisville, New Albany and Chicago Railway Company*, and says that the defendant is and was, on the ——— day of *February*, A. D. 1881, a corporation under the general laws of the State of *Indiana*, owning and possessed of a railway, locomotives, engines and trains of carriages or coaches attached thereto, running into and through the county of *Washington* and State of *Indiana*, upon a certain line of railway then and there belonging to said defendant, by its servants so conducted said engines and trains that the same were run and driven against *two* colts belonging to the plaintiff; that said locomotive, engine and train of cars were so driven as aforesaid against both of said animals aforesaid at the same time, thereby injuring and killing the said *two* colts at the same time, to the damage of the plaintiff in the sum of

ing of a highway need not be alleged. If the complaint shows that the animal got upon the track at a point where the company was required to fence it, it is sufficient. Mayfield *v.* St. Louis, etc., R. Co., 91 Mo. 296; Jantzen *v.* Wabash, etc., R. Co., 83 Mo. 171.

Precedents. — Where the declaration alleged that it was the duty of the defendant under a statute, citing it, to erect and maintain suitable fences on the sides of its railroad track sufficient to exclude and turn live stock therefrom, and that the company failed to erect and maintain such fence at a point on the road not in a town or city, but a public road crossing, and by means of such neglect plaintiff's cows, of a certain value mentioned, strayed upon the track and were killed by a passing train of the defendant, it was held to state a good cause of action. Jacksonville, etc., R. Co. *v.* Prior, 34 Fla. 271.

In Horn *v.* Atlantic, etc., R. Co., 35 N. H. 169, the declaration alleged that on the first day of April, 1854, at, etc., the plaintiff was possessed of a close in Milan, and the defendants were in possession of a railroad, passing over and across said close, and the corporation, by reason of said crossing, ought to have erected and maintained a sufficient and lawful fence on each side of their railroad against the plaintiff's said close, to prevent cattle lawfully feeding or depasturing, or being in said close, from escaping out of said close into and upon said railroad, and upon other lands of the plaintiff and upon adjoining closes of others; yet the defendants, well knowing, etc., have neglected and refused, and on the first day of May, 1854, and hitherto, neglected and refused, to erect and keep a sufficient and lawful fence on each side of their railroad against the plaintiff's said close, whereby his close all that time lay open and exposed, and whereby divers cattle, to wit, ten sheep and ten lambs, lawfully depasturing and feeding in said close, to wit, on the twenty-seventh day of April, 1854, escaped out of the same into and upon said railroad, and then and there straying upon said railroad were struck by an engine driven at great speed along said railroad, and were thereby killed, torn and mangled, and rendered of no value, whereby the plaintiff has been totally deprived of his said sheep and lambs, etc. Judgment for plaintiff was affirmed.

Where the complaint alleged "that the defendant on or about," etc., "at and in said county of," etc., "in the state of *Indiana*, by its locomotive and train of cars then running on its railroad at a point on its said road in said county where its said railroad track was not securely fenced, ran over and killed *two* hogs of the plaintiff," it was held to be sufficient. Bellefontaine R. Co. *v.* Reed, 33 Ind. 476.

1. *Indiana.* — Horner's Stat. (1896), § 4025 *et seq.*

See also list of statutes cited *supra*, note 1, p. 412: and, generally, *supra*, note 2, p. 445.

2. It was held that this complaint was sufficient.

3. The matter to be supplied within [ ] will not be found in the reported case.

$*200*; that is to say, that each of said colts was of the value of $*100*. Plaintiff further says that said engine and train was driven against said *two* colts as aforesaid at a point along the said line of railway in *Washington* township, in said county of *Washington* aforesaid, and that said colts entered upon said track and road of said railway company at a point where said railway was not securely fenced, although it was the duty of the said defendant to maintain a good and sufficient fence at said point. Wherefore plaintiff demands judgment for $*200* and all other proper relief.

[(*Signature and verification as in Form No. 5915.*)][1]

Form No. 16976.[2]

(Precedent in Louisville, etc., R. Co. *v.* Consolidated Tank Line Co., 4 Ind. App. 40.)[3]

[(*Title of court and cause as in Form No. 5947.*)][1]

The Consolidated Tank Line Company, plaintiff, complains of the *Louisville, New Albany and Chicago Railway Company*, defendant, and says that the defendant is, and for more than *five* years last past has been, a railway corporation operating a line of railway from *New Albany*, in the State of *Indiana*, to the city of *Chicago*, in the State of *Illinois*, which said line of railroad passes through *Tippecanoe* county, in said first named State. That said railroad, immediately north of the city of *La Fayette*, in said county, and extending for a distance of *two* miles and more northward, during all said period of time, was not and is not now fenced in, and said railroad and its right of way is accessible to cattle, horses, and other domestic animals. That heretofore, to wit: on the *28th* day of *March*, *1889*, a horse belonging to the plaintiff, of the value of *two hundred and fifty* dollars, got upon said railroad and its right of way at the point aforesaid, immediately north of the city of *La Fayette*, where said railroad was not fenced, and said horse, while so on said railroad, was run against and over by a locomotive of the defendant, and so injured as to be utterly worthless, to the damage of the plaintiff $*250*, which is due and unpaid. That the point where said horse was struck and run over was in said county of *Tippecanoe*.

[Wherefore (*concluding as in Form No. 5915*).][4]

bb. In Justice's Court.[5]

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *Indiana.* — Horner's Stat. (1896), § 4025 *et seq.*

See also list of statutes cited *supra*, note 1, p. 412; and, generally, *supra*, note 2, p. 445.

3. This complaint was held sufficient against a motion to make more definite and certain.

4. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

5. **Requisites of Complaint, Petition or Statement, Generally.**— See *supra*, note 2, p. 445.

The statement should specify the nature of the transaction and the particulars of the demand so as to apprise the opposing party of what he is called upon to defend, and should be sufficiently specific to bar another action. Belcher *v.* Missouri Pac. R. Co., 75 Mo.

514; Razor *v.* St. Louis, etc., R. Co., 73 Mo. 471; Norton *v.* Hannibal, etc., R. Co., 48 Mo. 387; Iba *v.* Hannibal, etc., R. Co., 45 Mo. 469.

Place of Injury — *County.* — In some jurisdictions, it is held that the complaint must state that the injury resulted in the county where the suit is instituted. Louisville, etc., R. Co. *v.* Davis, 83 Ind. 89; Louisville, etc., R. Co. *v.* Wilkerson, 83 Ind. 153; Detroit, etc., R. Co. *v.* Blodgett, 61 Ind. 315; Evansville, etc., R. Co. *v.* Epperson, 59 Ind. 438; Toledo, etc., R. Co. *v.* Milligan, 52 Ind. 505; White Water Valley R. Co. *v.* Quick, 30 Ind. 384; Indianapolis, etc., R. Co. *v.* Wilsey, 20 Ind. 229; Lake Erie, etc., R. Co. *v.* Rinker, 16 Ind. App. 334; Chicago, etc., R. Co. *v.* Wheeler, 14 Ind. App. 62; Wichita, etc., R. Co. *v.* Gibbs, 47 Kan. 274; St. Louis, etc., R. Co. *v.* Byron, 24 Kan. 350; Hadley *v.* Central Branch Union Pac. R. Co., 22 Kan. 359.

Where the complaint averred that the road was located upon a certain section of land in Lawrence county, and a portion of the road upon said section and adjoining plaintiff's land was not fenced, and in consequence thereof the mule went upon the road and was then and there fatally injured, etc., it was held that the complaint showed that the injury occurred in the county. Louisville, etc., R. Co. *v.* Wilkerson, 83 Ind. 153.

That "a locomotive owned and used by the said defendant on its railroad in the county of *Franklin* and state of *Indiana*, on," etc., struck, ran against and over and killed one hog of the plaintiff, sufficiently shows that the animal was killed in Franklin county. White Water Valley R. Co. *v.* Quick, 30 Ind. 384.

Where the complaint alleges that the defendant operated a railroad between two certain municipal corporations within the county, and that said animal was on said company's right of way, having entered at a point where said right of way was insecurely fenced, etc., it sufficiently avers that the animal was killed in the county. Lake Erie, etc., R. Co. *v.* Rinker, 16 Ind. App. 334.

Where the bill of particulars stated that the defendant owned and operated a road over and across the plaintiff's premises in Reno county, and that defendant killed the plaintiff's cow "on the said railway track of said defendant and by the operation of said railway," it was held that as the pleadings did not disclose any other railroad or railway through the plaintiff's farm the bill sufficiently showed that the accident occurred in Reno county. Wichita, etc., R. Co. *v.* Gibbs, 47 Kan. 274.

Township. — In *Missouri*, the complaint must show that the injury occurred in the township in which the suit is brought or in the adjoining township. Briggs *v.* St. Louis, etc., R. Co., 111 Mo. 168; Backenstoe *v.* Wabash, etc., R. Co., 86 Mo. 492; Ellis *v.* Missouri Pac. R. Co., 83 Mo. 372; Cummings *v.* St. Louis, etc., R. Co., 70 Mo. 570; Haggard *v.* Atlantic, etc., R. Co., 63 Mo. 302; Barnett *v.* Atlantic, etc., R. Co., 68 Mo. 56; Kinion *v.* Kansas City, etc., R. Co., 30 Mo. App. 573; Manuel *v.* Missouri Pac. R. Co., 19 Mo. App. 631; Roberts *v.* Missouri Pac. R. Co., 19 Mo. App. 649; Vaughn *v.* Missouri Pac. R. Co., 17 Mo. App. 4.

That plaintiff was damaged need not be averred. Louisville, etc., R. Co. *v.* Argenbright, 98 Ind. 254.

That damages are due and unpaid need not be stated. Louisville, etc., R. Co. *v.* Argenbright, 98 Ind. 254.

That injury was done by locomotive or cars of defendant must be stated. Louisville, etc., R. Co. *v.* Harrington, 92 Ind. 457; Pittsburgh, etc., R. Co. *v.* Hannon, 60 Ind. 417; Pittsburgh, etc., R. Co. *v.* Troxell, 57 Ind. 246.

That road was not fenced where animal entered upon the track need not be stated. Louisville, etc., R. Co. *v.* Argenbright, 98 Ind. 254; Indianapolis, etc., R. Co. *v.* Sims, 92 Ind. 496; Wabash R. Co. *v.* Forshee, 77 Ind. 158; Ohio, etc., R. Co. *v.* Miller, 46 Ind. 215.

Other Precedents. — In Talbot *v.* Minneapolis, etc., R. Co., 82 Mich. 66, the declaration was as follows:

"Plaintiff present, and declares orally against the defendant that, whereas, the defendant is a corporation owning and operating a railroad through the township of *Bruce*, county of *Chippewa*, and have been so operating a railroad over a year last past; that said company have not fenced said road at any place through said township; that on the *18th* day of *September* last the plaintiff was the owner of a certain horse colt of great value, to wit, of the value of *one hundred* (*100*) dollars, which was lawfully in said township, which colt went on the track of the said railroad, and was there killed through the negli-

Form No. 16977.[1]

(Precedent in Moore *v.* Wabash, etc., R. Co., 81 Mo. 501.)[2]

[(*Title of court and cause as in Form No. 16973.*)][3]

Plaintiff says that the defendant, at the time of the alleged injury hereinafter mentioned, was and still is a corporation, duly organized

gence of said company, and because said track was not fenced, to the damage of said plaintiff *one hundred* dollars, and therefore he brings suit."

This declaration was held to be as full as is usual or necessary in a justice's court.

In Perriquez *v.* Missouri Pac. R. Co., 78 Mo. 91, the statement was as follows:

"Plaintiff, for his cause of action against the defendant, alleges that the defendant is, and was at the time hereinafter referred to, a corporation duly organized under and by virtue of the laws of the State of *Missouri* under the corporate name of the *Missouri Pacific Railway Company*. Plaintiff further states that said defendant, by its agents, officers and servants, in conducting, managing and running a locomotive engine and train of cars on its said road, did, on the *6th* day of *May*, 1879, in *Linn* township, *Osage* county, State of *Missouri*, run over and cripple a certain cow belonging to this plaintiff, thereby making said cow totally and entirely valueless to plaintiff, which said cow was about *four* or *five* years old, of a red and white color, and known by the name "*Doodle*," to the plaintiff's damage of the sum of $*20*; that said cow was crippled and got on the railroad of said defendant at a point where the same runs along or adjoining unenclosed fields and lands, and where the same was not fenced with a good and lawful fence, and not at the crossing of any public highway. Wherefore plaintiff says an action has accrued to him and asks judgment in double damages so sustained, to-wit: the sum of $*40*, and costs."

It was held that this statement was sufficient.

In Razor *v.* St. Louis, etc., R. Co., 73 Mo. 471, the following petition was held sufficient.

"Plaintiff, for a cause of action, states that the defendant is a corporation duly organized and existing as such by virtue of the general and special laws of *Missouri*, and that as such corporation, it is the owner of that certain railroad known as the *Iron Mountain* Railroad, which passes through *Castor* township in said county; that as such railroad corporation it was the duty of defendant to erect and maintain lawful fences, gates, cattle-guards and road-crossings on the sides of its said railroad in said township of *Castor*, where the same passes through, along and adjoining enclosed and cultivated fields and unenclosed lands; that it failed so to erect and maintain said fences, gates, cattle-guards and road-crossings at a point on said railroad in said township of *Castor*, about between mile-posts ——, on or about the *18th* day of *July*, 1876, by reason of which neglect and default, *two* of the plaintiff's hogs, of the value of $*18*, strayed at said point, (which was not a public road or road-crossing, nor a street of any town or incorporation), on the defendant's said railroad, where the same passes through, along or adjoining enclosed or cultivated fields and unenclosed lands, and were negligently and carelessly run over and killed by the defendant and the locomotives, engines and cars, which were then and there negligently and carelessly being run by defendant and its servants and employees — wherefore plaintiff demands double damages for the killing as aforesaid of said (hogs) cattle, to-wit: The sum of $*36*, as is given by the statute in such cases made and provided," etc.

For other statements held sufficient see Johnson *v.* Missouri Pac. R. Co., 80 Mo. 620; Williams *v.* Hannibal, etc., R. Co., 80 Mo. 597; Blakely *v.* Hannibal, etc., R. Co., 79 Mo. 388; Campbell *v.* Missouri Pac. R. Co., 78 Mo. 639; Wade *v.* Missouri Pac. R. Co., 78 Mo. 362.

1. *Missouri.* — Rev. Stat. (1899), §§ 1105–1109, 2867, 2868.

See also list of statutes cited *supra*, note 1, p. 412; and, generally, *supra*, note 5, p. 450.

2. This statement was held sufficient.

3. The matter to be supplied within [ ] will not be found in the reported case.

and doing business under and by virtue of the laws of *Missouri.** Plaintiff alleges that on the *14th* day of *December*, A. D. 1880, the defendant did, by its agents, engines, cars and locomotives, strike, wound, bruise and kill a cow, the property of the plaintiff, of the value of $*35*, at a point on its road in *Grand River* township, in *Daviess* county, *Missouri*, where there was no railroad, farm or public crossing and where the defendant's road was wholly unfenced, and passed through and along inclosed and cultivated fields, and where the defendant was, by virtue of the statute in such cases made and provided, to-wit: By section 809 of article (2) two of chapter (21) twenty-one, of the Revised Statutes of Missouri, entitled "of private corporation," bound to make, construct and maintain lawful fences and cattle-guards on or along the sides of its road. And plaintiff says that by reason of the failure of defendant so to construct and maintain said fences and cattle-guards, his cow strayed upon its road and was killed, and that by reason thereof he has been damaged in the sum of $*35*.

Wherefore plaintiff by virtue of said statute has the right to recover of defendant, and, therefore, prays judgment for double the amount of said damages, to-wit, *seventy* dollars ($*70*).

[(*Signature of attorney.*)][1]

Form No. 16978.[2]

(Precedent in Cummings *v.* St. Louis, etc., R. Co., 70 Mo. 570.)[3]

[(*Title of court and cause as in Form No. 16973.*)][1]

Plaintiff states: that the defendant is and was, on the *8th* day of *May*, 1875, and was a long time before a corporation duly organized under the law of this State, and as such corporation owned and operated all of that part of the *Belmont* branch of the *St. Louis, Iron Mountain & Southern* Railway that passes through *Iron* township, in *St. Francois* county. Plaintiff, for cause of action, states that on or about the said *8th* day of *May*, 1875, the defendant, its agents, servants and employees in charge of a locomotive and train of cars in passing over its said road, ran against, struck and killed *one* red and white pied heifer *two* years old, of the value of $*15*, and the property of the plaintiff; that said heifer strayed upon said railroad track at a point between mile-posts *79* and *80*, in said township of *Iron*, and was run against, struck and killed as aforesaid, by a locomotive and train of cars owned and operated by defendant, its agents, servants and employees; that at the point where said heifer strayed upon said track, the said railroad was not fenced on either side by defendant, or any one for it, but plaintiff avers that defendant has neglected to fence the same as required by the statutes in such case made and provided; that said heifer strayed and went upon said railroad track in consequence of the absence of the fences, cattle-guards, etc., required to be erected and maintained by said defendant at the point

1. The matter to be supplied within [] will not be found in the reported case.

2. *Missouri.* — Rev. Stat. (1899), §§ 1105–1108, 2867, 2868. See also list of statutes cited *supra*, note 1, p. 412; and, generally, *supra*, note 5, p. 450.

3. This statement was held sufficient.

where said heifer strayed upon said railroad track. Plaintiff states that in consequence of the killing of his said heifer, as aforesaid, he is damaged in the sum of $*15*; plaintiff, therefore, asks judgment for $*30*, being double the damages sustained by him as aforesaid, and for costs of suit.

[(*Signature of attorney.*)][1]

Form No. 16979.[2]

(Precedent in Fraysher *v.* Mississippi River, etc., R. Co., 66 Mo. App. 573.)[3]

[(*Commencing as in Form No. 16977, and continuing down to* *.)

Plaintiff states that][4] on or about the *fifth* day of *August*, 1894, plaintiff was the owner and possessor of a certain cow, to wit: A red muley cow *seven* years old, branded on the left hip with a horse-shoe, of the value of $*35*; that said cow casually and without the fault or procurement of plaintiff strayed in and upon the track and grounds occupied by the said railroad of defendant at a point where said road passes through defendant's uninclosed lands at and in the township of *Perry*, in *St. Francois* county, state of *Missouri*, at a point where said defendant was by law required to erect and maintain good and lawful fences along the sides of its said road, not at a public crossing nor within an incorporated city, town or village. The said cow strayed and went in and upon said railroad track and grounds by reason of the failure and neglect of defendant to erect and maintain good and lawful fences on the sides of its road where said cow got upon the same as aforesaid. The defendant by its agents, servants and employees, not regarding their duty in that respect, so ran and managed its said locomotive and cars as to run the same over and against said cow, and kill and destroy it, in said township of *Perry*, on said *fifth* day of *August*, 1894, to plaintiff's damage $*35*. Wherefore plaintiff prays judgment for $*70*, being double the damages sustained by him as aforesaid, with costs and a reasonable compensation for an attorney fee, to wit, $*25*.

[(*Signature of attorney.*)][1]

(3) Answer that Animal was Running at Large in Violation of Order of County Commissioners.[5]

Form No. 16980.

(Precedent in Missouri Pac. R. Co. *v.* McGrath, 7 Kan. App. 710.)[6]

[(*Title of court and cause as in Form No. 6352.*)

The defendant, the *Missouri Pacific Railway Company*, for answer to plaintiff's petition alleges:][4]

1. The matter to be supplied within [ ] will not be found in the reported case.
2. *Missouri.* — Rev. Stat. (1899), §§ 1105–1109, 2867, 2868.
See also list of statutes cited *supra*, note 1, p. 412; and, generally, *supra*, note 5, p. 450.
3. This statement was held sufficient.
4. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.
5. **For the formal parts** of an answer in a particular jurisdiction see the title Answers in Code Pleading, vol. 1, p. 799.
6. It was held that the trial court erred in sustaining a demurrer to this answer, as it stated a defense.

That at the time of the alleged injury to the animal mentioned and described in plaintiff's petition it was one of the kind prohibited from running at large within the bounds of the county of *Greeley*, in the state of *Kansas*; that the board of county commissioners of said county, being duly and legally authorized thereunto, and while said board was in session at the county-seat of said county on the *6th* day of *January*, 1890, by order duly directed that mules, together with certain other animals, should not be allowed to run at large within the bounds of the said county of *Greeley*; and that said order is in the words and figures following: "That all horses, cattle, mules, asses, sheep, swine, or any one or more of said classes of animals, are hereby prohibited from running at large in *Greeley* county, *Kansas*; that this order shall take effect and be in force on and after the *8th* day of *February*, 1890. Dated at *Tribune*, *Kan.*, this *6th* day of *January*, 1890. *Henry Weaver*, chairman. *L. J. Rogers.*"

That said order was duly entered on the records of the board of commissioners, and duly and legally published for *four* successive weeks next after the entry of the order on the records in the newspaper published in the county of *Greeley* known as the "*Greeley Republican*," which publication was duly verified as provided by law, and the affidavit thereof entered on the records.

Defendant further alleges, that at the time the animal described in said petition was injured as alleged therein, and long prior thereto, the said order of the board of commissioners was in full force and effect, as will more fully appear by reference to the records of the board of county commissioners, which are hereby referred to as a part of this defense. And the defendant alleges that at the time said animal was injured, as alleged in the petition, it was by the order of the board of county commissioners aforesaid duly prohibited from running at large; that the plaintiff at that time well knew that said order was in full force and effect in the county of *Greeley*, notwithstanding which, and in violation thereof, he turned the animal out upon the highways and commons of the county and permitted the same to be running at large, contrary to the provisions of the order and contrary to law, and by reason thereof was guilty of negligence which directly contributed to the injury to the animal as alleged in his petition, if the animal was injured as therein alleged.

[(*Signature and verification as in Form No. 6352.*)][1]

2. For Damages.

a. By Fire from Locomotive.

(1) Complaint.[2]

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **For the formal parts** of a complaint in a particular jurisdictton see the title Complaints, vol. 4, p. 1019.

Precedents. — In Missouri, etc., R. Co. *v.* Lycan, 57 Kan. 635, the petition, which was held sufficient, alleged as follows:

"That this plaintiff, on the *18th* day of *October*, 1891, and for a long time

prior thereto, was the owner of and possessed of the following described lands, to wit: The southeast quarter and the east half of the southwest quarter of section *four*, township *twenty-eight*, of range *twenty-two* in *Crawford* county, *Kansas*, upon which said lands there were growing and standing large and valuable trees, shrubs, vines, apples, rick of straw, as follows, to wit: (*Here followed a particular description of the number and kind, and value of each*), and all of the foregoing items, consisting of trees, vines, bushes, apples and straw, were the property of this plaintiff, and were of the aggregate value of $7,383."

"Fourth. Plaintiff says that on or about the *18th* day of *October*, 1891, the said defendant was operating its said railroad hereinbefore mentioned, and did run a large passenger train, No. 4, drawn by locomotive engine, numbered ——, along and over said railroad in *Crawford* county, *Kansas*, and when said passenger train and locomotive, or engine, was passing through and over said section *4*, township *28*, range *22*, in *Crawford* county, *Kansas*, at about *12.30* o'clock *p.* m. of that day near to this plaintiff's land, said defendant carelessly, negligently, and unlawfully permitted large flames and sparks of fire and live cinders to escape from its said locomotive or engine, by carelessly, negligently and unlawfully failing to provide and have sufficient safety screens or spark arresters attached to said engine to prevent fire and sparks from escaping from its said locomotive or engine, and, by reason of the said defendant's negligent, unlawful and careless manner in which it was operating said railroad, the grass beside said line of railroad, and on said defendant's right of way, became, and was, ignited by and from sparks and coals of fire emitted and thrown from its said locomotive or engine.

"Fifth. Plaintiff says that the said defendant carelessly, negligently, and unlawfully permitted tall grass and weeds, and a large amount of combustible material to grow, be and remain on the right of way of the said railroad company, and by reason of said defendant's said careless, negligent and unlawful manner of operating said railroad by failing to provide sufficient safety screens and spark arresters for its said engine or locomotive, and permitting said grass, weeds and combustible material to grow, be and remain on its said right of way, it permitted fire and sparks to escape from its said locomotive or engine, and which said fire and sparks, so escaping or thrown, or permitted to escape or be thrown, from its said locomotive or engine, the grass, weeds, rubbish and combustible material so carelessly, negligently and unlawfully permitted to be and remain along by, and adjacent to, said line of railroad, became and was ignited; and the said defendant carelessly, negligently and unlawfully permitted said fire to spread and communicate to the premises of this plaintiff, and which said fire burned and destroyed the apple trees, budded peach trees, seedling peach trees, walnut trees, cherry and plum trees, hedge fences, gooseberry bushes, grape vines, blackberry vines or bushes, apples and straw hereinbefore set forth, and the property of this plaintiff to her damage in the sum of $7,383."

In Fields *v.* Wabash R. Co., 80 Mo. App. 603, the first count of the petition, after alleging that the plaintiff was the owner of the farm in question, averred "that the railroad of defendant runs * * * through the farm; that on the *17th* day of *November*, 1897, a certain engine and train of cars were drawn over defendant's said road at the point where said road runs through the premises of plaintiff; that said engine was so defectively and improperly built and constructed, and it and said train of cars were so carelessly, negligently and unskilfully managed by the agents, servants and employees of defendant in charge thereof, that fire escaped from the said engine and train of cars and set fire to the grass and fences of plaintiff on said farm * * * all on plaintiff's said premises, to plaintiff's damage, and the same did damage plaintiff by the destruction of plaintiff's property on said premises," etc. In the second count, the plaintiff repeated the allegation of his ownership of the farm and continuing averred, "that the railroad of the defendant did not run * * * through the south side of plaintiff's said farm, that on the *2d* day of *February*, 1898, a certain locomotive was in use on said railroad of defendant operated along and through said county * * * that said locomotive was so defectively and improperly built and constructed, and was so carelessly, negligently and unskilfully managed by the agents, servants and employees of defendant

Form No. 16981.[1]

(Precedent in Missouri, etc., R. Co. *v.* Steinberger, 6 Kan. App. 586.)[2]

[(*Title of court and cause as in Form No. 5917.*)

The plaintiff, *Ira Steinberger*, states:

That at the time of the grievance hereinafter mentioned the defendant the *Missouri, Kansas and Texas Railroad Company* was and now is a corporation duly incorporated under and by virtue of the laws of the state of *Kansas* and as such corporation was and now is the owner and occupier of a certain railroad in the county of *Neosho* in the state of *Kansas*.

That plaintiff][3] on the *thirteenth* day of *September*, 1893, was the owner of a large apple orchard and the land upon which the same was maintained and growing, about *one-half* mile south of the city of *Erie*, *Neosho* County, through which said apple orchard and premises the defendant had constructed and built and was maintaining and operating its said line of railroad.

That said orchard was a valuable orchard and the apple-trees thereon were in a thrifty condition and a good state of cultivation; and said apple-trees were of the very best quality and variety, and situated on the northeast quarter of section *5*, township *28*, range *20* east, *Neosho* County, *Kansas*. That on said *thirteenth* day of *September*, 1893, the said defendant, its agents and servants, while operating its said railroad through plaintiff's said orchard and while attempting to burn off its right of way and the dead grass thereon, did negligently and carelessly set fire to the dry grass, weeds and other combustible material which had grown and collected and been placed along and upon the said right of way where it passed and ran through plaintiff's said premises and orchard, and negligently and carelessly permitted said fire to escape from the right of way, over and upon said plaintiff's land and premises upon which said orchard was growing, where it continued to spread and burn until it consumed and burned up *594* of plaintiff's apple-trees, which were *seven* years old, of the value of *five* dollars each, or of the value of $2,970, and also consumed *112* small apple-trees of the value of *one* dollar each, or of the value of $112 in all, to the plaintiff's damage in the sum of $3,082. That by reason of the negligence and carelessness of said defendant as aforesaid, plaintiff has been damaged in the sum of $3,082.

[Wherefore plaintiff asks judgment against the defendant in the sum of *three thousand and eighty-two* dollars and costs of this suit.

(*Signature and verification as in Form No. 5917.*)][3]

in charge thereof, that fire escaped from said locomotive and train of cars and set fire to the grass of plaintiff and totally consumed and destroyed *fifty* acres of meadow on plaintiff's said farm, to plaintiff's damage," etc.

It was held that the alleged ownership of the railroad and of the property destroyed were badly pleaded, and that the petition, on direct attack, would have been held bad.

1. *Kansas.* — Gen. Stat. (1897), c. 70, § 32.

See also list of statutes cited *supra*, note 1, p. 412.

2. Judgment for plaintiff in this case was affirmed.

3. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

Form No. 16982.[1]

(Precedent in Ordelheide *v.* Wabash R. Co., 80 Mo. App. 360.)[2]

[(*Title of court and cause as in Form No. 5921.*)][3]

Plaintiff states that the defendant is a corporation duly incorporated under and by virtue of the laws of the state of *Missouri*, and was at the time of the grievance hereinafter mentioned, as such corporation, the owner and occupier of a certain railroad, together with depots, switches, sidetracks, and facilities for receiving and unloading freight, stock and goods, which said railroad runs through the counties of *Warren* and *Montgomery*, in the state of *Missouri*, and as said corporation was at said time operating, working, managing and running its said railroad by its agents, servants and employees, and using thereon its locomotives, engines, cars and trains.

That on or about the *6th* day of *April*, 1*895*, the plaintiff was the owner of a certain building, used as a warehouse, elevator or grain-house, together with horse-power, belting and all appliances and machinery necessary and required to run, work and operate the same, which said building, with the said horse-power, belting, appliances and machinery therein, stood adjoining or near the depots, switches, sidetracks, at or near the defendant's station or depot at *Wright City*, in said *Warren* county, all of which was of the value of *two thousand* dollars.

That on or about said date, the defendant so carelessly and negligently operated, worked, ran and managed its said railroad and carelessly and negligently used thereon defective and insufficient locomotives and engines, and so carelessly, negligently and unskilfully operated, worked and managed and ran its locomotives, engines, cars and trains on its said switches, railroad and sidetracks, that fire escaped from its locomotives and engines and was communicated to plaintiff's said building, warehouse, elevator or grain-house, and the same, together with said horse-power, belting and appliances, and machinery therein, as aforesaid, were damaged and destroyed to plaintiff's damage in the sum of *two thousand* dollars.

Wherefore, by reason of the premises, the plaintiff says he is damaged in the sum of *two thousand* dollars, for which and costs of suit he asks judgment.

[*Jeremiah Mason*, Attorney for Plaintiff.][4]

(2) Answer that Plaintiff had Released Defendant from Liability.[5]

1. *Missouri.* — Rev. Stat. (1899), § 1111.

See also list of statutes cited *supra*, note 1, p. 412.

2. In the answer to this petition, defendant set out a contract by which plaintiff had released the defendant from any damage that might result from the defendant's locomotives. It was held that this answer was sufficient to bar a recovery.

3. The matter to be supplied within [] will not be found in the reported case.

4. The matter enclosed by [ ] will not be found in the reported case.

5. **For the formal parts** of an answer in a particular jurisdiction see the title

Form No. 16983.[1]

(Precedent in Ordelheide *v.* Wabash R. Co., 80 Mo. App. 361.)[2]

[(*Title of court and cause as in Form No. 1329.*)][3]

Now comes the defendant in the above entitled cause, by its attorney, and for its answer to the petition of plaintiff therein filed, admits that it is and was on the *6th* day of *April*, 1*895*, a corporation duly incorporated under and by virtue of the laws of the state of *Missouri*.

Defendant denies each and every other allegation contained and set forth in plaintiff's said petition.

For other and further answer to the petition of the plaintiff, defendant says that on or about the *first* day of *November*, 1*892*, the plaintiff herein entered into a certain written and printed agreement with the defendant for the lease of certain ground, then belonging to the defendant in *Warren* county, *Missouri*, in said agreement described, for the purpose of erecting thereon a certain grain-house, said agreement expiring under its terms, on or about the *31st* day of *October*, 1*897*, which said agreement was in words as follows, to wit: "This agreement, made and entered into this *first* day of *November*, A. D. 1*892*, by and between the *Wabash Railroad Co.*, party of the first part, and *E. F. Ordelheide*, of *Wright*, in the county of *Warren*, and state of *Missouri*, party of the second part,

Witnesseth, that the said party of the first part, for and in consideration of the sum of *one* dollar per annum, in advance, to said party of the first part paid by second party, and upon the express condition and stipulation that second party shall assume all risk of fire from every cause, and shall hold and keep harmless said first party from any and all damages whatsoever, from fire or any other cause, to any building or buildings that may be erected on the land herein leased, or their appurtenances or contents, which guarantee enters into and forms part of the consideration that induces said first party to make this lease; and for the further covenants and agreements hereinafter contained on the part of the second party to be kept and performed, hereby grants unto the said second party the right to occupy and use for the purposes of grain-house the following described part of the grounds of the said party of the first part, at *Wright*, county of *Warren*, and state of *Missouri*, to wit: at a point on the west line of *South* street, *twenty-three* (*23*) feet north of the center of the *Wabash* main track; thence northward along the south side of *South* street *forty-five* (*45*) feet to the north line of *Wabash* right of way; thence westward along the right of way line *one hundred and ten* (*110*) feet; thence southward at right angle *thirty-eight* (*38*) feet to a point *seven and one-half* (*7 1-2*) feet north of the center of the *Wabash* house-track; thence eastward parallel to the house-track, and *seven and one-half* (*7 1-2*) feet from the same, to the point of beginning.

ANSWERS IN CODE PLEADING, vol. 1, p. 799.

1. *Missouri.* — Rev. Stat. (1899), § 1111.

See also list of statutes cited *supra*, note 1, p. 412.

2. It was held that the contract set out in this answer did not injuriously affect the public and the plaintiff could not recover.

3. The matter to be supplied within [ ] will not be found in the reported case.

And said first party further covenants to and with said second party, that second party shall have the right to occupy and use such portions of land, selected and designated as aforesaid, for the location of said grain-house, for and during the full term of *five* (*5*) years from the date of this agreement, unless the occupancy of said premises shall be sooner terminated in the manner hereinafter provided.

And the said second party covenants and agrees with the said party of the first part, to pay all taxes that may be assessed on said grain-house and the herein leased premises, and to conduct the business of storing and forwarding grain or other property, according to such rules as the party of the first part may prescribe in relation to such business at its stations generally.

And the said second party hereby further agrees for himself, his heirs or assigns, that they hereby assume all risk of fire, from any cause whatsoever; that if any insurance is effected during the continuance of this lease or any renewal thereof by said second party, or any party interested therein, on said grain-house or the contents thereof, said second party will, before such insurance is effected, exhibit this lease to the agent or agents, officer or officers of the insurance company or companies through whom said grain-house is to be insured, and procure the indorsement hereon of said agent or agents, officer or officers, and also upon the policies of insurance issued by them or any renewal thereof, to the effect that said insurance company will not, under any circumstances, bring or cause to be brought any claim or action at law against the party of the first part, its successors or assigns, for damages occurring during the term of this lease, or any renewal thereof, by fire or otherwise, to the said grain-house or appurtenances erected on said land, or to the contents thereof.

And it is hereby mutually agreed between the parties hereto, that in case said grain-house shall, at any time during the continuance of this agreement, be destroyed by fire or otherwise, this contract shall not cease and determine by reason thereof, but the said second party shall be allowed *thirty* (*30*) days within which to rebuild the same; and in case the said grain-house shall not be, by said second party, rebuilt in all respects equal to one so destroyed, within *thirty* days from the time of the destruction by fire or otherwise, then this contract shall, at the option of the party of the first part, cease and determine, and be no longer binding upon the parties thereto.

And the party of the second part also further agrees with the party of the first part, that he will remove said grain-house from off the grounds of said party of the first part at any time during the aforesaid term of *five* (*5*) years after having received from the said party of the first part ——— days' notice to do so.

And the party of the first part agrees to recognize said grain-house as the property of the party of the second part, and to permit him to remove the same, at any time, from the premises of the party of the first part.

And it is also expressly understood between the parties hereto, that at expiration of the time mentioned for the continuance of the right herein granted to the second party, the said second party shall

have reasonable time for removing said grain-house from off the grounds of the party of the first part, said removal to be at the expense of said second party; and till such removal, the provisions of this lease regarding damages occasioned by fire, or otherwise, shall remain in full force and virtue.

And said second party hereby agrees that he will not sublet said leased land nor assign nor transfer this agreement without the consent in writing of the general manager of the party of the first part, indorsed hereon, and subject to all the conditions, covenants, limitations and restrictions of this lease, and that he will use said leased land for no other purpose than that contemplated by the terms of this contract.

And the said second party hereby further agrees to paint all buildings erected by him on the herein leased premises a color in conformity with the uniform color established by said party of the first part for its buildings generally.

And it is distinctly understood and agreed between the parties hereto, that in case the second party shall make default in any of the covenants herein contained on his part, to be kept and performed, or shall insure said grain-house on said leased land without procuring the indorsement thereon, as hereinbefore provided in that respect, then in that case it shall and may be lawful for the said first party, its assigns, successors, agent or attorney, at its election, to declare this agreement at an end, and into or upon said premises, with the said grain-house and appurtenances hereon or any part thereof, to enter with or without process of law, and the said second party or any persons occupying said premises and said grain-house or appurtenances, to expel, remove and put out, using such force as may be necessary for that purpose, and occupy and possess said premises, and hold and occupy the grain-house and appurtenances thereon till they can be removed or the conditions of this lease shall have been complied with by said second party; but no action or proceedings under this paragraph by the party of the first part shall in any manner release the party of the second part from the obligations and duties assumed as regards damages occasioned by fire, or otherwise, as provided for in this agreement of lease."

Further answering defendant says that for the various considerations named in said agreement the plaintiff herein agreed to assume, and by said contract did assume all risk of fire to his property, then or thereafter to be located upon defendant's land as aforesaid, from any cause whatever; and that under said agreement, for said consideration the plaintiff further assumed all risk of fire from every cause, and undertook and agreed to hold and keep harmless the defendant from any and all damages whatsoever from fire or any cause to any building or buildings that might be erected upon said land, or their appurtenances and contents.

Wherefore, defendant says that plaintiff ought not to have or maintain this case, and having fully answered, prays to be discharged with its costs. [*Oliver Ellsworth*, Attorney for Defendant.][1]

1. The matter enclosed by [ ] will not be found in the reported case.

b. For Destruction of Merchandise in Transit.

Form No. 16984.

(Precedent in Louisville, etc., R. Co. *v.* Marbury Lumber Co., 125 Ala. 239.)[1]

[(*Title of court and cause as in Form No. 5907.*)][2]

1st. Plaintiff claims of defendant the sum of *twenty-five hundred* dollars (*$2,500.00*) as damages, for that heretofore, to wit, the *13th* day of *January*, 1897, the defendant negligently set fire to and destroyed, to wit, *seventy* bales of cotton, the property of the plaintiff, located on the premises of the plaintiff, of the value, to wit, *twenty-five hundred* dollars (*$2,500.00*), to plaintiff's great damage as aforesaid.

2d. The plaintiff claims of the defendant the further sum of *twenty-five hundred* dollars (*$2,500.00*) for that heretofore, to wit, on the *13th* day of *January*, 1897, the defendant negligently set fire to and destroyed, to wit, *seventy* (*70*) bales of cotton, the property of the plaintiff, of the value of, to wit, *twenty-five hundred* dollars, to plaintiff's great damage as aforesaid.

3d. The plaintiff claims of defendant the further sum of *twenty-five hundred* dollars (*$2,500.00*) as damages, for that heretofore, on, to wit, *13th* day of *January*, 1897, the defendant, by the negligence of its agents and servants who were then and there engaged in the operation of a train of cars and engine upon defendant's railway track at *Bozeman, Alabama*, negligently threw from said engine sparks which set fire to cotton, the property of plaintiff, of the value, to wit, *twenty-five hundred* dollars (*$2,500.00*), and by means thereof destroyed, to wit, *seventy* (*70*) bales of cotton, to the plaintiff's damage in the sum aforesaid.

[(*Signature as in Form No. 5907.*)][2]

c. For Ejecting Plaintiff from Train.

(1) Complaint or Declaration.[3]

Form No. 16985.[4]

(*Title of cause as in Form No. 6949.*)

The plaintiff sues the defendant for *two thousand* dollars damages, for that heretofore, on the *twelfth* day of *June*, 1897, the plaintiff purchased a ticket of the ticket agent of the defendant at *Owensboro*, in the state of *Kentucky*, and paid him therefor, calling for transportation from said *Owensboro* to the city of *Nashville* in the state of *Ten-*

1. It was held that this complaint stated a cause of action.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. **For the formal parts** of a complaint or declaration in a particular jurisdiction see the titles Complaints, vol. 4, p. 1019; Declarations, vol. 6, p. 244.

4. This was the declaration in the case of Sinnott *v.* Louisville, etc., R. Co., 104 Tenn. 233. In this case it was shown that the plaintiff, when he purchased the ticket, gave a fictitious name; that the agent at Nashville knew the plaintiff personally, and upon plaintiff signing a fictitious name to the ticket refused to validate the same. It was held that upon these facts the plaintiff could not recover.

nessee and return, and limited for return passage to the *nineteenth* day of *June*, 1897. The said ticket so purchased provided among other things that it should only be good for return passage, within the said limit, of the original purchaser, after identification by signature on the back of the same and by other means, if required, in the presence of joint agent of terminal lines at said *Nashville*, by whom said ticket was to be stamped with what was termed a validating stamp. The plaintiff came to said *Nashville* on said ticket on the railroad of said defendant, and within the limit of said ticket, to wit, on the evening of the *sixteenth* day of *June*, 1897, the plaintiff desiring to return to said *Owensboro*, presented the said ticket to the said ticket agent of terminal lines at said *Nashville*, namely, one *John A. Thomas*, who was the agent of the defendant referred to in said ticket as the joint agent of terminal lines, and plaintiff offered to identify himself as the original purchaser of the ticket by signature or otherwise, and did identify himself as original purchaser by signature in the presence of said *John A. Thomas*, who also personally knew the plaintiff, and demanded return passage to said *Owensboro*, but the said *John A. Thomas* wrongfully and oppressively refused to stamp the ticket; that plaintiff thereupon boarded the proper train of defendant going in the direction of said *Owensboro* and offered the said ticket for passage to the conductor of said train; said conductor refused to accept said ticket, and at *Guthrie*, in the state of *Kentucky*, wrongfully ejected plaintiff from said train, the plaintiff being then and there, as was well known to said conductor, very sick and scarcely able to stand upon his feet, to the great hurt, inconvenience and humiliation of said plaintiff, and to his damage in the sum of *two thousand* dollars; therefore he sues and demands a jury to try the cause.

Jeremiah Mason, Attorney for Plaintiff.

Form No. 16986.

(Precedent in Iseman *v.* South Carolina, etc., R. Co., 52 S. Car. 567.)[1]

[(*Title of court and cause as in Form No. 5932.*)

The complaint of the above named plaintiff respectfully shows to this court:

I. That the defendant is a corporation created, organized and doing business under the laws of the state of *South Carolina*.

II. That during the times hereinafter named the defendant was and now is doing business as a common carrier of passengers for hire between the city of *Charleston*, in the county of *Charleston* and state of *South Carolina*, and the city of *Columbia* in the county of *Richmond* and state of *South Carolina*.][2]

III. That on the afternoon of the *21st* day of *June*, 1896, the plaintiff boarded the defendant's train at *Charleston*, *S. C.*, for the purpose of taking passage to *Columbia*, having previously purchased a ticket from *Charleston* to *Columbia*, and the defendant having received its usual charge for said ticket and transportation between said places.

1. It was held that a nonsuit was improperly entered in this cae.

2. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

IV. That when the said train had gotten only a few miles from *Charleston*, the defendant's agent in charge of the said train demanded of the plaintiff his fare, and refused to accept their aforesaid ticket, which the plaintiff tendered to him, and which he had purchased in good faith; but the plaintiff, well knowing that his ticket was perfectly good, and that defendant had received its usual charge therefor, declined to pay any more, and persisted in riding on his said ticket.

V. That thereupon the defendant caused its train to be stopped between stations, and at a place with no shelter or convenience for passengers, and while it was then raining, and with intent to degrade, humiliate, mortify, and wound the plaintiff in his person and feelings, caused him to be forcibly ejected from the said train, violently, wilfully, and unlawfully, and without regard to the rights of the plaintiff, and with a design to injure and oppress him in the exercise of his lawful rights.

VI. That after the plaintiff had been so unlawfully and violently ejected from the said train, he again entered it, and, under protest, paid in money the fare demanded of him by the conductor to *Branchville.* That thereafter, and after proceeding some distance, the defendant's agent, who had ejected him, approached the plaintiff, refunded him the money he had paid him to *Branchville*, and asked for his ticket, which he had before refused, which said ticket he then punched and returned to the plaintiff, and recognized the said ticket as good and valid for passage from *Charleston* as far as *Branchville.*

VII. That after leaving *Branchville*, another conductor in the employment of the defendant; and who then had charge of the said train, or car, on which the plaintiff was traveling from *Branchville* to *Columbia*, accepted the aforesaid ticket as passage from *Branchville* to *Columbia*, it being the identical ticket that plaintiff had tendered before he was ejected from the train.

VIII. That by the aforesaid wrongful and unlawful acts and violence of the defendant, and disregard of the plaintiff's rights, the plaintiff has been injured in his person and feelings to his damage $5,000.

[Wherefore plaintiff demands judgment against the defendant to the sum of *five thousand* dollars, costs of this action.

(*Signature of attorney and verification as in Form No. 5932.*)][1]

(2) Answer.[2]

Form No. 16987.

(Conn. Prac. Act, p. 206, No. 373.)

(*Commencement as in Form No. 11429.*)

1. Paragraph fourth is denied, except so far as admitted in the following statement:

The plaintiff received, while passing from *New Haven* to *Berlin*, in

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

2. For the formal parts of an answer in a particular jurisdiction see the title Answers in Code Pleading, vol. 1, p. 799.

exchange for his said ticket, a certain check which was evidence of his right to travel from *Berlin* to *Middletown*. By a reasonable rule adopted and enforced by the defendant, it was the duty of the plaintiff to surrender said check to the conductor of the defendant's train during his passage from *Berlin* to *Middletown*, upon demand, and the duty of the conductor to eject from the train, at the first stopping-place, any passenger who refused to surrender such check. The plaintiff, while passing as aforesaid from *Berlin* to *Middletown*, refused, upon demand, to surrender said check to the conductor of the train, and thereupon the conductor, without unnecessary force, attempted to put the plaintiff off the train at the first stopping-place, to wit, *East Berlin*, and desisted from said attempt as soon as the plaintiff surrendered said check.

2. As to paragraph fifth, the defendant has no knowledge or information, sufficient to form a belief.

(*Signature as in Form No. 11429.*)

d. For Failure to Construct and Maintain Fence.

Form No. 16988.[1]

(*Venue and title of court and cause as in Form No. 5917.*)

The plaintiff, *C. H. Shoemaker*, complains of the defendant, the *St. Louis & San Francisco Railway Company*, and alleges that the defendant is a corporation duly incorporated under and by virtue of the laws of the state of *Kansas*, and doing business in the state of *Kansas*. Plaintiff further alleges that he was, on the *22d* of *December*, 1879, the owner in fee simple and in possession of the following described tracts of land, situate in the county of *Greenwood*, and state of *Kansas*, to wit, the north half of the southeast quarter of section *twelve* (*12*), township *twenty-eight* (*28*), of range *ten* (*10*), east, and the north half of the southwest quarter of section *twelve* (*12*), township *twenty-eight* (*28*), of range *ten* (*10*), east, and that he is now the owner and in possession of said described premises.

Plaintiff further alleges, that on said *22d* day of *December*, 1879, the said defendant, the *St. Louis & San Francisco Railway Company*, under and by the name of the *St. Louis, Wichita & Western Railroad Company*, was constructing its said railway through *Twin Grove* township, in *Greenwood* county, *Kansas*, and the line of route for said railway extended through and over said described premises, the property of the plaintiff. Plaintiff says that the defendant, by *A. J. Allen*, its accredited agent, and who represented himself as the agent for defendant, did, on the *22d* day of *December*, 1879, purchase of and

1. This is substantially the petition filed in St. Louis, etc., R. Co. *v.* Shoemaker, 27 Kan. 677. The petition as set out in the report contains an additional paragraph, charging that by reason of the premises the agreement had become forfeited and absolute, and that the sum of one thousand dollars was due to plaintiff. It was held that the petition stated a cause of action, but that the sum of one thousand dollars mentioned in the contract must be construed as a penalty; that on default the owner of the property was entitled to recover his actual damages only. For this reason that paragraph has been omitted and the prayer changed to meet the allegations of the petition.

from this plaintiff *one hundred* feet in width through and across the above-described lands, the property of plaintiff, as and for a right of way for said defendant to construct its road-bed and track, and to operate its locomotives and trains thereon, and paid defendant therefor the sum of $*200*; and as a further consideration thereof the said *A. J. Allen*, agent for plaintiff aforesaid, entered into an agreement for defendant, under the name of the *St. Louis, Wichita & Western Railway Company*, with plaintiff, whereby it agreed and obligated itself to build a good, substantial and lawful fence of *five* boards high on each side of the railroad the distance the same extends through the north half of the southeast quarter of section *twelve* (*12*), township *twenty-eight* (*28*), range *ten* (*10*) east, and the north half of the southwest quarter of section *twelve* (*12*), township *twenty-eight* (*28*), range *ten* (*10*), of the lands of said *C. H. Shoemaker*, the plaintiff herein, and also agreed and obligated itself to make and construct a crossing with cattle-guards on each of the *eighty* acres described herein, at such places as *C. H. Shoemaker*, the owner of said premises, shall designate; said fence and crossings to be kept up and maintained in good repair by said railway company; said fence and crossings with cattle-guards to be completed at and by the time said railway company begins to run regular trains on said track through said premises. Upon failure on the part of the said railway company to build said fence and construct said crossings with cattle-guards in the manner and at the time specified in said agreement, the said railway company agrees to forfeit and pay to the said *C. H. Shoemaker* the sum of *one thousand* dollars, a copy of which agreement is hereto attached, marked "Exhibit *A*,"[1] and made a part thereof.

Plaintiff further alleges, that said defendant (the said railway company) has not, nor has anyone for it, built and constructed said fence and crossings in said premises, although the time in which it was to have done so has long since elapsed; that said railway company has been operating its regular trains through said premises for a long space of time, to wit, for *six* weeks or more.

Plaintiff says that by reason of the failure of said defendant to build and construct said fence and crossings with cattle-guards on

1. **Exhibit A** was as follows: "The *St. Louis, Wichita & Western Railway Company* agrees, and hereby obligates itself, to build a good, substantial and lawful fence on each side of the railroad track, the distance the same extends through the north half of the southeast quarter of section *twelve* (*12*), township *twenty-eight* (*28*), range *ten* (*10*) east, and the north half of the southwest quarter of section *twelve* (*12*), township *twenty-eight* (*28*), range *ten* (*10*), the same to be completed at and at the time the said railway company begins to run regular trains on said tracks through said premises.

And the said railway company further agrees to make and construct, at and by the time the said company begins to run regular trains through said premises, a 'crossing' with cattle-guards on each of the *eighty* acres described herein, at such places as *C. H. Shoemaker*, the owner of said land, shall designate.

And it is understood and agreed that the said fence is to be a good and substantial *five*-board fence, and the said fence and crossings to be kept up and maintained in good repair by said railway company.

And in case the said railway company should fail to build and construct said fence and crossings with cattle-guards, in the manner and by the time before stated, then the said company

said premises he has been deprived of the use of his said premises for cultivation and other farm purposes, and by reason thereof has been greatly damaged, to wit, in the sum of *five hundred* dollars.

Wherefore, plaintiff prays a judgment against said defendant for the sum of *five hundred* dollars, his damages so as aforesaid sustained, and for costs of suit.

(*Concluding as in Form No. 5917.*)

Form No. 16989.[1]

(Precedent in Dean *v.* Sullivan R. Co., 22 N. H. 316.)[2]

[(*Commencing as in Form No. 6945*)][3] in a plea of the case, for that the plaintiff heretofore, to wit, on the *10th* day of *June*, 18*48*, was and from thence hitherto hath been and still is lawfully possessed and in the occupation of a certain close, situated in *Claremont* (*describing close*); and the said defendants during the time aforesaid, were and still are in possession of, and in the use and occupation of a certain railroad passing over and across the plaintiff's said close; and the said corporation by reason of their said railroad passing over and across the plaintiff's said close, on the day first above mentioned, ought to have erected, and, during all the time aforesaid, to have kept and maintained a sufficient and lawful fence on each side of their said railroad, against the plaintiff's said close, to prevent cattle, lawfully feeding, or depasturing, or being in said close, from erring or escaping from and out of said close, into and upon the defendants' said railroad, and into and upon other lands of the said plaintiff, and into and upon the adjoining closes, and to prevent cattle of other persons lawfully feeding and depasturing in adjoining closes, from escaping into the said close of the said plaintiff; yet the defendants well knowing the premises but continuing to neglect and refuse to erect and keep a sufficient and lawful fence on each side of their railroad against the plaintiff's said close, as by law they were required, to wit: on the day and year first above mentioned, neglected and refused, and from thence hitherto have neglected and refused, and still neglect and refuse, to erect and keep a sufficient and lawful fence on each side of their railroad, against the plaintiff's said close, whereby the said close was, and has been, during all that time, laid open and exposed, and thereby, divers cattle, to wit: *three* horses, *ten* cows, and *one hundred* sheep, lawfully feeding and depasturing in said close, on the several days and times aforesaid, went, erred, and escaped from and out of the same, in and upon the adjoining closes, and upon other lands of the said plaintiff, and to other places unknown to the plaintiff; and the cattle of persons unknown to the plaintiff, by reason of said close being and remaining so open and exposed, on divers days and times between the day first above mentioned, and the day of the purchase of this

agrees to forfeit and pay to the said *C. H. Shoemaker one thousand* dollars. *Dec. 22*, 1879. *A. J. Allen.*"

1. *New Hampshire.* — Pub. Stat. & Sess. L. (1901), c. 159, §§ 23, 24, 25. See also list of statutes cited *supra*, note 1, p. 412.

2. A demurrer to this declaration was overruled.

3. The matter to be supplied within [] will not be found in the reported case.

writ, entered into the said close of the plaintiff, and greatly injured the same, and spoiled the grass and grain thereon growing and being, and by all which the plaintiff lost the profits of his said close for the time aforesaid, and was put to great trouble and expense in finding his said horses, cows, and sheep, so erring and escaping from his said close as aforesaid; to the damage, [(*concluding as in Form No. 6945*).][1]

Form No. 16990.

(Precedent in Huston *v.* Cincinnati, etc., R. Co., 21 Ohio St. 236.)[2]

[(*Title of court and cause as in Form No. 5929.*)][1]

Plaintiff says that formerly, and in 1853, *Solomon Sturges* was the owner of a tract or parcel of land in said county of *Muskingum*, and while he was so the owner thereof, the *Cincinnati, Wilmington and Zanesville Railroad Company*, incorporated under the laws of *Ohio*, on the *25th* day of *April*, 1853, commenced proceedings under the statutes of said state, to appropriate so much of said land as was necessary for the purpose of a road way for the railroad of said company, through the same, and extending in length through the said land *fourteen hundred and fifteen* feet; that said proceedings were commenced in the *probate* court within and for said county.

Plaintiff further says, that in said proceedings before said court, in the hearing and trial of said cause, in consideration of the premises and for the consideration hereinafter shown, by the consent of the said parties to said cause, there was entered of record in said court and in said cause the matters set forth in exhibit "*A*," hereto attached and made a part of this petition.

The exhibit referred to, omitting so much thereof as it is unnecessary to recite here, is as follows:

"The sheriff having returned with the jury from viewing the premises, and the cause coming on to be heard, and now come the parties by their attorneys and entered into the following agreement with regard to fencing and cross-ways, to wit:

"In consideration that the said *Solomon Sturges*, upon the trial of this cause, has, at the instance and request of the *Cincinnati, Wilmington and Zanesville Railroad Company*, withdrawn entirely from the consideration of the jury all claim for compensation on account of the fences to be made for the protection of his remaining lands (and of his stock and property thereon), lying along and on each side of said parcel of land so by said company appropriated, as in the statement in this cause mentioned, such fences being made necessary by reason of the appropriation aforesaid; and has also in like manner withdrawn all claim for compensation on account of the cross-ways over said parcel so appropriated, and over the said road to be constructed thereon, becoming necessary by reason of said appropriation to enable the said *Solomon Sturges*, his heirs and assigns, conveniently to pass and repass over said parcel of land so appropriated, and over the said railroad from the lands of the said *Solomon Sturges* being on the one side thereof, to his lands lying on the other side thereof, the

1. The matter to be supplied within [ ] will not be found in the reported case.

2. It was held that the trial court erred in sustaining a demurrer to this petition.

said *Cincinnati, Wilmington and Zanesville Railroad Company* have agreed, and now here in open court do agree, with the said *Solomon Sturges*, his heirs and assigns, that the said company will make and erect, for the purpose aforesaid, along and on the entire length of the lines on each side of the said parcel of land so appropriated as aforesaid, good and sufficient fences, *five* feet high, to be made of posts and boards, and also will always repair, maintain and keep up the said fences in good condition, all at the cost and expense of said company, and without any liability therefor at any time by way of contribution or otherwise on the part of the said *Solomon Sturges*, his heirs or assigns; and also will make and construct for the accommodation of the said *Solomon Sturges*, his heirs and assigns, two good and sufficient cross-ways, with proper cattle pits on each side thereof, over the said parcel of land so appropriated, and over the said road to be thereon constructed, the same to be located at the places heretofore by the said parties indicated therefor upon the ground, so as always to enable the said *Solomon Sturges*, his heirs and assigns, conveniently to pass and repass over the said parcel so appropriated and over said railroad, from the lands of the said *Solomon Sturges*, on the one side thereof, to his lands on the other side thereof, and always to have access to and from the same to any turnpike or public highway, and this too with implements, wagons, carriages, and other vehicles, and with horses, cattle and other stock, as well as on foot, and also by their agents and servants, as well as by themselves, and for all purposes whatsoever, provided, however, that the use of such cross-ways by said *Solomon Sturges*, his heirs and assigns, shall at no time interfere with the necessary and reasonable use of said railroad by said company, and also always to repair, maintain, and keep up the said *two* cross-ways in said condition, all at the cost and expense of the said company and without any liability therefor, at any time by way of contribution or otherwise, on the part of the said *Solomon Sturges*, his heirs and assigns; and also has further agreed, and now here in open court does further agree with the said *Solomon Sturges*, his heirs and assigns, * * * and it is now here in open court further agreed by both the parties thereto, that the agreement aforesaid shall be here entered of record in this cause, and that such record shall be a perpetual memorial thereof; all which is now accordingly here done. *April 30, 1853.*

Now come the parties, the *Cincinnati, Wilmington & Zanesville Railroad Company*, by *Goddard and Eastman*, their attorneys, and *Solomon Sturges*, by *C. C. Convers*, his attorney, and submitted the cause to the jury upon their own examination. Whereupon the jury retired to consider of their verdict, and afterwards, on the same day, returned into court, and on their oaths aforesaid did find and say that they did estimate and assess the amount of compensation and damages in money which the said *Solomon Sturges* will sustain by reason of the said appropriation of the property in said statement mentioned, to the use of the *Cincinnati, Wilmington & Zanesville Railroad Company* in the proceedings herein, at the sum of *one hundred and seventeen* dollars. It is therefore considered and ordered by the court that the said verdict be and is hereby confirmed; and it is by the court

further ordered that the said *Solomon Sturges* recover of the said *Cincinnati, Wilmington & Zanesville Railroad Company*, the said sum of *one hundred and seventeen* dollars damages, together with costs taxed in this case.

Afterward, *May 2*, 1853, came the *Cincinnati, Wilmington & Zanesville Railroad Company*, by *John A. Adams*, their agent, and deposited in said *probate* court the sum of *one hundred and seventeen* dollars damages, together with the costs taxed herein. It is, therefore, by the court further ordered, that the said *Cincinnati, Wilmington & Zanesville Railroad Company* hold the property, in said proceedings mentioned, for the purpose for which the same was appropriated."

Plaintiff further says, that the said *Cincinnati, Wilmington & Zanesville Railroad Company*, under and by virtue of the judgment and proceedings aforesaid, in said *probate* court, took possession of said land so sought to be appropriated as aforesaid, being in length through said land, *1,415* feet, and used and occupied the same as and for the purposes of a road-way for said railroad.

Plaintiff further says, that said road-way and the land so appropriated as aforesaid, have been sold to the defendant; that said defendant is now, and for more than *two* years last past has been in the possession and occupancy of said land so as aforesaid appropriated, and using and occupying the same as and for the purposes of a road-way for said railroad, and that said defendant acquired its interest in the same with a full knowledge of all the matters herein alleged.

Plaintiff further says, that neither the said *Cincinnati, Wilmington & Zanesville Railroad Company*, nor this defendant, nor any person for them at any time, has built or erected, or caused to be built or erected, the fences on either side of said road-way so as aforesaid appropriated, nor either of the cross-ways or cattle pits, though often requested so to do.

Plaintiff further says, that said *Solomon Sturges* sold and conveyed in fee simple his land aforesaid, from which said road-way was appropriated as aforesaid, to *Howard Copeland*, and said *Howard Copeland* sold and conveyed the same in fee simple to this plaintiff, in the year 1863, and this plaintiff thence hitherto has been in possession and occupancy of the same, except the road-way so as aforesaid appropriated.

Plaintiff further says that neither said *Sturges* nor said *Copeland*, nor any person claiming by, through or under them, or either of them, ever prosecuted any suit in this behalf, or ever received any compensation in such behalf.

Plaintiff further says, that his said land is used and occupied by him for farming purposes, and upon each side of said road-way, and along the whole length thereof extending through said land, he is using the same for pasture and for cultivation, and his stock is endangered by running and straying on said road-way.

Wherefore plaintiff says he is damaged in the premises in the sum of *two thousand* dollars, for which sum he asks judgment.

[(*Signature of attorney and verification as in Form No. 5929.*)][1]

1. The matter to be supplied within [ ] will not be found in the reported case.

e. For Failure to Deliver Goods.

Form No. 16991.[1]

(*Title of court and cause as in Form No. 5947.*)

The plaintiff above named, complaining of the defendants, alleges that the defendant *The Midland Railway*, is a corporation duly incorporated under the laws of the state of *Indiana*, owning and operating a railroad between the city of *Cincinnati*, in the state of *Ohio*, and the city of *Anderson*, in the state of *Indiana*; that on and prior to the *twenty-ninth* day of *August*, 1894, the plaintiff was engaged in doing business under the firm name of *Tebbs Brothers*, at *Anderson*, in the county of *Madison*, and state of *Indiana*, in selling bananas in the markets to merchants and grocers along the line of the defendant railway, in the cities of *Greensburg*, *Rushville* and *Anderson*, all in said state of *Indiana*, and prior to said *twenty-ninth* day of *August*, 1894, had arranged to sell in the markets in each of said cities in said state of *Indiana*, and had arranged to procure from the city of *Cincinnati*, in the state of *Ohio*, a carload of bananas and ship said bananas to said cities of *Greensburg*, *Rushville* and *Anderson* with the privilege of stopping over at each of said places and selling to customers in the markets in each of said cities; that on or about said *twenty-ninth* day of *August* plaintiff purchased of defendants *J. Leverone & Company*, in *Cincinnati*, in the state of *Ohio*, a carload of bananas, for the purpose of making such shipment as aforesaid, which said carload of bananas was of the value of *three hundred and fifty* dollars and of good merchantable and marketable condition and quality, and plaintiff caused said *J. Leverone & Company* on said day to ship said carload of bananas so purchased from them over the line of defendant railway, with the privilege of stopping over in said cities of *Greensburg* and *Rushville*, said bananas to be consigned to plaintiff at said city of *Anderson*; that the said defendants, *J. Leverone & Company*, on said *twenty-ninth* day of *August*, for the use and benefit of this plaintiff, shipped the said carload of bananas over the line of defendant railway, and said defendant railway then entered into a written and printed contract with said *J. Leverone & Company* for the use and benefit of this plaintiff, for the shipment of said carload of bananas, a copy of which printed and written contract is made a part of this complaint, filed herewith and marked "Exhibit *A*;" that although said contract was issued in the name of said *J. Leverone & Company*, said contract was issued for the use and benefit of plaintiff, and said defendants, *J. Leverone & Company*, have no right, title or interest therein, and they are made parties defendant to answer as to any such right, title or interest, if any they claim; that defendant railway took possession of said carload of bananas and undertook to ship the same as provided in said contract, and did carry said carload of bananas through said *Greensburg* and *Rushville*, and this plaintiff before or while said carload of bananas was at *Greensburg*, in the state of *Indiana*, and immediately before its arrival at said *Greensburg*, notified and demanded the defendant railway to stop and sidetrack said carload of bananas at said city of

1. This is substantially the complaint in Tebbs *v.* Cleveland, etc., R. Co., 20 Ind. App. 192. It was held that that complaint stated a good cause of action and that the trial court erred in sustaining a demurrer thereto.

Greensburg; that said defendant railway, without this plaintiff's consent, and against his will, failed and refused to allow said carload of bananas to be stopped or sidetracked at the said city of *Greensburg* and caused the same to be carried on to the said city of *Anderson* without any stopover and without allowing plaintiff to take said bananas from said car; that before or at the time said carload of bananas reached said city of *Rushville*, plaintiff notified and demanded said defendant railway to stop and sidetrack said carload of bananas at said city of *Rushville*; that said defendant railway, without this plaintiff's consent and against his will, failed and refused to allow said carload of bananas to be stopped or sidetracked at said city of *Rushville*, and failed and refused to allow plaintiff to take bananas from said car, and carried said bananas on through to the place of their final consignment, to wit, said city of *Anderson*, and at said city of *Anderson* delivered said bananas to this plaintiff; that the stopover privilege expressed in said contract heretofore referred to and marked "Exhibit *A*," was by the parties and custom of common carriers agreed and understood to be for the purpose of allowing a portion of the contents of said car to be unloaded; that said contract for shipping was entered into for a valuable consideration moving to the said defendant railway; that this plaintiff and the said firm of *J. Leverone & Company*, in whose name the said contract was made for the use and benefit of this plaintiff, have each performed the stipulations and conditions of said contract on their part required to be performed; that the defendant railway has violated and broken said contract in failing and refusing to stop over and sidetrack said carload of bananas at said cities of *Greensburg* and *Rushville*; that at the time said carload of bananas was shipped in said city of *Cincinnati* there were therein *seven hundred* bunches in sound condition, not decayed, and of good merchantable quality, and then and at the time the said car arrived at said city of *Greensburg* were of the value of *fifty* cents per bunch, that being the market value per bunch at said city of *Greensburg* of the kind of bananas that were in said car when it arrived at said city of *Greensburg*; that said city of *Greensburg* is a city having a population of *four thousand* inhabitants, and at the time of the arrival of said car at said city the banana market of said city was poorly supplied and there was a great demand for bananas at said market price, and had said car been stopped at that place this plaintiff could and would have sold in the market at said city more than *two hundred and fifty* bunches of said bananas at and for the price of *fifty* cents per bunch, and could and would have sold the ripest portion of said carload of bananas which were then in good marketable condition; that said city of *Rushville* was then a city having a population of more than *five thousand* inhabitants, and at the time said car arrived at said city there was a good market and a great demand for bananas at said city, and the market price at said city for bananas such as were more than *one-third* of the said carload when it arrived at said city was *sixty* cents per bunch, and had said car been stopped over at said city of *Rushville*, plaintiff could and would have sold in the market of said city more than *two hundred* bunches of bananas from said carload at the price of *sixty* cents per bunch, which was then the market price at said city of said

bananas, and the value thereof, and plaintiff could and would have sold the ripest portion then remaining in said car, and which portion was at least *one-third* of the whole amount in said car, and which portion was then of good merchantable quality; and when said car arrived at said city of *Anderson*, and continuously thereafter, there was a poor market at that point for said bananas; that the market at said point had been supplied; that plaintiff was unable to sell any of said bananas there without great sacrifice, and was wholly unable to dispose of but a small portion of said carload; that the nature of the banana trade and the character of bananas is such that it is a fact that unless bananas when ready for the market are speedily sold they will in a very short time decay and become unfit for use, and while more than *two hundred and fifty* bunches of said bananas in said car were of good merchantable quality when the same arrived at the city of *Greensburg*, and while said number of bunches in said car could and would have been sold in the market at said city at the price aforesaid, and were upon their arrival at said city of good merchantable quality and of the value of *one hundred and fifty* dollars, yet by reason of said car not being stopped at said point, and because of the delay from the time said car arrived at the said city of *Greensburg* until it arrived at said city of *Anderson*, said *two hundred and fifty* bunches of said bananas that could and would have been sold at said city of *Greensburg* became spoiled, decayed, unfit for use, wholly valueless, and there was no market therefor in said city of *Anderson*; and that while more than *two hundred* bunches of said bananas in said car were of good merchantable quality when said car arrived at said city of *Rushville*, and while said *two hundred* bunches of bananas in said car could and would have been sold in the markets of said city of *Rushville* at the market price aforesaid, and were upon their arrival at said city of *Rushville* of good merchantable quality of the value of *one hundred and fifty* dollars, yet by reason of said car not having been stopped at said city of *Rushville*, and because of the delay from the time said car arrived at said city of *Rushville* until it arrived at said city of *Anderson*, said bananas that could and would have been sold at said city of *Rushville*, became spoiled, decayed, unfit for use and wholly valueless, and there was no market therefor in said city of *Anderson*; that when said carload of bananas arrived at said city of *Greensburg*, *two hundred and fifty* bunches thereof were of the value of *one hundred and twenty* dollars, and that by reason of said car not having been stopped over at said city when the car arrived at said city of *Anderson* said bunches were wholly valueless; that when said car arrived at said city of *Rushville*, *two hundred* bunches of said bananas were of the value of *one hundred and twenty* dollars, and by reason of said car not having been stopped over at said city of *Rushville* when said car arrived at said city of *Anderson*, said bunches were wholly valueless; that when said carload of bananas reached said city of *Anderson*, the whole thereof was of the value not to exceed *ten* dollars; that by reason of the violation by said defendant railway of said contract, the plaintiff has been damaged in the sum of *three hundred* dollars.

Wherefore (*concluding as in Form No. 5915*).

f. Occasioned by Smoke and Noise.

Form No. 16992.

(Precedent in Baltimore, etc., R. Co. *v.* Lersch, 58 Ohio St. 645.)[1]

[(*Commencement as in Form No. 5929.*)][2]

Defendant is a foreign corporation duly organized under the laws of the state of *Maryland*, and in *April*, 1888, did, and yet does own and operate a certain railroad running through *Mansfield*, *Ohio*, and known as the *Baltimore & Ohio* Railroad.

That at the time of the grievances hereinafter complained of, the said plaintiff was and still is the owner of *fifty-five* feet off of the south side of in-lot number *two hundred and eighty-seven* (*287*), and by last numbering, No. *960*, in *Bentley's* addition to the town, now the city of *Mansfield*, *Ohio*. That said lot is situated on the north-east corner of the crossing of *West Diamond* and *Bloom* streets in said city of *Mansfield*, with *fifty-five* feet fronting and abutting on said *West Diamond* street, and *one hundred and eighty* feet bounding and abutting on said *Bloom* street.

That at the time of the grievances here complained of, there was situated on said plaintiff's said lot, a certain *two*-story brick building, containing *three* business rooms on the ground floor fronting on said *West Diamond* street, together with a frame barn situated thereon.

That without the consent and against the will of the said plaintiff, the said defendant, *The Baltimore & Ohio Railroad Company*, wrongfully, about the month of *April*, 1888, built and extended its switch railroad track across said *West Diamond* street at its crossing of said *Bloom* street and east along *Bloom* street by the side of the flouring mill on the south side of said *Bloom* street and directly opposite to said plaintiff's lot and buildings. And that said defendant at the same time, about the month of *April*, 1888, built and extended its branch line of railroad track across said *West Diamond* street, at its crossing of *Bloom* street and along said *Bloom* street, east, near by and past said plaintiff's said lot and buildings. By reason of which said defendant runs its cars and locomotives along said switch track and along said branch railroad track close by said plaintiff's said lot, business building and improvement, causing discordant noises and filling said premises with vapor, smoke and dust, and emitting sparks of fire, to the great damage and discomfort of its occupants, and whereby said premises were and are greatly diminished in value to the damage of the said plaintiff in the sum of *eight thousand* dollars.

Wherefore said plaintiff prays judgment against said defendant for said sum of *eight thousand* dollars and costs of suit.

[(*Signature and verification as in Form No. 5929.*)][2]

1. In this case the plaintiff was allowed to establish, as the measure of his recovery, the difference between the value of the property before and after the railroad track was laid. The supreme court held that the plaintiff must be held to his specific allegations, and that the only injury alleged was that caused by the noises, smoke, dust and sparks of fire resulting from passing locomotives. Judgment was therefore reversed.

2. The matter to be supplied within [ ] will not be found in the reported case.

g. To Crops.[1]

Form No. 16993.[2]

(*Title of court and cause as in Form No. 16978.*)

Plaintiff states that on the *first* day of *July*, 1897, the defendant was and now is a corporation organized and existing under the laws of the state of *Missouri*, and owning and operating a railroad through the town of *Bowling Green*, in *Booth* township, in *Pike* county, state of *Missouri*; that on said day the plaintiff was and now is the owner of certain lands situated in said town of *Bowling Green*, and described as follows: (*describing them*); that said defendant had built and on said day was operating[3] its said line of railroad over and through said described lands; that on said day, at a point on defendant's railroad, certain hogs came upon the said lands of plaintiff from the tracks of said railroad and laid waste and wholly destroyed about *four* acres of corn belonging to plaintiff, then growing upon said lands, which said corn was of the value of *thirty* dollars; that the point at which said hogs came upon said land from said railroad was not within the limits of any incorporated town or city, nor within the switch limits of any station, and was not at the crossing of any public or private way or street over said railroad, but that said hogs came upon said lands at a point where said railroad passes through, along or adjoining enclosed and cultivated fields on the side of which railroad at said point the defendant had then and there failed to erect and maintain lawful fences, and where said defendant had failed to construct and maintain cattle-guards sufficient to prevent animals from coming upon or from said railroad as said defendant was required to do by law; that the coming of said animals upon the land of said plaintiff, and the damage to said corn as aforesaid, were occasioned by the failure of the defendant to construct and maintain such fences and cattle-guards at the place where said animals went upon said field.

Whereby plaintiff states that he is damaged in the sum of *thirty* dollars, the value of said corn, for which sum he is entitled to a ver-

1. **Precedent.** — In Clare *v.* Chicago, etc., R. Co., 79 Mo. 39, the complaint was as follows:

"Plaintiff states that defendant is a corporation; that about the *1st* day of *September*, 1878, in *Green* township, *Platte* county, *Missouri*, at a point on defendant's railroad, where the said defendant had failed to erect and maintain lawful fences on the sides of said railroad, as required by the 43 section of chapter 37 of Wagner's Statutes, where the same passed through, along or adjoining enclosed or cultivated fields or unenclosed lands, etc., and by reason of said failure, aforesaid, certain hogs broke into and laid waste, and wholly destroyed about *four* acres of corn, belonging to plaintiff, of the value of $30. Whereupon plaintiff asks judgment for double the value of said corn as his damages with lawful interest, by virtue of the said section 43."

It was held that this complaint was sufficient to negative the possibility of the animals having entered at the crossing of a public highway. It was also held that under section 43 of the railroad law, in actions for damages to crops, this possibility need not be negatived.

2. *Missouri.* — Rev. Stat. (1899), § 1195.

See also list of statutes cited *supra*, note 1, p. 412.

3. **That road was completed** should be shown by the statement. Comings *v.* Hannibal, etc., R. Co., 48 Mo. 512.

dict, and ne prays the court for judgment of *sixty* dollars, being double the amount of said damages.

Jeremiah Mason, Attorney for Plaintiff.

h. To Land.

Form No. 16994.

(Precedent in Emery *v.* Raleigh, etc., R. Co., 102 N. Car. 211.)[1]

[(*Title of court and cause as in Form No. 5927.*)][2]

The plaintiff, complaining of the defendant, alleges:

1. That the defendant is a corporation, duly chartered and organized under an act of the General Assembly of *North Carolina*, passed at its sessions in 18—, and acts amendatory thereof.

2. That the plaintiff *Emma J.* intermarried with *Thos. L. Emery*, many years prior to the year 1884.

3. That the feme plaintiff is the owner of, and, for some years prior to 1884, has been the owner of a valuable farm, adjacent to the town of *Weldon*, and lying upon *Chockeyotte Creek*, and upon the upper or south side or the roadbed of the defendant, which said farm is commonly known as the "*Model Farm.*"

4. That the defendant's track passes over said *Chockeyotte Creek*, and the defendant, more than *three* years prior to the beginning of this action negligently constructed a culvert under its said track for the passage of the waters of said creek, which they have maintained ever since, to the great nuisance of the plaintiff.

5. That in times of freshets or [heavy] rains the said culvert is entirely too small for the free passage of the waters of said creek, so that the said stream becomes dammed and choked up, and the waters thereof are ponded back upon the plaintiff's land, to its great injury and diminished productiveness for purposes of agriculture.

7. That in the fall or late summer of 1885, the said defendant wrongfully and negligently, by means of its said culvert as aforesaid, caused the waters of said creek to pond back upon plaintiff's land and brick-yard situated thereon, and destroyed *175,000* brick, the property of the plaintiff, standing thereon, worth *five* dollars per thousand, and accumulated clay and debris upon the said brick-yard of the plaintiff, to her damage *one thousand and seventy-five* dollars.

8. That about *May* or *June*, 1887, the said defendant wrongfully and negligently, by reason of its said culvert as aforesaid, caused the waters of said creek to pond back upon the plaintiff's land and brick-yard situated thereon, and destroyed *75,000* brick situated thereon, the property of plaintiff, worth *five* dollars per thousand, and accumulated clay and debris upon said yard, to her damage *four hundred and seventy-five* dollars, and destroyed the plaintiff's crop growing upon said land, to her further damage *nine hundred* dollars.

1. This form is the amended complaint in the case, and upon this complaint judgment was rendered for plaintiff.

2. The matter to be supplied within [ ] will not be found in the reported case.

9. That about the last of *October* or first of *November*, 1887, the said defendant negligently and wrongfully caused the water of said creek to pond back upon the plantiff's land and brick-yard as aforesaid, by means of said culvert, and destroyed *15,000* brick, the property of plaintiff, standing upon said yard, which said brick were worth *five* dollars per thousand, and accumulated clay and debris thereon, to the plaintiff's damage *one hundred and twenty-five* dollars.

10. That the annual damage to the plaintiff's crops of grass, oats, corn, etc., has been *five hundred* dollars per year for the past *three* years.

Wherefore, the plaintiff prays judgment for *four thousand* dollars damages and cost.

[(*Signature and verification as in Form No. 5927.*)][1]

3. For Penalties.[2]

a. For Failure to Keep Flagman at Railroad Crossing.

Form No. 16995.[3]

(*Commencement as in Form No. 11525.*)

That whereas on the *twenty-eighth* day of *February*, A. D. 1898, the plaintiff was and since said day has continued to be and is now an incorporated village, incorporated under the general laws of the state of *Illinois*, for the incorporation of cities, within the said county of *Effingham*, and then had and still has charge and control of all the streets within the corporate limits of said village; that the defendant on said *twenty-eighth* day of *February* was and still is the owner of, operating and using a certain railroad for the running of trains of cars, for the transportation of freight and passengers through the said village and over and across *Maple* street within the corporate limits of said village; that on said *twenty-eighth* day of *February*, at a regular meeting of the president and board of trustees of said village of *Altamont*, an ordinance was duly passed declaring that it was necessary that the said defendant should place and retain a flagman at the point where the said railroad crosses said *Maple* street, and requiring the said defendant to place and retain a flagman at the point where the said *Baltimore & Ohio Southwestern Railroad Company* crosses said *Maple* street in said village of *Altamont*, said ordinance being as follows, to wit: (*inserting copy of ordinance*); that at said meeting said president and board of trustees adopted a motion that a copy of said ordinance be served on the said *Baltimore & Ohio Southwestern Railroad Company*; that on the *twenty-ninth* day of *June*, 1898, plaintiff, by *John Doe*, clerk of said plaintiff, served a copy of said ordinance on *J. M. Orrell*, an agent of defendant residing in said village of *Altamont*, whereupon it became and was the duty

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **For other forms** in proceedings to recover penalties see the title PENALTIES, FORFEITURES, FINES AND AMERCEMENT, vol. 13, p. 747.

3. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 114, par. 105.
See also list of statutes cited *supra*, note 1, p. 412.

of defendant within *sixty* days from and after the said *twenty-ninth* day of *June*, 1898, to place and maintain a flagman at said crossing of said *Maple* street by the defendant said railroad; but the defendant neglected and refused to place and maintain a flagman at said crossing and still neglects and refuses so to do, contrary to the form of the statute in such case made and provided, whereby and by force of the said statute, an action hath accrued to the plaintiff to demand of the defendant the sum of *one hundred* dollars per day for every day the defendant has neglected and refused to place and maintain a flagman at the said crossing of defendant's railroad over the said *Maple* street after a lapse of *sixty* days after the said *twenty-ninth* day of *June*, 1898, amounting to the sum of *one thousand eight hundred* dollars, separate from the said sum of *four thousand two hundred* dollars first above demanded, and that the defendant, though requested, has not paid to the plaintiff the said last mentioned sum of money or any part thereof, but refuses so to do, to the damage of the plaintiff of *four thousand two hundred* dollars, and therefore plaintiff brings suit.

(*Concluding as in Form No. 11525.*)

b. For Charging Excessive Rates.

Form No. 16996.[1]

(Precedent in Logan *v.* Pennsylvania R. Co., 132 Pa. St. 403.)

[(*Title of court and cause, and venue as in Form No. 6947.*)][2]

The plaintiffs, *A. H. Logan, Lewis Emery, Jr.*, and *W. W. Weaver*, partners under the firm name of *Logan, Emery and Weaver*, demand of the defendant, the *Pennsylvania Railroad Company*, a corporation created by the state of *Pennsylvania*, the sum of *one hundred and seven thousand one hundred and twenty* dollars and *seventy* cents ($*107,120.70*), with interest thereon from the several days of receipt thereof by the said defendant, which sum is justly due to the plaintiffs from the defendant upon its assumption to pay the same upon the days of the receipt thereof, and being for the sum aforesaid had and received by the defendant from the plaintiffs and for their use, as shown by the schedule and statement hereto attached and made a part hereof, which sum the defendant justly owes with interest, and has not been paid, though often requested.

2. And the said plaintiffs also demand of the said defendant the sum of *three hundred and twenty-one thousand three hundred sixty-two* dollars and *ten* cents (*321,362.10*), which sum is justly due to the plaintiffs from the defendant upon its assumption to pay the same on the several days of the receipt thereof, the same being for treble damages allowed by the act of assembly of Pennsylvania, approved June 4, 1883 [P. L. 72], for and on account of undue and unreasonable discrimination by the defendant, as a common carrier, in the

1. *Pennsylvania.* — Bright. Pur. Dig. (1894). p. 1815, § 187.
See also list of statutes cited *supra*, note 1, p. 412.

2. The matter to be supplied within [ ] will not be found in the reported case.

charge made and collected of the plaintiffs in excess of the sum charged and collected of others for the same service, from and to the same places, upon like conditions and under similar circumstances, and at the same times, to wit: in the transportation of petroleum from points of shipment upon the lines of its railways and in the counties of *McKean*, *Warren*, *Washington*, *Venango* and *Crawford*, and from *Milton* station, in the state of *Pennsylvania*, to or near *Philadelphia* in the state of *Pennsylvania*, as shown by a schedule statement hereto attached and made a part hereof, showing the dates and amounts of such petroleum transported, and the rate and amount of freight paid, which sum the defendant justly owes and has not paid, though often requested so to do.

[(*Signature of attorney and verification as in Form No. 6947.*)][1]

c. For Failure to Deliver Goods on Payment of Freight Charges Specified in Bill of Lading.

Form No. 16997.[2]

Pulaski Circuit Court.

John Doe, plaintiff,
against
The Western Railroad, defendant. } Complaint at law.

The plaintiff, *John Doe*, states:

That at the times of the grievances hereinafter mentioned defendant was and is now a corporation organized and existing under the laws of the state of *Arkansas* and owned and possessed a certain railroad extending from the city of *Little Rock*, in said county of *Pulaski*, to the city of *Prescott*, in the county of *Nevada*, in the state of *Arkansas*, and then was and now is engaged in the business of a common carrier for hire of passengers and freight on said railroad between said city of *Little Rock* and said city of *Prescott*. That plaintiff, on the *twentieth* day of *November*, 1898, at said city of *Little Rock*, delivered to said defendant certain goods and merchandise the property of this plaintiff of the value of *five hundred* dollars for transportation from said city of *Little Rock* to said city of *Prescott*. That said defendant then and there agreed with this plaintiff to transport said goods and merchandise from said city of *Little Rock* to said city of *Prescott* for the sum of *thirty* dollars, and to deliver said goods and merchandise to this plaintiff upon the payment by him to defendant of said freight. That defendant thereupon executed to this plaintiff its bill of lading wherein it was specified that the said sum of *thirty* dollars be the charge on said freight.

That said defendant transported said goods and merchandise to said city of *Prescott*; that on the *twenty-fifth* day of *November*, A. D. 1898, this plaintiff tendered to the defendant, its officers and agents at defendant's depot in said city of *Prescott* the said sum of *thirty* dollars, and did then and there demand from said defendant, its

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *Arkansas*. — Sand. & H. Dig. (1894), §§ 6255, 6256.
See also list of statutes cited *supra*, note 1, p. 412.

officers and agents, the delivery of said goods and merchandise. That said defendant, its officers and agents, refused to deliver said goods and merchandise to this plaintiff, and did continue so to refuse to deliver said goods to this plaintiff until the *thirtieth* day of *November*, 1898, when defendant delivered said goods and merchandise to the plaintiff, who thereupon paid the freight charges due thereon as specified in said bill of lading.

That by reason of the premises and by virtue of sections 6255 and 6256 of Sandel & Hill's Digest of the State of Arkansas, the defendant became liable to pay the plaintiff the sum of *thirty* dollars for each and every day said defendant refused to deliver said goods and merchandise to this plaintiff as above alleged, amounting in the aggregate to the sum of *one hundred and fifty* dollars.

Wherefore plaintiff prays judgment against said defendant for said sum of *one hundred and fifty* dollars, and for other relief.

Jeremiah Mason, Attorney for Plaintiff.

(*Verification.*)[1]

4. For Personal Injuries.

a. Through Negligence of Defendant.[2]

1. For a form of verification in a particular jurisdiction see the title VERIFICATIONS.

2. For forms in actions for negligence, generally, see the title NEGLIGENCE, vol. 13, p. 1.

Requisites of Complaint, etc., Generally.—For the formal parts of a complaint, declaration or petition in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, vol. 6, p. 244; PETITIONS, vol. 13, p. 887.

Precedents. — In Pennsylvania Co. *v.* Marshall, 119 Ill. 399, the declaration was in substance as follows:

For that the defendant, in the lifetime of said James Marshall, to-wit, on the 27th of March, 1881, in the county aforesaid, was possessed, using and operating a certain railroad and a certain locomotive and cars, which were then and there under the management of certain servants of the defendant, who were then and there driving the same upon and along said railroad, toward a public street, known as Eighteenth street, and while the said Marshall, with all due care and diligence, was then and there walking across said railroad at the said crossing upon said street, the defendant then and there, by its servant, so carelessly, negligently and improperly drove and managed the engine and cars, that by reason thereof the said engine and cars ran into, upon and over the said Marshall, whereby he was then and there killed.

Judgment for plaintiff was affirmed.

In Lake Erie, etc., R. Co. *v.* Pence, 24 Ind. App. 12, an allegation that "the defendant did, then and there, in violation of said ordinance, as aforesaid, by itself, agents, servants, and employees, carelessly and negligently run its locomotive engine and cars against plaintiff's wagon with great force and violence, by which said wagon in which the said plaintiff was situated was thrown from said highway, and said plaintiff was thrown against a telegraph pole with great force, and was bruised, wounded, and permanently injured thereby; and that he also sustained from such accident a great mental and physical shock, pain and mental anguish, from all of which injuries he has not yet recovered, and may never recover,—all of which was without any fault or negligence on the part of the plaintiff. That by reason of the premises plaintiff has been damaged in the sum of $1,999, for which he demands judgment, and all proper relief," was held to sufficiently aver that the negligent running of the train in violation of the ordinance caused the injury for which the plaintiff sued, and that it was by reason of such

(1) In Constructing Overhead Bridge.

negligence that he was damaged; that having charged his injury by the cause specified, it was not necessary to aver that but for this cause he would not have been injured.

In Whitney *v.* Maine Cent. R. Co., 69 Me. 208, the declaration was as follows:

"And the plaintiff avers that, on the *sixth* day of *June*, aforesaid, there was a certain public highway leading from the south-west bend ferry, so called, to *Lisbon* factory village, in said county of *Androscoggin*, which said public highway was crossed by said railroad, occupied and controlled by said defendant corporation, at a place near the south-easterly end of the *Lisbon* depot, so called, at said *Lisbon*; and the plaintiff further avers that, on said *sixth* day of *June*, he was riding over and upon said highway in a wagon drawn by one horse, said horse, harness and wagon being then and there sufficient, and he, the said plantiff, being then and there in the exercise of due care and without fault, and that, when he attempted to drive over that part of said highway where the same is crossed by said railroad, the said defendant corporation, by its servants, suddenly, negligently, and without due and sufficient warning, backed a train of cars propelled by an engine, then and there standing upon the railroad track on the northerly side of said highway, across said highway and immediately in front of the horse driven by said plaintiff, causing said horse to become frightened and unmanageable. And the plaintiff further avers that said defendant corporation did not then and there employ in and about said train a suitable number of careful and competent engineers, firemen, conductors, and brakemen, for the management of said train and engine, and the same were not then and there properly stationed and in the exercise of due care, skill and vigilance in the management of said engine and train; but that said servants of said defendant corporation then and there in charge and control of said engine and train were careless and negligent in the management of said train, and gave no warning to the plaintiff by bell, whistle, or other signal or act, of the crossing of said road by their said cars as aforesaid, and had no person at the rear end of said train or at said crossing to give warning to the plaintiff and others who should desire to cross said railroad where the same crossed said highway, by reason whereof and the negligence, carelessness, and this conduct of the servants of said defendant corporation then and there in charge of said train, and the want of suitable engineers, conductors, brakeman and firemen, and a sufficient number thereof, properly stationed, the plaintiff's horse became frightened, the plaintiff's carriage in which he was then and there riding was overturned, and the plaintiff was thrown violently upon the ground and then and there received grievous bodily injury," etc.

A verdict in favor of plaintiff was set aside as being against the evidence.

In Potter *v.* Detroit, etc., R. Co., 122 Mich. 179, the declaration was as follows:

"And for that whereas, on, to wit, the *17th* day of *September*, 1892, said plaintiff was, and for a long time previous thereto had been, employed by said defendant as brakeman on its cars at the yard at *Milwaukee Junction*, a station along the line of said railroad; and in the performance of the duties imposed on said plaintiff by said defendant in the employment aforesaid it became and was necessary for said plaintiff to ride back and forth in said employment on the side of the railway cars, clinging to the steps or ladders placed on the side of said cars by said company for that purpose, and which is the usual manner of performing and going to and from the work in and about which plaintiff was employed. * * * But, notwithstanding the duty aforesaid of the said defendant, it wholly neglected and refused to perform such duty toward said plaintiff, in that it placed and permitted to remain a post or telegraph pole so near one of the tracks of said railway in said yard that, while said plaintiff was in the performance of his duty, and while riding along on the side of one of defendant's cars, as aforesaid, he would be struck by said post or pole, and there was not sufficient room between said car and said post or pole to allow the body of said plaintiff, while engaged in his duties as aforesaid, to pass without injuring him. * * * And while in the performance of his duty,

as aforesaid, and while riding on the side of a moving car, as aforesaid, and in the performance of such duty, he was struck by said post or telegraph pole, negligently left standing by said defendant so near its track in said yard, and was knocked off the side of said car," etc.

In this case it was held that there was not such a variance between proof and the allegation as to work a surprise to defendant.

In Willet *v.* Michigan Cent. R. Co., 114 Mich. 411, the declaration averred, among other things, as follows:

"And plaintiff avers that on the *18th* day of *April*, A. D. 1895, in the city of *Owosso*, aforesaid, said plaintiff, in company with *Mary Otto*, with a gentle horse and single buggy, was riding along in a careful and prudent manner, coming from the south, and going north, on said public highway, intending to pass over said railroad track, going to the business part of the city of *Owosso*; that when thus approaching said track in a careful and prudent manner, looking and listening for a train on said railroad tracks, and going at a very slow rate of speed, so as to avoid any danger, and without any negligence on her part, or upon the part of her companion, said *Mary Otto*, and when nearly upon said railroad tracks, the defendant's said engine, coaches, and cars, propelled by steam, aforesaid, approached said public highway, coming from the southwest, and going northeast, on said railroad track at an unusual and very great rate of speed, to wit, *25* miles per hour, and came upon and over said crossing and public highway without having given, or caused to be given, any warning of approach of said engine, coaches, and cars, and without any flagman or other servant there stationed to warn people walking, passing, or riding along said public highway over said crossing of the approach of said engine, coaches, and cars, and without blowing the whistle on said locomotive engine, as required by law, and which was then and there placed upon said locomotive engine, which was then and there propelling the said coaches and cars, and without having any careful and prudent method or means of notifying the said plaintiff or the public of the approach of said engine, coaches, and cars, and having a large number of box cars and flat cars loaded with lumber, to wit, *30* cars, upon the said side track, and upon said highway, as aforesaid, and rising above said highway, to wit, *six* feet, thus obstructing the view and hearing of the public and of said plaintiff and of said *Mary Otto*, so that they, or either of them, could neither see nor hear an approaching train from the southwest upon said railroad.

And the said defendant then and there, by its servants in charge of said engine, cars, and coaches, so carelessly, negligently, and improperly managed, moved, and conducted the same that by and through the carelessness, negligence, and improper conduct of the said defendant, by its servants in their behalf, said engine of the said defendant, as said horse hitched to a single buggy, in which were riding the said plaintiff and said *Mary Otto*, arrived at and upon said railroad track, then and there ran into and struck with great force and violence upon and against the buggy in which said plaintiff was riding, and which was passing over said railroad, thereby throwing said plaintiff and said *Mary Otto*, who were in said buggy, violently to the earth, greatly injuring said plaintiff in and about her person, in her nervous system, and in her mind, in this, to wit: * * * And the said *Agnes Willet*, at the time of the said accident, and before, did not know that the said train from the southwest was approaching said public highway on said railroad, and had no reason to anticipate the same, and did not and could not see nor hear the same, on account of said defendant not giving proper signals, and running its train at so rapid a rate of speed, contrary to the ordinance of the city of *Owosso*, and on account of said defendant leaving box cars and flat cars loaded high with lumber on its said side track and on said public highway, in the manner as aforesaid, and on account of said highway immediately south of said railroad not having been restored by said defendant to its former state, as near as might be, as is required by the statute of the State of *Michigan*. And said plaintiff avers she herself, and her companion, said *Mary Otto*, were entirely free from any negligence in respect to said accident and to said injuries sustained."

In Jackson *v.* Kansas City, etc., R. Co., 157 Mo. 621, the petition alleged: "that on said day and long prior

thereto there was duly passed and in force an ordinance in the said city of *West Plains*, regulating the speed of railroad trains and cars within the corporate limits of said city, and prohibiting and making it unlawful for trains and cars to be run within said corporate limits at a greater rate of speed than *six* miles per hour; that on the said *twelfth* day of *June*, 1895, the said *Samuel Jackson* started across defendant's said railroad track near its depot in said city of *West Plains* and within the corporate limits of said city, and at a point where divers persons ever have and do cross said track, and while so crossing said track and just as he was across and leaving the same, he, the said *Samuel Jackson*, was struck and instantly killed by one of defendant's passenger trains, then and there being run and operated by defendant's agents, servants and employees; that the said *Samuel Jackson* was, at the time of his death, *eighty-eight* years of age, and feeble and infirm in body and in mind; that at the time said *Jackson* was struck and killed as aforesaid by defendant's train of cars as aforesaid, the said train was being run negligently and carelessly at a great rate of speed, and far in excess of *six* miles per hour. Plaintiff says that by reason of the negligence and carelessness of defendant's agents, servants and employees, in running and operating said passenger train at a great and rapid speed and in violation of said ordinance in said city of *West Plains*, the said *Samuel Jackson* was struck and killed, by reason of which plaintiff says she is damaged in the sum of *five thousand* dollars, for which she prays judgment."

In Coatney *v.* St. Louis, etc., R. Co., 151 Mo. 35, the petition was in part as follows:

"That near said city of *Granby* there is on said railroad a bridge spanning a stream which the defendant has permitted the public to use as a footway crossing for over *twenty* years continuously and undisputedly, and as such had become a public traveled crossing of said railroad. That on the *5th* day of *October*, 1890, the plaintiff's husband, *James Coatney*, was, at a time when no regular trains were crossing said bridge, lawfully crossing the same, using all the care possible under the circumstances, when a special train of cars drawn by a locomotive carelessly and negligently approached said bridge and crossing from the west, when said *Coatney* was midway on said bridge and crossing, at the unusual speed of *30* miles per hour, without sounding the whistle or ringing the bell on said locomotive at a distance of *80* rods or any other distance from said crossing, or another crossing *100* yards west thereof, and, without checking or attempting to check the speed of said train, although said *James Coatney* was in plain view of said employees and agents of defendant in charge of said train for the distance of *80* rods, then and there carelessly and negligently struck and killed the said *James Coatney*, who was at the time making every effort in his power to get out of the way of said train."

In Barth *v.* Kansas City El. R. Co., 142 Mo. 535, the petition charging the facts attending the death of the decedent was as follows:

"Plaintiff further states, for the purpose of admitting passengers to the cars owned and operated on its said railroad as aforesaid, steps are supplied on the right hand side of the rear platform, by the aid of which passengers are invited and are accustomed to go upon the platform and into said cars. That each of said cars and the particular one hereinafter mentioned is provided with a gate which is intended to guard against accidents and to prevent passengers from falling from the cars while in motion; that the rules of the defendant company provided that the gates of the cars should be kept closed while the cars were running over the elevated structure and that the cars should not be started until passengers were fairly landed or received on the car. That it was the duty of the agents, employees and servants of defendant to keep said gates closed while running said cars over the elevated structure, and they were only accustomed to be open while the cars were stopped for the admission of passengers at the several stations along said railroad.

Plaintiff states that, to wit, on said *twenty-fifth* day of *February*, 1894, the husband of plaintiff, *Bartholomew Barth*, entered the station of said defendant company at the corner of *Ninth* and *Mulberry* streets as aforesaid for the purpose of taking a trip west as a passenger on one of defendant's cars. Plaintiff states that the destination of her said husband, *Bartholomew Barth*,

was his home in *Kansas City*, *Kansas*, near one of the terminal stations of said defendant company in said *Kansas City*, *Kansas*, and that upon the arrival at said station of the first car of said railway conducted, maintained and operated by said defendant and so propelled by the servants, agents and employees of defendant's company, and after said car had been stopped and the gate of the car opened for the admission of passengers, the husband of said plaintiff attempted to get upon said car for the purpose of riding upon the same as aforesaid.

Plaintiff states that while *Bartholomew Barth* was in the act of getting upon said car, and before he had sufficient time to get upon the platform of said car, and without waiting for said *Bartholomew Barth* to board said car or to get upon a safe portion of the platform of the same, and before said gate had been closed, the agents, servants and employees of defendant, managing its said railway and in charge of said car, and knowing that he was in the act of boarding said car, negligently and carelessly started said car forward suddenly and at a rapid rate of speed, causing said *Bartholomew Barth*, the husband of this plaintiff, to be thrown with great force and violence off the car and upon the platform, near the point where said fence or guard on the west end of said platform was negligently and carelessly left open; and by reason of the fact that said fence or guard was left exposed and open on the west end of said platform as aforesaid, and there being nothing to stop his body and nothing which he could grasp to save himself, he was by the impetus of said fall from defendant's car, propelled with great force and violence over said platform to the surface of the ground, *twenty* to *thirty* feet below.

Plaintiff states that by reason of said fall, caused by the negligence and carelessness of the servants, employees and agents of said defendant as aforesaid, said *Bartholomew Barth*, the husband of plaintiff, was so greatly bruised, mangled and hurt that he died; that such death resulted from and was directly occasioned by the defect and insufficiency in the construction of said guard or fence as aforesaid, and by the carelessness and negligence of said servants, agents and employees in so starting said car before said *Bartholomew Barth* had got upon said car and before the gate to said car was closed as aforesaid.

Plaintiff states that she was dependent upon the deceased, *Bartholomew Barth*, for her support, and has suffered pecuniary loss and has been otherwise injured by the death of said *Bartholomew Barth* to her damage in the sum of *five thousand* dollars.

Wherefore plaintiff asks judgment for said sum of *five thousand* dollars, and for all costs herein incurred and expended."

Judgment was awarded for plaintiff.

In Spry *v.* Missouri, etc. R. Co., 73 Mo. App. 203, the petition alleged in part as follows:

"That the defendant carried the plaintiff as a passenger upon its said train to the city of *Sedalia*, and wrongfully, carelessly and negligently stopped the train about *one half* mile from the Union depot or station at said city of *Sedalia*, and which was then used as defendant's depot, and by its servants and agents in charge of said train announced and stated to the passengers thereon that said train would not proceed as far south as the city of *Nevada*, and then and there wrongfully, carelessly and negligently failed, neglected and refused to cause said train to be moved to the station or depot, but wrongfully, carelessly and negligently directed and required plaintiff to leave said passenger car at a place in the railroad yards, about a *half* mile distant from the Union depot or shelter, in the midst of various railroad tracks and switches, and surrounded by cars and engines; that said place was filled with mud and water, and that a violent snow and rain storm was then raging, and that defendant's servants and agents wrongfully, carelessly and negligently, when requiring her to leave said car, failed to give her any directions as to where she should go for shelter from said storm; that she was a stranger and not acquainted in the vicinity where said train stopped, and where she was wrongfully, carelessly and negligently required to leave said car as aforesaid: that the plaintiff was thereby compelled to walk along the railroad tracks in the mud, water and snow to said Union depot, about *one half* mile distant aforesaid, and to pick her way as best she could along said tracks, and in the midst of said violent storm.

That in consequence thereof her

health has been permanently injured, by reason of which she has sustained damage in the sum of $2,000."

It was held that the plaintiff was entitled to recover.

In Mack *v.* South Bound R. Co., 52 S. Car. 323, the complaint alleged in part as follows:

5. "That on the afternoon of the said mentioned day, between 6 and 7 o'clock, the plaintiff, *Stewart Spearman Mack*, as was his wont and customary duty, was sent by his father to drive the cows from the pasture, which was on the south side of said railroad, at or near the *seven*-mile post; that while engaged in driving said cattle from said pasture to the house of said *Barnett Salley Mack*, which was on the north side of said railroad track, it being necessary to cross the track at a private crossing which had been in use for years, and which use was well known to the defendant, the plaintiff, who was riding a mule, being unable to control said mule, on account of his tender age and lack of strength, was carried by said mule, which had become unruly and unmanageable, in and upon the track of defendant, at or near the said *seven*-mile post; and in endeavoring to get said mule off said track, the plaintiff alighted, and was pulling the said mule by the bridle and a plowline attached thereto, away from and across said track; and while so engaged, his attention being absorbed in his efforts to control the mule and to prevent him from going further down the track and getting away from him — being in open and plain view of an approaching train from the south for half a mile or more — a locomotive with a train of cars attached, belonging to the defendant, its agent, lessee or lessees, without any signal or warning whatsoever, running at a rapid and reckless rate of speed towards *Columbia*, came upon the plaintiff, who was not aware of its approach, on account of his being so engaged in endeavoring to get the mule off said track, and struck the mule and instantly killed the same; the plaintiff, in order to save his own life, threw himself down between and along the cross-ties just outside of the rail, bruising and injuring his person, and just barely escaped being struck by the locomotive and cars of said defendant, its servants and agents, which said locomotive and cars ran immediately over and above the plaintiff at a rate of speed of more than *sixty* miles an hour; and being of such tender age, inexperienced and ignorant of the operation of railroads, and the running of locomotive cars thereon; and owing to the great and imminent danger in which he was and the reckless movement of said train over him, was terribly frightened, his nervous system was shocked, his mind was affected and partially destroyed, his reason unbalanced, and he, for a long time, was made ill and sick, and suffered great mental anguish and physical pain, arising from the terrible shock to his nervous system and the fright which he received; and by reason thereof he was incapacitated from performing or attending to his ordinary duties, and his capacity for work greatly diminished; and he will for a long time and probably will for the balance of his life, be affected in mind and body, and it will, to a great extent, affect his means of making a livelihood, and of advancing his happiness in life; that prior to said accident and injury he was perfectly healthy and sound, both physically and mentally, and had every reason to think and believe that he would so continue; but the injury to his mind and body, by reason of such fright and nervous shock, has greatly diminished his capacity for performing his duties, and will hereafter diminish and affect his capacity and means of acquiring property, and means of advancing his happiness in life, which he had a right to expect that he would be fully able to do, and acquire all those means of happiness which he, as a perfectly healthy and sound person, could have acquired; and he will hereafter pass through life subject to the effects which said fright and nervous shock have produced."

The specifications of negligence are alleged in paragraph 6 thereof, as follows, to wit:

6. "That the *South Bound Railroad Company*, its servants, agents, lessee or lessees, were negligent in this: that although the plaintiff and the mule he was endeavoring to pull away from the track could be seen for at least *one-half* a mile, and were in plain and open view of the engineer driving the locomotive — the track at said point being perfectly straight — and although the said train could have been easily stopped before it reached the point on said track where the plaintiff and mule were, the engineer in charge of said

locomotive made no effort whatsoever to stop or diminish the rate of speed of the train, nor did he give any signal, either by the sounding of the steam whistle of the locomotive or by the ringing of the bell thereon, nor did he take or exercise any prudence or foresight, or do anything whatsoever to prevent the running of the said train upon the plaintiff and said mule; but that the said engineer and persons in charge of said locomotive and train, although they saw, or could easily have seen, by the exercise of the slightest outlook or observation upon the track in front of said advancing locomotive and train, the plaintiff and the mule, and did see, or could easily have seen, by the slightest observation or outlook from the train, that he was a child of tender years and endeavoring to get his mule across the track; and although the said engineer or persons in charge of said locomotive saw, or could easily have seen, by the exercise of any prudence or outlook whatsoever, that the plaintiff was not aware of the approach of the train, yet the said engineer or persons in charge of said locomotive and train, carelessly, negligently, without any prudence or foresight, or observation or outlook, which he should have kept upon the track before him, ran the said locomotive and train, at a reckless rate of speed, over said plaintiff and against said mule, and so injured and frightened the plaintiff as above stated and instantly killed the mule, and that by reason of the said negligent act and want of care on the part of the defendant, its servants, agents, lessee or lessees, the plaintiff was damaged in his person, mind, and health, $2,500."

Judgment for plaintiff was affirmed.

In Littlejohn *v.* Richmond, etc., R. Co., 49 S. Car. 12, the complaint, after charging the incorporation of the defendant, proceeded as follows:

"IV. That on or about *August 19th*, 1891, the defendant corporation negligently and unlawfully allowed one of its trains, made up of a locomotive and a number of freight cars, in charge of one of its authorized agents, to stop for a considerable time across one of the public streets of the town of *Gaffney City*, in said county and State (through which town said road runs), all of which was against the ordinances of said town, and a great annoyance and inconvenience to the citizens of the same. V. That on said day the plaintiff, while transacting his business in said town, had occasion to cross said railroad track, and being unable, without very great inconvenience and loss of time, to go around said train then stopped across said street, as hereinbefore stated, on which said street plaintiff was walking, the plaintiff was compelled to cross over said track by going between two of said freight cars; that when plaintiff reached said track, and started to go over, the said train was standing motionless across said street; that while plaintiff was in the act of crossing between said cars, without the slighest notice or warning, — without blowing the whistle or ringing the bell on said locomotive, — the defendant company, through their conductor and engineer then in charge of said train, negligently, recklessly, and unlawfully caused said train of cars to move rapidly and suddenly, and thereby jarred the plaintiff, and caught his foot between two of said cars, and so mangled and crushed his said foot that amputation became necessary, all of which was grossly, negligently, recklessly, and unlawfully on the part of the said defendant corporation."

Where the petition alleges that defendant "so carelessly and negligently managed, conducted and propelled said car that by said carelessness and negligence that car ran against, knocked down and ran over the said *James G. Taylor* without any fault or neglect on his part," the averment, though general, is sufficient to admit the proof of any acts of carelessness and negligence in conducting, managing and propelling the car at the time and place mentioned. St. Louis, etc., R. Co. *v.* Taylor, 5 Tex. Civ. App. 668.

An allegation that defendant placed said locomotive in the rear of said cars, and then and there proceeded to push and move said train along said track in a negligent, dangerous and careless condition, and so negligently moved and operated said train, without giving any signal or warning, that the deceased was struck and injured, is sufficient allegation of negligence where it is shown that the defendant owed a duty to the plaintiff. Winifred *v.* Rutland R. Co., 71 Vt. 48.

In Greenman *v.* Chicago, etc., R. Co., 100 Wis. 188, a complaint was held sufficient which alleged, in substance, that the plaintiff was in the

Form No. 16998.

(Precedent in Taylor *v.* Wabash R. Co., 112 Iowa 158.)[1]

[(*Title of court and cause as in Form No. 5916.*)

The plaintiff states that during all the times hereinafter mentioned, the defendant was and now is a corporation organized and existing under the laws of the state of *Iowa*, and owning and operating a railroad from *Albia*, in the county of *Monroe* and state of *Iowa*, to *Des Moines*, in the county of *Polk* and state of *Iowa*.][2]

That defendant has been in the control and possession of said line of railroad from the year 1887; that it operated the road by running trains over it for about *two* years thereafter, when it ceased to use that part of said road within *Monroe* county, and did not resume operations thereon until in *September*, 1897; that about the year 1880, while said railroad was being constructed from *Albia* to *Des Moines*, and at a place where the same crosses what is known as the *Albia and Eddyville Highway*, in the northeast part of the city of *Albia*, a bridge was built over and above the said highway; that said bridge was negligently constructed, in that it was built too low where the same passes over the highway; that, after the defendant came into possession of said railroad as aforesaid, it permitted said bridge to remain in the same condition as when built, and, after ceasing the operation of its trains over that part of the railroad, as aforesaid, it allowed the said bridge to become out of repair; timbers were taken out of the same where it crosses the highway, and bolts and rods were permitted to extend downward so as to strike persons driving under said bridge and along the said highway; that on, after, and prior to the *fourth* day of *September*, 1897, the defendant, as

employ of Valentine-Clark Company, at the city of Green Bay, Brown county, Wisconsin, and was engaged in unloading a car of poles standing alone and detached from any engine on a spur track of defendant, which ran into the yards of the said Valentine-Clark Company, on the west side of the Fox River in said city of Green Bay; that, while plaintiff was so engaged in unloading said car, defendant's servants backed an engine and two cars onto said spur track; that it was the duty of defendant's servants in charge of said engine and two cars not to collide with, or disturb in any way, the car at which plaintiff was working; that defendant's engineer, in violation of said duty, and in total disregard of the signals made by the conductor in charge of said engine and two cars, to stop said engine and cars before reaching the stationary car at which plaintiff was working, carelessly, recklessly, and negligently backed said engine and cars against the said stationary car, causing it to move forward by the force of the impact; that the plaintiff endeavored to stop said car by standing on the side of the track and putting a block of wood beneath the wheels of said car, but defendant's engineer, carelessly, recklessly, and negligently, and in violation of the conductor's signals, and without plaintiff's knowledge, continued to back said engine and two cars against the said detached car, thereby pushing said detached car over the block of wood so placed beneath it by plaintiff, thereby, without any fault on the part of the plaintiff, causing the poles with which said car was loaded to fall off said car and upon the plaintiff, thereby greatly injuring him, to his damage in the sum of $5,000, for which said sum, and for costs herein, plaintiff demanded judgment.

1. Judgment in favor of plaintiff in this case was affirmed.

See also, generally, *supra*, note 2, p. 480.

2. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

the possessor of said railroad, as aforesaid, and through its own negligence, suffered the said bridge to remain in the same condition as above stated; that on or about the *fourth* day of *September*, 1897, while the plaintiff was driving along said highway, under said bridge, he was struck violently on the head by a bolt or rod extending downward from said bridge and over said highway; that he was grievously and severely injured thereby; that he was damaged, in the way of necessary medical attendance, nursing, pain, and suffering, in the sum of $1,995. He states that at the time of receiving said injury he was in the exercise of ordinary care and caution, and contributed in no manner to it; that he was injured wholly through the fault and negligence of defendant.

Wherefore plaintiff asks judgment against defendant for $1,995, and costs of this action.

[(*Signature of attorney and verification as in Form No. 5916.*)][1]

(2) In Coupling Cars.

Form No. 16999.

(Precedent in Glover *v.* Charleston, etc., R. Co., 57 S. Car. 229.)[2]

[(*Title of court and cause as in Form No. 5932.*)

The complaint of the above named plaintiff respectfully shows to this court that the defendant, the *Charleston and Savannah Railroad Company*, is a railroad corporation organized and existing under the laws of the state of *South Carolina*, and operating a line of railroad between the city of *Charleston*, in the county of *Charleston* and state of *South Carolina*, and the city of *Savannah*, in the city of *Chatham* and state of *Georgia*, and at the time hereinafter mentioned said defendant held out to the general public and caused to be known that it was a common carrier of passengers from said *Charleston* and other stations on the line of said railroad between said *Charleston* and said *Savannah* to said *Savannah*.][3]

2d. That on the *10th* day of *September*, 1897, the defendant received the plaintiff into one of its passenger cars drawn by a steam locomotive engine, for the purpose of conveying her therein and upon said railroad as a passenger from *Yemassee* to *Green Pond*, both being on said railroad, for reward paid to the defendant by the plaintiff.

3d. That while she was such passenger on said railroad, near the station house and passenger platform at *Green Pond*, aforesaid, and while she was in the act of embarking from said passenger car, on the invitation and by the instruction of the conductor in charge of said train, the defendant, its agents and servants, so negligently, carelessly and recklessly conducted itself in that behalf, that the locomotive engine which had been attached to said train, and which had then been detached therefrom, was carelessly, negligently and

1. The matter to be supplied within [ ] will not be found in the reported case.

2. Judgment for plaintiff was affirmed.

See also, generally, *supra*, note 2, p. 480.

3. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

recklessly and with great force, and without notice to the plaintiff, caused to be run back and come in contact with said passenger coach, throwing the said plaintiff with great force and violence against said passenger car, whereby she was greatly bruised and injured, her hip and back being thereby permanently injured.

4th. That by reason of her injuries, the injuries to her hip and back being permanent in their nature, the plaintiff was made sick, and remained and is still sick, and suffered and will continue to suffer great bodily pain and mental anguish in consequence of such bodily injuries, and has expended and will be forced to expend large sums of money for medical attention and other like services in treating her injuries, and has been and still is unable to attend to her business and properly perform her household and other domestic duties, to her damage *$10,000.*

[Wherefore plaintiff demands judgment against the defendant for *ten thousand* dollars damages, and such other relief as the court may see fit.

(*Signature and verification as in Form No. 5932.*)][1]

(3) In Managing Locomotive.

Form No. 17000.[2]

(*Commencing as in Form No. 10663, and continuing down to* *) in a plea of the case, for that on the *tenth* day of *June*, 1900, the defendant was a corporation established by the authority of the legislature of the state of *Vermont*, with power to sue and be sued, and especially to construct a railroad from *Chester*, in the county of *Windsor*, to *Rutland*, in the county of *Rutland*, in said state, and as a common carrier to convey passengers from said *Chester* to said *Rutland* by means of cars drawn on said road by locomotive engines; that the plaintiff on said *tenth* day of *June*, at the request of the defendant, took a seat at said *Chester* in one of the said cars of the defendant to be conveyed, for a reasonable reward to the defendants, on said railroad from thence to said *Rutland*, whereby it became the duty of the defendant to convey the plaintiff safely from said *Chester* to said *Rutland*, yet the defendant, not regarding its said duty, did not convey the plaintiff safely from said *Chester* to said *Rutland*, but wholly neglected so to do, and the defendant then and there, in attempting to convey the plaintiff as aforesaid, so negligently, carelessly and unskilfully managed the locomotive by which the car in which the plaintiff was seated as aforesaid was drawn, and the said road of the defendant was so unskilfully and imperfectly built by the defendant and was at said time suffered to be in such a defective and dangerous condition that said locomotive ran off the track of said railroad and dragged off from the same and overturned the car in which the plaintiff was seated as aforesaid, whereby the plaintiff was badly bruised, his shoulder dislocated and his right arm broken, and he was thereby

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

2. This form is set out in 2 Rev. Swift's Dig. 519.

rendered for a long time, to wit, *one* year, sick and lame, and unable to attend his ordinary business, he was obliged to expend and did expend a large sum, to wit, the sum of *five hundred* dollars, for necessary medical attendance, nursing and other expenses, vet though often requested (*concluding as in Form No. 10663*).

b. Wilful or Intentional Injury.

(1) Complaint.[1]

1. Requisites of Complaint, etc., Generally. — For the formal parts of a complaint, declaration or petition in a particular jurisdiction see the titles Complaints, vol. 4, p. 1019; Declarations, vol. 6, p. 244; Petitions, vol. 13, p. 887.

That injury was wilful or wanton must be alleged where the action is to recover for injury on that ground. Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 587; Haley *v.* Kansas City, etc., R. Co., 113 Ala. 640; Georgia Pac. R. Co. *v.* Richardson, 80 Ga. 727; Ullrich *v.* Cleveland, etc., R. Co., 151 Ind. 358; Cleveland, etc., R. Co. *v.* Stephenson, 139 Ind. 641; Dull *v.* Cleveland, etc., R. Co., 21 Ind. App. 571; Pittsburgh, etc., R. Co. *v.* Judd, 10 Ind. App. 213; Seaboard, etc., R. Co. *v.* Joyner, 92 Va. 354. And intention on part of defendant to commit a wilful injury must be strictly and conclusively alleged, and an allegation of wilful negligence is not sufficient. Cleveland, etc., R. Co. *v.* Tartt, 99 Fed. Rep. 369; Louisville, etc., R. Co. *v.* Bryan, 107 Ind. 51. Or that the act or omission which produced the injury was wilful, and of such a character that the injury which followed must reasonably have been anticipated, as the natural and probable consequence of the act or omission must be shown. Louisville, etc., R. Co. *v.* Bryan, 107 Ind. 51. It has been held, however, that where the declaration or complaint contains general allegations of intentional or wilful injury it is sufficient. Pittsburgh, etc., R. Co. *v.* Judd, 10 Ind. App. 213.

Defendant's knowledge of plaintiff's danger must be alleged, where the action is for injuries to a trespasser. Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 587.

Precedents. — In Pittsburgh, etc., R. Co. *v.* Judd, 10 Ind. App. 213, the complaint alleged:

"That said line of railway passes through and across the incorporated town of *Jonesville*, in said county and State; that on the *18th* day of *March*, 18*92*, and for many years prior thereto, the defendant, in addition to said main line of railway running through and across the town of *Jonesville*, controlled, owned, and maintained, and now owns, controls, and maintains a switch track on the west side thereof, running parallel with said main track, a distance of —— feet away; that said line of railroad and said switch track adjacent thereto run through said town of *Jonesville* in a north and south direction; that the defendant company, on said day, and for many years prior thereto, owned, controlled, and maintained, and now owns, controls, and maintains a passenger depot, and platform adjacent thereto, at said town of *Jonesville*; that said depot platform is situated adjacent to said railroad, on the east side thereof, about midway between the north and south boundaries of said town; that said main track of railroad from said depot southward for a distance of *one hundred and fifty* yards, and within the corporation of said town of *Jonesville*, was, on the *18th* day of *March*, 18*92*, and for many years prior thereto, in general and constant and habitual use as a public highway for foot passengers going to and from said depot, and that said usage had at all times been known and acquiesced in by the defendant; that by reason of such general, constant, and habitual use of said part of said railroad track as a public highway for foot passengers going to and from said depot, and that such usage had at all times been known and acquiesced in by the defendant, the public was on said day, and for many years prior thereto, licensed to use said part of said railroad as such highway by defendant company; that on the *18th* day of *March*, at — minutes past *nine* o'clock in the *fore*noon, a gravel train, controlled, owned and operated by de-

(*a*) *In Ejecting Plaintiff from Train.*

fendant, was standing on the aforesaid switch track. The engine of said gravel train facing southward was standing about *sixty-five* yards south of said depot platform, and was in charge of servants in the employ of defendant; that at the said time one *Jesse Davis* was walking northward along and over the center of defendant's said main line of railroad about *sixty-five* yards south of said depot platform; that said *Jesse Davis* was rightfully and lawfully a footman at said point on said railroad by reason of the aforesaid license from defendant company; that while said *Davis* was walking on said track facing northward as aforesaid, the regular passenger train from the south, consisting of a locomotive, a baggage car and three coaches, and controlled by defendant's servants, came towards said *Davis*, and within *300* yards of said *Davis* the engineer of said passenger train saw said *Davis* walking on said track, as aforesaid, and blew the whistle, and blew it several times, but the escaping steam and noise of the engine of the aforesaid gravel train standing on said switch track as aforesaid, was making so much noise that said *Davis* was prevented from hearing said whistle by said passenger train engineer; that the said engineer of said passenger train, with the use of ordinary care, might have seen, and did see, the gravel train engine on the side track as aforesaid, and that the said passenger train engineer, with the use of ordinary care, might have known, and did know, that said *Davis* did not hear, and could not have heard, the whistling and danger signals of said passenger train engineer; that said *Jesse Davis*, not knowing of said train approaching from behind, continued to walk on the track as aforesaid, and defendant's servants, with a reckless disregard of consequences, failed and refused to slow up said train, and with a reckless disregard of consequences, wantonly and recklessly and willfully ran its engine, or locomotive, over, upon and against the said *Jesse Davis*, and the said *Jesse Davis* was then, there and thereby killed, and all without any fault whatever on the part of said *Jesse Davis*."

The third paragraph was as follows: "For third and additional paragraph of complaint, the plaintiff, *Daniel Judd*, administrator of the estate of *Jesse Davis*, deceased, complains of the defendant, the *Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company*, and says that the defendant is a corporation duly organized under the laws of the State of *Indiana*, and doing business under the laws of the State of *Indiana*; that said defendant controls, owns, and operates a line of railway extending from *Indianapolis*, in *Marion* county, to *Jeffersonville*, in the county of *Clark*, in said State, and passing through the county of *Bartholomew*, in said State; that said line of railroad passes through and across the incorporated town of *Jonesville*, in said county and State; that on the *18th* day of *March*, *1892*, and for many years prior thereto, the defendant, in addition to its said main line of railroad running through and across the town of *Jonesville*, controlled, owned, and maintained, and now owns, controls, and maintains a switch on the west side thereof, at a distance of —— feet away; that said line of railroad, and said switch track adjacent thereto, run through said town of *Jonesville* in a north and south direction; that defendant company on said day, and for many years prior thereto, owned, controlled, and maintained, and now owns, controls, and maintains a passenger depot and platform adjacent thereto, at said town of *Jonesville*, and said depot platform is situated adjacent to said railroad on the west side thereof, and about midway between the north and south boundaries of said town; that said main track of railroad from said depot southward for a distance of *one hundred and fifty* yards, and within the incorporation of said town of *Jonesville*, was, on the *18th* day of *March*, *1892*, and for many years prior thereto, in general and constant, and habitual use as a public highway for foot passengers going to and from said depot, and that usage had at all times been acquiesced in by defendant; that by reason of such general, constant and habitual use of said part of said railroad track as a public highway for foot passengers going to and from said depot, and that such usage had at all times been known and acquiesced in by defendant, the public was, on said day and for many years prior thereto, licensed to use said part of said rail-

road as such highway by the defendant company; that on said *18th* day of *March*, at —— minutes past *nine* o'clock in the *fore*noon, a gravel train, controlled, owned, and operated by defendant, was standing on the aforesaid switch track; the engine of said gravel train, facing southward, was standing about *sixty-five* yards south of said depot platform, and was in charge of servants in the employ of defendant; that at said time one *Jesse Davis* was walking northward along and over the center of defendant's said line of railroad, about *sixty-five* yards south of said depot platform, and adjacent to the engine or locomotive of the aforesaid gravel train standing upon said switch track as aforesaid; that at said time the escaping steam of said engine or locomotive of said gravel train was making a loud noise; that the said *Jesse Davis* was rightfully and lawfully a footman at said point on said railroad by reason of the aforesaid license from defendant company to footmen to use it as a public way; that while the said *Davis* was walking on said track, facing northward as aforesaid, the regular passenger train from the south, consisting of a locomotive, a baggage car, and *three* passenger coaches, and controlled by defendant's servants, came towards the said *Davis*, and when within *three hundred* yards of said *Davis*, the engineer on said passenger train saw the said *Davis* walking on the track as aforesaid; that at said time the said defendant's said servant, the engineer of said passenger train, engine, or locomotive, with ordinary care might have seen, and did see the gravel train engine or locomotive on the side track, with the escaping steam, as aforesaid, and that the said passenger train engineer, with the use of ordinary care, might have known, and did know, that the said *Davis* could not have heard the noise of the approaching passenger train; that the said *Jesse Davis*, not knowing of the said passenger train approaching from behind, continued to walk upon the track, as aforesaid, and defendant's said servant, in charge of said passenger train, engine, or locomotive, with a reckless disregard of consequences, failed and refused to slow up the said engine and train, and refused to sound the danger signal of said engine or locomotive until within *one hundred* yards of the said *Davis*, at which time it was impossible, as defendant's servant well knew, to stop said engine or locomotive and train before they reached the said *Davis*; and with a reckless disregard of consequences the defendant's said servant wantonly, recklessly, and wilfully ran said passenger train, engine, and locomotive over, against, and upon the said *Jesse Davis*, that said *Jesse Davis* was then and there and thereby killed, and all without any fault whatever on the part of said *Davis*.

Plaintiff alleges that the said *Jesse Davis* leaves a widow, *Catharine Davis*, and *two* minor children; that deceased was a strong, able-bodied man, and was the sole means of support for the said widow and minor children; that by reason of the wrongful, unlawful killing of the said *Jesse Davis*, as aforesaid, the said widow of said *Davis*, and minor children, have been wrongfully and unlawfully deprived of the services and society of said *Jesse Davis*; that said services and society were of the value of $*10,000*; that this plaintiff had been appointed and has been appointed and has duly qualified as administrator of the estate of the said deceased."

It was held that this complaint was sufficient.

In House *v.* Blum, (Tex. Civ. App. 1900) 56 S. W. Rep. 82, the petition was as follows: "That on the *4th* day of *February*, *1897*, her son, *Israel Blum*, aged *13* years, a strong, healthy, active, and obedient child, possessing the discretion of boys of his years, was killed by and through the negligence of the defendant; that defendant was in possession of the tracks of the *Galveston & Western Railway Company*, operating and controlling trains thereon; that the trains operated upon the tracks of the *Galveston & Western Railway Company* were engaged in hauling gravel, shell, and soil, and depositing the same along the tracks on *Avenue N* for subsequent removal; that *Avenue N*, between *Twenty-Fourth* and *Twenty-Fifth* streets, was incumbered and obstructed by heaps of gravel and sand that had been placed along and in the middle of the avenue by the receiver, and suffered to remain there an unreasonable length of time, interfering with pedestrians and vehicles; that on said occasion plaintiff's son, in company with other little boys, got upon a moving train to take a ride, whereupon employees of receiver, who had charge of said train, negligently and recklessly forced the said boys, including plain-

Form No. 17001.

(Precedent in Book *v.* Chicago, etc., R. Co., 75 Mo. App. 604.)[1]

[(*Title of court and cause as in Form No. 5921.*)][2]

Plaintiff for his amended petition and cause of action herein, states that the defendant is a corporation, and was at all the times hereinafter mentioned, a railroad corporation, organized and existing under the laws of the state of *Illinois*, and in the possession of, and operating a line of railway in *Holt* county, *Missouri*, from the town of *Napier*, to the *Missouri* river, and engaged as a common carrier, in conveying passengers on its said line for compensation. That the town of *Fortescue* is a railway station on the defendant's said railway in said county, where all of the defendant's passenger trains on said railway, at all the times hereinafter mentioned, stopped to receive and let off passengers, and where defendant has a railroad depot, provided with a waiting room for passengers, and with a ticket office; and where defendant keeps and maintains an agent in said office to attend to and transact all defendant's railroad business transacted thereat, and to represent the defendant in all business matters generally at said place.

Plaintiff further states, that on or about the *third* day of *October*, A. D. 18*94*, he became, and was, a passenger upon one of the defendant's passenger trains on the line of its said railway from the said town of *Napier* in said county to the said town of *Fortescue*, in said county, and paid his fare for such passage to the conductor in charge of the said defendant's said train, to wit, the sum of *ten* cents, which said sum was received and accepted by the said conductor.

That it became and was the duty of the defendant to convey plaintiff as such passenger to the said town of *Fortescue*, and to stop said train at the usual stopping place, in said town of *Fortescue*, and at the depot, and give the plaintiff an opportunity to get off said train, and to protect the plaintiff from insult, unkindness and abuse from the defendant's servants, in charge of the said train, as well as from

tiff's son, to jump from the cars while in motion, and that the boys, alarmed by the orders, pursuit and threats of said employees, jumped from the train while moving, and, the public streets and highways being obstructed with heaps of gravel and sand, brought and allowed to be placed there by defendants, plaintiff's son jumped or fell upon one of the sand heaps alongside of the track, and the same gave way under his feet, causing him to slide, and throwing him under the wheels of the moving cars, or, being pursued by defendant's servants, he ran from one car to the other, and fell between them, or was otherwise ejected from said cars, several of which passed over him, crushing and mangling him, and causing his death in a few minutes; that the death of plaintiff's son was due proximately and directly to the negligence of defendants in placing and leaving dangerous obstructions in the public streets, and in such proximity to its cars; also in putting plaintiff's son off the train, or causing him to fall off, or causing him to jump off while in motion, and to light on the unstable obstruction, each and both of which matters constitute negligence on the part of said defendants; and that by reason of the tender years of plaintiff's son she was greatly damaged by his death."

It was held that this complaint contained allegations sufficient to charge wilful negligence, and if sustained would entitle plaintiff to recover, though the deceased was a trespasser.

1. It was held that this petition stated an action *ex delicto*, and that the plaintiff was entitled to trial.

See also, generally, *supra*, note 1, p. 490.

2. The matter to be supplied within [ ] will not be found in the reported case.

all other persons, and to treat plaintiff with kindness while a passenger upon said train, and while alighting therefrom.

That notwithstanding the premises, the defendant did not stop said train at the said town of *Fortescue*, or at the depot thereat, but on the contrary, the defendant purposely, wrongfully, wilfully, negligently, recklessly and wantonly, ran said train at a great rate of speed through, by, and beyond the said town of *Fortescue*, and past the said depot thereat, without stopping, a distance of about *one* mile, and then and there stopped the said train at an unfrequented spot, and not at any usual stopping place, or near any dwelling house, and where the said defendant's said roadbed was graded up high, making it inconvenient and dangerous for one to get off or alight from said train, and the defendant by its conductor and agent ordered the said plaintiff to get off of said train, and upon the said plaintiff requesting him, the said conductor, to back the said train to the town of *Fortescue*, and let him, plaintiff, off, or to take him to the next station on said defendant's railway and return him by defendant's next train, defendant's conductor became very insulting and greatly angered, and suddenly, and without any warning whatever, with great force and violence, unlawfully, wilfully, wrongfully and wantonly laid his hands upon and seized hold of the plaintiff, and with great and unnecessary force and violence, wilfully, wrongfully, and maliciously ejected and threw the said plaintiff off of, and from, said train, and down said grade and embankment, onto the ground, greatly injuring the plaintiff, by bruising and wounding him upon his body and limbs so that the said plaintiff became lame, sore and sick, and permanently injured.

The plaintiff was thereafter unable to attend to his business for a long time, and is now and has been since said acts and injuries physically unable to perform the same labor and work that he did before. That plaintiff suffered and still suffers therefrom, great pain and mental anguish. That he was compelled to, and did, expend the sum of *twenty-five* dollars in doctoring and trying to cure himself of said injuries. That the said conductor, at the said time, in the presence of a great number of other passengers, ejected said plaintiff as aforesaid from said train, and in a very insulting and offensive manner informed and stated to the plaintiff, at the time, that he would learn the plaintiff to hereafter pay his fare, and used other insulting and abusive language to and toward the plaintiff, all of which was said at the time the plaintiff was so ejected from said train, in the presence of said passengers, which greatly wounded the feelings of the plaintiff and humiliated and disgraced him, the said plaintiff.

That by reason of all of said wrongful acts of said conductor as aforesaid, and by means of all the premises as aforesaid, plaintiff says that he is damaged in the sum of *fourteen hundred* dollars ($\$1,400$), for which he asks judgment, and also for the further sum of *five hundred* dollars ($\$500$) as exemplary damages as a warning to others, and for his costs of suit.

[(*Signature of attorney as in Form No. 5921.*)][1]

1. The matter to be supplied within [ ] will not be found in the reported case.

(*b*) *In Running Train Against Plaintiff.*

Form No. 17002.

(Precedent in Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 589.)[1]

[(*Title of court and cause as in Form No. 5907.*)][2]

Plaintiff claims of the defendant *twenty-five thousand* dollars as damages, for that defendant on or about the ——— day of *August*, 1894, was engaged in the business of a common carrier of passengers, propelling cars by steam, in *Etowah* county, *Alabama*, and then and there wantonly or intentionally, through its agents and servants, drove and propelled its engine and train upon and against plaintiff in said county, who was then and there a minor between *seven* and *eight* years of age, knocking him down and fracturing his skull and otherwise wounding and injuring him to his great damage as aforesaid; hence this suit.

[(*Signature of attorney as in Form No. 5907.*)][2]

(2) Answer.[3]

(*a*) *In General.*

Form No. 17003.

(Precedent in Pennington *v.* Atlanta, etc., R. Co., 35 S. Car. 439.)[4]

[(*Title of court and cause as in Form No. 1339.*)][2]

The defendant corporation, answering the complaint herein, says:

1. It admits that it was a corporation duly chartered under laws of the State of *South Carolina*, but denies that it was at the time mentioned in said complaint a common carrier of goods and passengers, or that it was operating or controlling any railroad, cars, locomotives, or trains in the State of *South Carolina*.

2. That it has not knowledge or information sufficient to form a belief as to the truth of allegations contained in paragraph *2* of complaint, and therefore demands strict proof of the same, and so much of said paragraph as alleges carelessness, recklessness, and negligence of servants, agents, and employees of defendant, this defendant denies.

3. This defendant has no knowledge or information sufficient to form a belief as to the truth of allegations contained in paragraph *3* of complaint, and demands strict proof of same.

4. Defendant denies the allegations of paragraph *4* of the complaint.

Wherefore defendant demands judgment that the complaint herein be dismissed and for cost.

[(*Signature of attorney and verification as in Form No. 5932.*)][2]

1. It was held that this count sufficiently charged that the defendant committed the injury wantonly, wilfully and intentionally.

See also, generally, *supra*, note 1, p. 490.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. **For the formal parts** of an answer in a particular jurisdiction see the title Answers in Code Pleading, vol. 1, p. 799.

4. After evidence was introduced, it

(*b*) *Setting Up Release.*

Form No. 17004.

(Precedent in Atchison, etc., R. Co. *v.* Higgins, 9 Kan. App. 672.)[1]

[State of *Kansas*, } ss.
Sedgwick County. }

In the *District* Court in and for the county and state aforesaid.

John J. Higgins, plaintiff,
against
Atchison, Topeka & Sante Fe Railroad Company and *Aldace F. Walker, et al.*, *receivers*, defendants. } Answer.

The *Atchison, Topeka & Santa Fe Railroad Company*, the defendant, in answer to plaintiff's petition alleges,][2]

That after the date said injuries are alleged to have been sustained, to wit, on the *14th* day of *October*, 1892, the said plaintiff received and accepted from said defendant, the *Atchison, Topeka & Santa Fe Railroad Company*, the sum of $*125* in full release, discharge and satisfaction of all claims, damages or causes of action arising from said alleged injuries, and in consideration of said sum of money entered into a written contract with said defendant, the *Atchison, Topeka and Santa Fe Railroad Company*, by the terms and conditions of which he remised, released and forever discharged the said defendant, the *Atchison, Topeka & Santa Fe Railroad Company*, of and from all manner of actions, causes of action, suits, debts and sums of money, dues, claims and demands whatever in law or equity, which he had, ever had or then had against the said company by reason of any matter, cause or thing whatever, whether same arose upon contract or tort.

[Wherefore defendant prays that the said petition may be dismissed and asks judgment for costs.

Atchison, Topeka & Santa Fe Railroad Company,
by *Oliver Ellsworth*, Attorney.

(*Verification.*)][3]

5. To Eject Railroad Company from Land.

a. Complaint.[4]

Form No. 17005.

(Precedent in Northern Pac. R. Co. *v.* Smith, 171 U. S. 260.)[5]

[In the *Circuit* Court of the United States for the District of *North Dakota.*

was held that the defendant was entitled to a nonsuit.

1. It was held that the release set up by the answer was valid and binding and the judgment of the district court in favor of plaintiff was reversed.

2. The matter enclosed by [ ] will not be found in the reported case.

3. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

4. For the formal parts of a complaint in a particular jurisdiction see the title COMPLAINTS, vol. 4, p. 1019.

5. An answer was filed to this complaint and upon trial judgment was

Patrick R. Smith, plaintiff,
against
Northern Pacific R. Co., defendant.
} At Law. No. *100.*

Complaint.][1]

The complaint of the above-named plaintiff respectfully shows to this court and alleges that the plaintiff is and ever since the organization of the State of *North Dakota* has been a citizen thereof, and that prior thereto he was during all the time hereinafter mentioned a citizen of the Territory of *Dakota*.

That during all the time hereinafter mentioned the above-named defendant has been and still is a corporation created by and existing under and in virtue of an act of the Congress of the United States of America, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast, by the Northern route," approved July 2, 1864.

That on the *14th* day of *September*, A. D. 1876, the plaintiff became and ever since has been and still is duly seised in fee simple and entitled to the possession of the following described real property situated in the city of *Bismarck*, in the county of *Burleigh* and Territory of *Dakota*, (now, and since the organization thereof under a state government, the State of *North Dakota*), to wit: Lots numbered *five*, *six*, *seven*, *eight*, *nine*, *ten*, *eleven* and *twelve*, in block number *eight*, according to the recorded plat of the city of *Bismarck*, *D. T.*, together with the hereditaments, privileges and appurtenances thereof and thereto belonging.

That said defendant more than *six* years prior to the commencement of this action wrongfully and unlawfully went into the possession of the premises above described. That said defendant ever since said entry has wrongfully and unlawfully retained and withheld, and still does wrongfully and unlawfully retain and withhold, the possession thereof from the plaintiff. And the use and occupation thereof during said time was worth at least *five thousand* dollars a year. That the damage to the plaintiff by the wrongful withholding of the possession of the premises as aforesaid is the sum of *thirty thousand* dollars.

Wherefore the plaintiff demands judgment against said defendant for the possession of said premises and for the sum of *thirty thousand* dollars, his damages as aforesaid, together with his costs and disbursements herein.

[*Jeremiah Mason*, Plaintiff's Attorney.][1]

b. Answer.[2]

Form No. 17006.

(Precedent in Northern Pac. R. Co. *v.* Smith, 171 U. S. 262.)[3]

[(*Title of court and cause as in Form No. 17005.*)

rendered for the plaintiff. This judgment was reversed in the supreme court.

1. The matter enclosed by [ ] will not be found in the reported case.

2. For the formal parts of an answer in a particular jurisdiction see the title ANSWERS IN CODE PLEADING, vol. 1, p. 799.

3. Judgment was ordered in favor of defendant.

Answer.

The defendant answering the complaint of the plaintiff herein,][1]

First. For a first defense, alleges —

That the land mentioned in the complaint is situated within *two hundred* feet of the centre line of the roadbed of its line of railroad constructed through the State of *North Dakota*, and has been for more than *twenty* years in its lawful possession as its right of way, roadbed and depot grounds, and that the same was granted to it as a right of way by the act of Congress described in the complaint.

Admits that at all times mentioned in the complaint the plaintiff was a resident of the city of *Bismarck*, in the State of *North Dakota*, and further admits that the defendant is a corporation created by the said act of Congress. Denies each and every allegation in the complaint not hereinbefore specifically admitted, and it specifically denies that by reason of any of the allegations or things in the said complaint set forth the plaintiff has been damaged in any sum whatever.

Second. For a second defense —

That on the *9th* day of *May*, 1*889*, the plaintiff impleaded the defendant in the district court within and for the county of *Burleigh*, in the *sixth* judicial district for the Territory of *Dakota* (now the State of *North Dakota*), for the same cause of action for which he has impleaded it in this action.

That at the time of the commencement of this action, said action was pending in said court and is still pending therein.

Third. For a third defense —

That on the *31st* day of *January*, 1*878*, the defendant recovered judgment against the plaintiff for the possession of a portion of the property described in the complaint, to wit, that portion thereof described as lots *eleven* and *twelve*, for *six* cents damages and for $——— costs, and that said judgment was rendered upon the cause of action mentioned in the complaint, which judgment is in full force, unreversed and unsatisfied.

Wherefore, the defendant demands judgment: 1st. That the complaint be dismissed. 2d. For its costs and disbursements in this action.

[*Oliver Ellsworth*, Attorney for Defendant.

(*Verification.*)][1]

6. To Recover Compensation for Right of Way.

Form No. 17007.

(Precedent in Davis *v.* Watson, 158 Mo. 192.)[3]

[(*Title of court and cause as in Form No. 5921.*)][2]

1. Plaintiffs, by their attorneys, state that they are husband and wife, and for their cause of action against defendant allege that on

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. Judgment was rendered in favor of the plaintiffs, and upon appeal to the

the *14th* day of *November*, 1890, a certain agreement was made and entered into by and between the plaintiffs and the defendants in words and figures following, to-wit:

"*Bevier, Mo., Nov. 14*, 1890.

This agreement certifies that *Wesley H. Loomis* and *Wm. S. Watson* have this day purchased from *James W. Davis* and *Margaret Davis*, his wife, for *one thousand* dollars, the exclusive right of way for any railroad or switch or railroad purposes over his farm of *eighty* acres. If we build a switch, we will occupy only *seventy* feet in width up the ravine, namely, the south half of the southwest quarter of section *fifteen*, township *fifty-seven*, range *fifteen*, together with the privilege of purchasing his farm named above for *four thousand* dollars at any time prior to *March 1*, 1891, that is $*3,000*, in addition to the $*1,000* for the exclusive right of way. In consideration of the above agreement all parties have signed their names hereto and the receipt of *ten* dollars earnest money is hereby acknowledged by *James W. Davis*.

James W. Davis.
Wesley H. Loomis.
W. S. Watson.
Margaret Davis.

Witness: *Jno. H. Gay*, Notary Public. (SEAL)"

2. Plaintiffs allege that they have duly performed all the conditions of said contract on their part to be performed; that they have at all times been ready and willing to make a conveyance of the exclusive right of way over their land mentioned in the above contract and that they now tender into court a deed for said right of way to be delivered to the defendant upon payment by him of the consideration named therein.

3. The plaintiffs further state that the defendant has caused to be built and is now using a railroad switch over the land and along the line described in the contract; and that he has wholly failed, refused and neglected, and still fails and neglects to pay the plaintiffs the balance due on said contract, to wit, the sum of *nine hundred and ninety* dollars.

Wherefore plaintiffs say that by reason of the premises they are damaged in the sum of *nine hundred and ninety* dollars, for which they pray judgment, together with interest from *November 14*, 1900, and costs of this suit.

[(*Signature of attorney as in Form No. 5921.*)][1]

Form No. 17008.

(Precedent in Cureton *v.* South Bound R. Co., 59 S. Car. 372.)[2]

[(*Venue and title of court and cause as in Form No. 5932.*)

The complaint of the above-named plaintiffs respectfully shows to this court:

supreme court it was held that as judgment rendered was for less than twenty-five hundred dollars and did not involve or affect the title of real estate the supreme court would not hear the case on its merits and it was transferred to the court of appeals.

1. The matter to be supplied within [] will not be found in the reported case.

2. On demurrer, this complaint was held sufficient.

1. That the defendant, the *South Bound Railway Company*, is a corporation duly incorporated under the laws of the state of *South Carolina.*][1]

2. That on or about *August 19*, 1899, the defendant served upon the plaintiffs herein (except *Josephine E. Cureton*) a written notice, of which the following is a copy: (*setting out copy of notice*).

3. That on or about *September 18*, 1890, in response to above notice, the plaintiffs served upon the defendant company a written notice objecting to the entry of the company upon the said lands without compensation for the required right of way.

4. That despite plaintiffs' written objection the defendant proceeded without making any compensation to plaintiffs, without any agreement with them, and without any condemnation of the right of way, to construct their railway through said lands, and at this date have completed same except some work upon the river bridge now in progress.

5. That at the time of the entry of the defendant upon said lands for the construction of its road, and until *January 3d*, 1900, *C. O. Witte*, Esq., of *Charleston, S. C.*, was in possession of said lands as tenant of an interest therein for the life of *C. B. Cureton* (father of the plaintiff herein), the said *C. O. Witte* having acquired the life estate of the said *C. B. Cureton*, and the plaintiffs (except *Josephine E. Cureton*) were entitled upon the expiration of the said life estate, as remaindermen in fee simple under and by virtue of the will of *Joseph Cunningham*, whereby said lands were devised to *C. B. Cureton* for life, and at his death "to the issue of his body living at the time of his death."

6. That on or about *November 14th*, 1899, whilst the construction of said railway through said lands was in progress, the plaintiff, *Josephine E. Cureton*, received from the plaintiffs named herein a deed of conveyance of their interest in said lands, the plaintiffs, *Hannah B. Cureton* and *Everard B. Cureton*, who appear by their guardian ad litem, *J. C. Cureton*, being as they are still minors under age of *twenty-one* years.

7. That said *C. B. Cureton* departed this life *January 3d*, 1900, before completion of the railway through said lands; whereupon the fee simple title in said lands vested in the plaintiffs above named and their grantee, *Josephine E. Cureton.*

8. That as plaintiffs are informed and believe, that said *C. O. Witte*, by instrument in writing of date *August 31st*, 1899, released to the said defendant company "to the extent of his ownership therein," a right of way through said lands, and that under said release defendant claims and occupies a right of way through said lands *100* feet wide and about *7,000* feet long.

9. That defendant has thus occupied a strip through said land of the dimensions aforesaid (*100* feet wide and about a *mile and a half* long), having constructed their track thereon, having made cuts and embankments and trestles, rendering unfit for cultivation, pasturage or other use some *fifteen* acres, having obstructed the communication

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

between various parts of the said lands and the drainage, and have thus divided the land into very inconvenient shape, to the damage of the plaintiff $*1,500*.

10. That although requested by plaintiffs, the defendant has declined to make any compensation to these plaintiffs for the right of way through their lands or for the damages done thereto.

Wherefore, plaintiffs pray judgment against defendant for $*1,500*, for the costs of this action, and such other relief as may be meet and proper.

[(*Signature and verification as in Form No. 5932.*)][1]

7. To Recover Earnings Above Ten per Cent. of Capital Stock of Company.

Form No. 17009.[2]

(Precedent in State *v.* Manchester, etc., R. Co., 69 N. H. 35.)[3]

[(*Commencement as in Form No. 6945*)][1] in a plea of debt for that the defendants are a corporation organized and existing under and by virtue of the laws of said state to construct and maintain a railroad from the city of *Manchester*, in our county of *Hillsborough*, to the state line in *Salem*, in said county of *Rockingham*, and it was and is provided in and by their charter, section 5, chapter 549, Laws of 1847, that in any and every year when the net receipts from the use of said road shall exceed the average of *ten* per cent. per annum from the commencement of their operations, the excess shall be paid into the treasury of the state; that in 1*849*, the defendants constructed their said railroad from said *Manchester* to the state line, in said *Salem*, and have maintained their said railroad to the day of the purchase of this writ, and the plaintiff avers that the net receipts received by the defendants from the use of said road have in each and every year since the *first* day of *January*, 1*867*, exceeded an average of *ten* per cent. per annum from the commencement of their operations by a large sum, to wit, the sum of *seven hundred and fifty thousand* dollars, which said sum the defendants, though hitherto requested, have neglected to pay into the treasury of said state: Whereby and by reason whereof an action has accrued to the plaintiff to have and recover of the defendants said sum of *seven hundred and fifty thousand* dollars.

Also, for that the defendants are a corporation duly chartered and organized under and by virtue of the laws of said state to construct and maintain a railroad within said state, and from the *first* day of *January*, 1*849*, to the date of this writ, have owned and maintained a railroad extending from the city of *Manchester*, in our county of *Hillsborough*, to the state line in *Salem*, in said county of *Rockingham*, and the plaintiff avers that the net receipts received by the defend-

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *New Hampshire.* — Pub. Stat. & Sess. L. (1901), c. 157, § 19.

See also list of statutes cited *supra*, note 1, p. 412.

3. A demurrer to this declaration was overruled.

ants from the operation of their said railroad have exceeded the average of *ten* per cent. per annum on its expenditures from the commencement of its operations in each and every year from said *first* day of *January*, 18*49*, to the date of the purchase of this writ by a large amount, to wit, by the sum of *seven hundred and fifty thousand* dollars, which said sum the defendants, though requested, have neglected to pay into the treasury of the state: Whereby and by reason whereof an action has accrued to the plaintiff to have and recover of the defendant said sum of *seven hundred and fifty thousand* dollars.

[(*Concluding as in Form No. 6945.*)][1]

8. To Recover for Use of Tracks.

Form No. 17010.

(*Title of court and cause as in Form No. 5932.*)[2]

The complaint of the above named plaintiff respectfully shows to this court:

I. That during all the times hereinafter mentioned the plaintiff was and now is a corporation, organized and existing under the laws of the state of *South Carolina*, and owning and operating a railroad from *Kingville*, in the county of *Richland*, in the state of *South Carolina*, to *Columbia*, in the county of *Richland*, in said state of *South Carolina*.

II. That under and by an act of the legislature of the state of South Carolina, ratified the eighteenth day of December, 1844, the plaintiff was authorized to construct a branch of its railroad from said *Kingville* to the town of *Camden*, in the county of *Kershaw*, in the state of *South Carolina*, and that plaintiff did shortly thereafter construct a branch of the said road from said *Kingville* to said *Camden*; that the lands and right of way used in and for the construction of said branch road were and are owned by said plaintiff solely.

III. That on the *twenty-second* day of *August*, 18*53*, the *Wilmington and Manchester Railroad Company* was a body corporate under the laws of the state of *South Carolina* and authorized under its charter to construct a railroad from *Wilmington*, in the state of *North Carolina*, to *Manchester*, in the state of *South Carolina*, or some point near that place.

IV. That on the *twenty-second* day of *August*, 18*53*, the plaintiff and said *Wilmington and Manchester Railroad Company* made and executed the following contract:

"State of *South Carolina*.

1st. This agreement, made and entered into this *twenty-second* day of *August*, in the year eighteen hundred and *fifty-three*, between the

1. The matter to be supplied within [ ] will not be found in the reported case.

2. This form is substantially the complaint in South Carolina R. Co. *v.* Wilmington, etc., R. Co., 7 S. Car. 410. In that case it was held that the plaintiffs were entitled to recover.

South Carolina Railroad Company of the one part, and the *Wilmington and Manchester Railroad Company* of the other part, witnesseth:

That the *South Carolina Railroad Company* agrees to admit the *Wilmington and Manchester Railroad Company* to the joint, permanent and mutual use of so much of the "*Camden Branch*" of their road as extends from the junction of the *Columbia* and *Camden* branches to the junction of said *Camden* branch with the *Wilmington and Manchester* road, upon the terms, conditions and covenants hereinafter expressed of and concerning the same.

2d. The said *Wilmington and Manchester Railroad Company*, in consideration of the joint and mutual use of so much of the road of the said *South Carolina Railroad Company* granted them as aforesaid, agrees to pay to the said *South Carolina Railroad Company one-half* of the estimated cost of the construction of the said road as extends from the said junction of the *Columbia* and *Camden* branches to the *Wateree* river, which cost is hereby fixed and ascertained to amount to *fourteen thousand* dollars per mile. And the said *Wilmington and Manchester Railroad Company* agree to pay to the *South Carolina Railroad Company one-half* of the estimated cost (or *seven thousand* dollars per mile) in *three* equal annual instalments, with interest thereon from the time hereinafter mentioned, and to execute and deliver their coupon bonds, with *seven* per cent. interest thereon, payable in *one*, *two* and *three* years, or at time or times (not exceeding *ten* years) as the *South Carolina Railroad Company* may require.

3d. And the said *South Carolina Railroad Company* agrees to construct a road through the *Wateree Swamp* and a bridge over the *Wateree* river, from the termination of the section of the road above referred to, to the junction of the *Camden* branch with the *Wilmington and Manchester Railroad*, said road to be constructed on the plan of the road through the *Congaree Swamp* (this plan to be subject to the modifications of the superintendents of the two roads hereafter), the work to be constructed under the direction of the engineer of the *South Carolina Railroad Company*, who shall be authorized to confer freely with the engineer of the *Wilmington and Manchester Railroad Company*, in consideration of the joint and mutual use of the said road so to be constructed by the *South Carolina Railroad Company*, as well as the joint and mutual use of their existing road through said swamp. The said *Wilmington and Manchester Railroad Company* agrees to pay to the *South Carolina Railroad Company one-half* of the cost of said work, including the bridges, the payment to be made from time to time as the work progresses, in such manner as to meet *one-half* of the payments which the *South Carolina Railroad Company* may be required to make in providing for the construction or execution of said work. It is also agreed that the iron to be used on said road or trestle shall be of the compound "*U*" form, weighing *seventy* pounds to the yard, unless the engineers shall determine on a different pattern and weight.

4th. The road from the junction of the *Columbia* and *Camden* branches to the junction of the *Camden* branch with the *Wilmington and Manchester Railroad* to be under a superintendent and a party of

hands directed by the engineer of the *South Carolina Railroad Company*, who shall purchase all material for the repairs of said road. And all expenses and charges for the superintendence and keeping up and repairs of that portion of the premises embraced in this agreement from the western bank of the *Wateree* river to the junction of the *Camden* branch with the *Wilmington and Manchester Railroad* shall, from this date, be at the joint and equal expense of the parties to this agreement, and the like expenses for the other portion of the said premises, to wit: from the western bank of the *Wateree* river to the junction of the *Columbia* and *Camden* branches shall be joint and equal betwixt the parties to this agreement from the commencement of the joint use of said premises herein provided for.

5th. A station building (for the joint and mutual use of the two roads, as now embraced in this agreement), *three hundred* feet long and *forty* feet wide, with a platform, on brick pillars, equal to *twelve thousand* superficial feet (these dimensions to be subject to modifications by the engineers of the two companies hereafter), to be erected at the junction of the *Columbia* and *Camden* branches, said building and necessary turnouts to be constructed under the direction of the superintendent of the *Wilmington and Manchester Railroad*, who shall be authorized to confer freely with the engineer of the *South Carolina Railroad Company*; the cost of such construction and the expenses incident thereto to be paid by the two companies in equal portions.

6th. Each of the parties of the first and second parts to pay to the other *one-half* of the amount received from the transportation of passengers and mails on the premises embraced within this agreement, said amount to be at the same rate per mile as charged the same passengers on each road, each party to pay the other for each carload of freight they may transport on the same premises *two* dollars and *fifty* cents. The road between the two junctions aforesaid to be used by each party, without hindrance or obstruction, according to the following conditions, viz.: All the road between the junction of the *Wilmington and Manchester Railroad* and the *Camden* branch and the junction of the *Camden* and *Columbia* branches (being the premises embraced in this agreement), to be used each alternate hour by the parties to this agreement, except with passenger trains, which are allowed to follow within a half mile of each other, and provided there shall be no delay to passenger trains of either party, freight trains in all cases to keep out of the way of passenger trains. The times of running of all trains to be regulated by schedule and a clock at each station.

7th. Each company to offer every facility for the transportation of passengers and freight, and to be provided with baggage crates for through baggage, which shall be checked by each company over the road of the other, and each company to sell tickets over the road of the other if required; the arrangements for baggage freight on crates to go into effect as soon as the superintendents of the two companies shall determine.

8th. It is also covenanted and agreed that the arrangements for running the freight and mail and passenger trains on that portion of

the *Camden* branch of the *South Carolina Railroad*, herein provided for, from its junction with the *Wilmington and Manchester Railroad* to the junction of the *Camden* and *Columbia* branches of the *South Carolina Railroad* shall commence so soon as the superintendents of the two roads shall determine, and the interest on the bonds herein provided to be given by the *Wilmington and Manchester Railroad Company* in the second clause of this agreement, as well as the interest on the fourth of the estimated cost of the road from the *Wateree* river to the junction of the *Wilmington and Manchester Railroad* (the estimate to be made by the superintendents of the two companies), shall commence running and be paid by the said *Wilmington and Manchester Railroad Company* to said *South Carolina Railroad Company* so soon as the joint use of said section of road herein provided for shall commence, and the divisions of receipts specified in the sixth section of this agreement do commence likewise and take effect from the said commencement of the joint use of said section of road as aforesaid.

Witness the signatures of the Presidents of the *South Carolina Railroad* and of the *Wilmington and Manchester Railroad Companies*, and the corporate seals of said companies respectively.

John Caldwell,
(*S. C. R. R. Co.* SEAL) President *S. C. R. R. Co.*
Witnesses: *J. R. Emery*, *John Samuel Bee.*

W. W. Harllee,
(*W. and M. R. R. Co.* SEAL) President *W. and M. R. R. Co.*
Witnesses: *D. K. Davis*, *C. F. Godbold.*"

V. That all the matters and things reciprocally to be performed by each of the said contracting parties have been performed by the *South Carolina Railroad Company* and were performed by the *Wilmington and Manchester Railroad Company* until the property, powers and privileges of the said corporation were transferred to and vested in the defendant, under the name and style of the *Wilmington, Columbia and Augusta Railroad Company.*

VI. That the railroad constructed and owned by the *Wilmington and Manchester Railroad Company* terminated at or near *Manchester*, and that the connection of the said corporation with the *South Carolina* railroad, and with railroads south and west, and the location of the terminus of said road at *Kingville*, were solely under and by virtue of the foregoing contract and the rights thereby acquired, and that the rights and interests thus acquired and held were essential to the use and enjoyment of the corporate franchises granted to the *Wilmington and Manchester Railroad Company.*

VII. That on or about the *tenth* day of *June*, 1855, *William F. Walters*, *Benjamin F. Newcomer* and *D. Willis James*, for themselves, as trustees for others, under decrees of sale for the purpose of foreclosing the various mortgages made by the *Wilmington and Manchester Railroad Company*, because the purchasers of all and singular the estate, property and effects of said company, and all the rights, privileges and franchises of said company connected with and relating to said railroad or the construction, maintenance or use thereof between its eastern terminus at *Wilmington* and its western terminus at *Kingville*, and subsequently, by act of the legislature of South

Carolina, approved March 1, 1870, the said purchasers were incorporated as a body politic and corporate under the name of the *Wilmington and Carolina Railroad Company*, "or by such other name as a majority in interest of the persons who are purchasers as aforesaid may designate and adopt at their first meeting after the passage of this act." And at the first meeting after the passage of said act a majority in interest of the purchasers adopted the name of the *Wilmington, Columbia and Augusta Railroad Company* as the style and name of the corporation.

VIII. That among the rights, privileges and property of the *Wilmington and Manchester Railroad Company* thus sold and purchased was the interest of the said company in the above recited contract, and the *nine* miles of road embraced therein, and under and by virtue of said sale and said act of incorporation the *Wilmington, Columbia and Augusta Railroad Company* became the successor and assignee of the *Wilmington and Manchester Railroad Company*, and substituted for them in all the rights which the *Wilmington and Manchester Railroad Company* had in said *nine* miles of railroad between *Camden Junction* and *Kingville*, and entitled to all the benefits and privileges of the contract above recited, and liable for all the duties and obligations to be performed under the contract by the party using and enjoying the privileges and benefit of said contract.

That after the sale and incorporation aforesaid, the *Wilmington, Columbia and Augusta Railroad Company* assumed, exercised and enjoyed, up to the *first* day of *January*, 1872, all the benefits and privileges of said contract in like manner and to the same extent as the *Wilmington and Manchester Railroad Company*, and also has, up to a recent period, to wit, the *first* day of *December*, 1871, performed all the obligations of said contract in like manner and to the same extent as the same were performed by the *Wilmington and Manchester Railroad Company*, and by reason thereof and the purchase and incorporation aforesaid the said *Wilmington, Columbia and Augusta Railroad Company* became, and is, a party to said contract above recited.

IX. That in and by the contract hereinbefore recited it is provided that the repairs of the railroad from the junction of the *Columbia* and *Camden* branches at *Kingville* to the *Camden Junction* shall be made under the direction of the *South Carolina Railroad Company*, its officers and agents, and that the expense thereof shall be jointly and equally borne by the parties to said contract; that, in pursuance of said contract, the plaintiff has repaired the railroad embraced in said contract, and have incurred expense therefor to the amount of *three thousand and five* dollars and *thirty-five* cents, as appears by the bill of items hereto annexed; that said expenses are, by the contract, equally to be borne by the plaintiff and defendant; that the plaintiff has demanded payment of the *one-half* thereof from the defendant, but the defendant has refused to pay the same.

Wherefore the plaintiff demands judgment against the said defendant for the sum of *fifteen hundred and two* dollars and *sixty-seven* cents ($\$1,502.67$), with interest and costs of this action.

(*Signature of attorney, and verification as in Form No. 5932.*)

9. By Laborer to Recover Wages Due from Contractor.

Form No. 17011.[1]

(Conn. Prac. Act, p. 146, No. 251.)

(*Commencement as in Form No. 5912.*)

1. From *May 1st*, 1878, to *June 15th*, 1878, *John Stiles* of *New London*, was engaged in building a section of railroad for the defendant, under a contract between them.

2. During the whole of said period the plaintiff worked, in building said section, under a contract between him and said *Stiles*, by which he was to have wages at the rate of $*1.25* a day.

3. On *June 15th*, 1878, $*34* was and still is due to the plaintiff from said *Stiles* on account of said wages.

4. *On July 1st*, 1878, the plaintiff gave written notice to *David Dun*, the treasurer of the defendant, that said sum was due the plaintiff from said *Stiles* for labor on the road during said period, and remaining unpaid.

5. Said sum is still unpaid.

The plaintiff claims $*50* damages, under the statute in such case provided.

(*Conclusion as in Form No. 5912.*)

IV. CRIMINAL PROSECUTIONS.

1. Against Railroad Company.

a. For Discrimination in Rates.[2]

(1) FREIGHT.

Form No. 17012.[3]

(*Commencement as in Form No. 10707.*)

The grand jurors for the state of *New Hampshire* upon their oath present that on the *fifth* day of *March* in the year of our Lord one thousand eight hundred and *ninety-nine*, the *Midland Railroad Company* was and during all the times hereinafter stated was and now is a railroad corporation organized and existing under the laws of the

1. *Connecticut.* — Gen. Stat. (1888), § 3022.

See also list of statutes cited *supra*, note 1, p. 412.

2. **Requisites of Complaint, Indictment or Information, Generally.** — For the formal parts of a complaint, indictment or information in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; INDICTMENTS, vol. 9, p. 615; INFORMATIONS IN CRIMINAL CASES, vol. 9, p. 768.

That freight was of same class or kind, or not of different classes or kinds, must be stated. Louisville, etc., R. Co. *v.* Com., (Ky. 1898) 48 S. W. Rep. 416.

That offense was wilfully and knowingly committed must be alleged. Louisville, etc., R. Co. *v.* Com., (Ky. 1898) 48 S. W. Rep. 416.

3. *New Hampshire.* — Pub. Stat. & Sess. L. (1901), c. 160, §§ 1–3.

See also list of statutes cited *supra*, note 1, p. 412.

This form is substantially the indictment in State *v.* Concord R. Co., 59 N. H. 85. The indictment in that case was held sufficient on motion to quash.

state of *New Hampshire*, and operating a railroad for the transportation of freight and passengers extending from *Portsmouth*, in the state of *New Hampshire*, to *Concord*, in the state of *New Hampshire*; that on said *fifth* day of *March*, one *John Doe* did deliver to the said *Midland Railroad Company*, for transportation from said *Portsmouth* to said *Concord*, *three hundred and ten* tons of coal; that on said *fifth* day of *March*, the said *Midland Railroad Company* did wilfully neglect and refuse to afford and furnish to said *John Doe* reasonable and equal terms, facilities and accommodations for the transportation of said *three hundred and ten* tons of coal upon said railroad, by then and there wilfully delaying, neglecting and refusing to transport said *three hundred and ten* tons of coal so delivered to said railroad as aforesaid, from said *Portsmouth* to said *Concord*, from said *fifth* day of *March* to the *tenth* day of the same *March*, and by wilfully refusing on said *fifth* day of *March* to transport said coal from said *Portsmouth* to said *Concord*, unless said *John Doe* would first prepay the freight of *one* dollar and *seventy-five* cents upon each ton of the coal, which exaction was unusual, extraordinary and unreasonable, and unequal in terms, and by wilfully refusing on the *tenth* day of said *March* to deliver to said *John Doe* the said *three hundred and ten* tons of coal transported by said railroad to said *Concord*, unless the said *John Doe* would before the delivery of said coal pay the said railroad the freight of *one* dollar and *seventy-five* cents per ton upon said coal, such exaction being unusual, extraordinary and unreasonable, and unequal in terms, contrary to (*concluding as in Form No. 10707*).

(2) Passenger.

Form No. 17013.[1]

(Precedent in State *v.* Southern R. Co., 122 N. Car. 1054.)[2]

[(*Commencement as in Form No. 10711.*)][3]

The jurors for the State upon their oath do present, that on the *first* day of *July*, in the year of our Lord one thousand eight hundred and *ninety-seven*, the *Southern Railway Company* was a corporation operating a line of railway from *Goldsboro* to *Charlotte*, in said State, and doing the business of a common carrier in the State of *North Carolina* subject to the provisions of Chapter 320, Public Laws of 1891; and that the said *Southern Railway Company* required and received of persons traveling over its line of railway a regular first-class passenger fare of *three and one-quarter* (*3 1-4*) cents per mile for each passenger.

And the jurors aforesaid do further present that the said *Southern Railway Company* on the day and year aforesaid, and at and in the county aforesaid, unlawfully and wilfully did collect and receive from one *H. L. Grant* a less compensation for the transportation of said *H. L. Grant* from the city of *Raleigh* to the town of *Goldsboro*, in said

1. *North Carolina.* — Laws (1891), c. 320.
See also list of statutes cited *supra*, note 1, p. 412.

2. The defendant was convicted under this indictment.

3. The matter to be supplied within [] will not be found in the reported case.

State, than it collected, demanded and received for the transportation of other passengers from the city of *Raleigh* to the said town of *Goldsboro*, for a like and contemporaneous service, in the transportation of passengers in its first-class carriages, under substantially similar circumstances and conditions.

And the jurors aforesaid, on their oath aforesaid, do say that the said *Southern Railway Company* did then and there wilfully and unlawfully and unjustly discriminate in the collection of passenger fares in favor of the aforesaid *H. L. Grant* and against other persons to whom like and contemporaneous service was rendered, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

And the jurors aforesaid, on their oath aforesaid, do further present, that on the *first* day of *July*, in the year of our Lord one thousand eight hundred and *ninety-seven*, the *Southern Railway Company* was a corporation operating a line of railway from *Goldsboro* to *Charlotte*, in said State, and doing business of a common carrier in the State of *North Carolina*, subject to the provisions of Chapter 320 of the Public Laws of 1891; and that said *Southern Railway Company* demanded and received a regular passenger fare of *three and one-quarter* (*3 1-4*) cents a mile for passengers traveling in its first-class carriages over its line of railway.

And the jurors aforesaid do further present, that the said *Southern Railway Company* on the day and year aforesaid, and at and in the county aforesaid, wilfully and unlawfully did make and give undue and unreasonable preference and advantage to one *H. L. Grant*, by then and there carrying the said *H. L. Grant* as a passenger free of charge over its line of railway from the city of *Raleigh* to the town of *Goldsboro*, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

Pou, Solicitor.

[(*Indorsements.*)][1]

b. For Failure to Give Signal at Crossing.

Form No. 17014.[2]

(Precedent in State *v.* Vermont Cent. R. Co., 28 Vt. 583.)[3]

[(*Commencement as in Form No. 10840*)][1] that the *Vermont Central Railroad Company*, a corporation existing under and by virtue of the laws of this state, duly organized and doing business, now and for a long time hitherto, to wit, *five* years, having, owning and using a railroad, and thereon running and using locomotive engines and cars during all the time aforesaid, which said railroad in part has, during all the time aforesaid, been situated, located, and passing in and through the village of *Windsor*, in the town of *Windsor*, in said county of *Windsor*, and crossed a public road in said village of *Windsor*, known and called

1. The matter to be supplied within [] will not be found in the reported case. See also list of statutes cited *supra*, note 1, p. 412.

2. *Vermont.* — Stat. (1894), §§ 3849, 3850.

3. This information was held to be sufficient.

Everett street, on the same grade as with said street, heretofore, to wit, on the *twenty-first* day of *July*, in the year of our Lord eighteen hundred and *fifty-four*, run and caused to be run a locomotive engine, and cars thereto attached, with great speed, to wit, at the rate of *thirty* miles per hour, along and upon said railroad within the said village of *Windsor*, and therewith then and there, at the speed aforesaid, crossed the said *Everett* street, on the grade aforesaid, and the said *Vermont Central Railroad Company* did not, while running and causing to be run said locomotive engine and cars along and upon said railroad, within said village of *Windsor*, and therewith crossing said *Everett* street as last aforesaid, ring or cause to be rung any bell upon said locomotive engine within the distance of *eighty* rods of the place where the said railroad then and there crossed said street as last aforesaid, nor keep or cause to be kept said bell ringing until said locomotive engine had then and there crossed said street, as last aforesaid, nor was the steam-whistle upon or connected with said locomotive engine blown within *eighty* rods of said place where said railroad crossed said *Everett* street, while said locomotive engine and cars were then and there running along and upon said railroad, and crossing said *Everett* street in the manner last aforesaid. And so in manner last aforesaid the *Vermont Central Railroad Company*, on the said *twenty-first* day of *July*, A. D. 1854, to wit, at *Windsor* aforesaid, unreasonably neglected to ring a bell upon said locomotive engine, and unreasonably neglected to blow a steam-whistle upon said locomotive engine within the distance of *eighty* rods of the place where said railroad then and there crossed said *Everett* street, and until said locomotive engine had then and there crossed said street, contrary to the form of the statute in such case provided, and against the peace and dignity of the state.

[(*Signature and indorsements as in Form No. 10840.*)][1]

c. For Failure to Provide Separate Accommodations for Races.

Form No. 17015.[2]

The State of *Alabama*, *Mobile* County. } *Circuit* Court, *January* Term, 1899.

The grand jury of said county charge that before the finding of this indictment, the *Alabama Central Railroad Company* was and is now a corporation organized and doing business under the laws of the state of *Alabama*, and owning aud operating a railroad for the transportation of freight and passengers between the city of *Mobile*, in said county, and the city of *Montgomery*, in the county of *Montgomery* and state of *Alabama*; which said railroad was not a street railroad; that the said *Alabama Central Railroad Company*, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-nine*, in the county of *Mobile* aforesaid, did wrongfully and wilfully neglect and refuse to provide equal and separate accommodations for the white and colored races upon the passenger

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *Alabama.* — Laws (1891), c. 185. See also list of statutes cited *supra*, note 1, p. 412.

trains of the said railroad, either by providing two or more passenger cars for each passenger train operated on said railroad, or by dividing the passenger cars operated on said railroad by partitions so as to secure separate accommodations for said white and colored races, contrary to the statute in such case made and provided, and against (*concluding as in Form No. 10680*).

d. For Failure to Record Lease of Railroad.

Form No. 17016.[1]

(Precedent in Com. *v.* Chesapeake, etc., R. Co., 101 Ky. 160.)[2]

[(*Venue and title of court and cause as in Form No. 10695.*)

The grand jury of *Campbell* county, in the name and by the authority of the commonwealth of *Kentucky*, accuse the *Chesapeake & Ohio Railway Company*, a corporation, of the offense of operating a railroad in the commonwealth of *Kentucky* under a lease without having said lease recorded in the office of the secretary of state of said commonwealth, and in the county clerk's office of said *Campbell* county, committed as follows, to wit:][3]

The Chesapeake & Ohio Railway Co., on the ——— day of ———, 1895 and 1896, before the finding of this indictment in the county aforesaid, did unlawfully operate a railroad in *Kentucky*, and through a part of *Campbell* county, in which a part of said road lies, under a lease from the *Maysville & Big Sandy Railroad Co.* without having the same recorded in the office of the secretary of state of *Kentucky* and in the county clerk's office of *Campbell* county, more than *thirty* days having elapsed since execution of the aforesaid lease by the *Maysville & Big Sandy Railroad Co.* to the *Chesapeake & Ohio Railroad Co.* [contrary to the form of the statute in such case made and provided, and against the peace and dignity of the commonwealth of *Kentucky*.

(*Signature and indorsements as in Form No. 10695.*)][3]

e. For Failure to Stop Train Before Reaching Railroad Crossing.

Form No. 17017.[4]

(Precedent in Com. *v.* Chesapeake, etc., R. Co., (Ky. 1895) 29 S. W. Rep. 136.)[5]

[(*Venue and title of court and cause as in Form No. 10695.*)][6]

The grand jury [of *Boyd* county, in the name and by the authority of the commonwealth of *Kentucky*][7] accuse the *Chesapeake & Ohio*

1. *Kentucky.* — Stat. (1894), § 791.
See also list of statutes cited *supra*, note 1, p. 412.

2. This indictment was held to be sufficient.

3. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

4. *Kentucky.* — Stat. (1894), §§ 775, 793.
See also list of statutes cited *supra*, note 1, p. 412.

5. This indictment, which was drawn under section 775 of the statutes, was held to be sufficient, although it alleged that defendant failed to stop any of its trains, as a conviction under the indictment could not be had for more than one offense.

6. The matter to be supplied within [ ] will not be found in the reported case.

7. The matter enclosed by [ ] will not be found in the reported case.

Railway Company, a corporation, of the offense of failing to bring its trains to a full stop at least *fifty* feet before reaching the railway crossing of the *Ohio & Big Sandy* Railroad in *Catlettsburg, Ky.*, and failing to bring its trains to a full stop at said crossing, committed in manner and form as follows, to wit: The said *Chesapeake & Ohio Railway Company*, a corporation, in the said county of *Boyd*, on the *31st* day of *Jany.*, 1893, did unlawfully fail to bring its trains running upon said road in this state to a full stop at least *fifty* feet before getting to the point of its crossing the *Ohio & Big Sandy* Railway, in *Catlettsburg, Ky.*, and failed to bring its trains to a full stop where its *Chesapeake & Ohio* Railway crosses the *Ohio & Big Sandy* Railway in *Catlettsburg, Ky.*, and that when it, defendant, had not provided, and the crossings of said roads and railways were not regulated by, derailing switches or other safety appliances which prevent collisions at railway crossings, and when a flagman or watchman was not stationed at said crossings, and did not signal that the trains might cross in safety; said *Chesapeake & Ohio Railway Company* was at the time a corporation created and authorized, under the laws of the states of *New York*, *New Jersey*, *Virginia*, and *Kentucky*, to own and operate a railroad, and do a general railroad business, such as running trains and its roads, under the regulation of the laws of *Kentucky*, — contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the commonwealth of *Kentucky*.

[(*Signature and indorsements as in Form No. 10695.*)][1]

f. For Negligently Killing Person Other than Employee.[2]

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **Precedent.** — In State *v.* Manchester, etc., R. Co., 52 N. H. 528, the indictment alleged: "that on the *seventeenth* day of *December*, 1870, the defendants, being proprietors of a certain railroad, etc., at *Salem*, in said county, by their servants in this State, to the jurors aforesaid unknown, did negligently and carelessly run a certain locomotive steam engine and a certain train of cars, on said *Manchester & Lawrence* Railroad, upon and across a certain public highway, at a place called *Ballard's* crossing, in *Salem*" (*Here followed a description of the highway*), "on the grade or level of said highway, at a greater speed than *six* miles per hour, to wit, at the speed of *twenty-five* miles per hour, and, by the said negligence and carelessness of their servants aforesaid, did then and there, at said *Ballard's* crossing, surprise, overtake, strike, and throw down one *Benjamin Woodbury*, of *Salem* aforesaid, *yeoman*, who was then and there not in the employment of said corporation, and was then and there peaceably and lawfully passing along said public highway at the crossing aforesaid, and him the said *Woodbury* thereby, and by the negligent, careless, and rapid running of the engine and cars aforesaid by the said servants of said railroad corporation, did then and there instantly kill." Then followed an allegation that one Gordon was administrator of the estate of deceased; that Sarah Woodbury was his widow; and that Hannah M. Gordon and others were his surviving children. "And so the jurors aforesaid, upon their oath aforesaid, do say that the life of the said *Benjamin Woodbury*, he being then and there a person not in the employment of said corporation, was lost as aforesaid, by reason of the negligence and carelessness of their servants aforesaid, in this State, contrary to the form of the statute," etc.

The second count alleged that the defendants "did negligently and care-

lessly omit to erect gates, or to place signals, notices, watchmen, or guards at a certain dangerous crossing in said *Salem*, called *Ballard's* crossing, where said *Manchester & Lawrence* Railroad crosses a certain public and frequented highway at the grade or level thereof" (*Here followed a description of the highway*), "and by the agents and servants of the said *Manchester & Lawrence Railroad* corporation in this State, to the jurors aforesaid unknown, at the crossing aforesaid, in *Salem* aforesaid, on the *seventeenth* day of *December* aforesaid, did with gross negligence and carelessness and unlawfully run a certain locomotive steam engine and a certain train of cars, all of the proper goods and chattels of said *Manchester & Lawrence Railroad* corporation, upon the said *Manchester & Lawrence* Railroad across said public highway, at said *Ballard's* crossing, at the grade or level of said public highway, at a greater speed than *six* miles per hour, to wit, at the speed of *twenty-five* miles per hour, and did then and there, by the gross negligence and by the carelessness of the said corporation and of their agents and servants aforesaid, in this State, omit to give suitable and proper notice of the approach of said engine and train to said crossing, so that, at the crossing aforesaid, the said engine and cars did suddenly surprise, overtake, strike, and throw down one *Benjamin Woodbury*, of *Salem* aforesaid, *yeoman*, who was then and there not in the employment of said corporation, and was then and there peaceably riding and passing in a wagon, drawn by *two* horses along the said public highway at the crossing aforesaid, and him, the said *Benjamin Woodbury*, did then and there mangle and kill, by which gross negligence and carelessness of said corporation, and of its agents and servants aforesaid, the life of the said *Benjamin Woodbury* was then and there lost as aforesaid." (*Then followed a statement of the administrator, widow, and children of the deceased, as in the first count.*) "And so the jurors aforesaid, upon their oath aforesaid, do say that the life of the said *Benjamin Woodbury*, he being a person not then and there in the employment of said corporation, was lost as aforesaid, by reason of the negligence and carelessness aforesaid of the said corporation, proprietors of the railroad aforesaid, and by the unfitness and gross negligence and by the carelessness of the agents and servants aforesaid of said corporation, in this State, contrary," etc.

The third count alleged that the defendants, "by their agent or agents, servant or servants, in this State, to the jurors aforesaid unknown, did, by reason of the negligence and carelessness of said corporation, and by the unfitness and gross negligence and by the carelessness of their servants and agents in this State, to the jurors aforesaid unknown, so mismanage the said *Manchester & Lawrence* Railroad, and so neglect to place proper gates, fences, guards, and watchmen, and did so neglect to give proper notice, warning, and signals of the approach of the engine and train hereinafter mentioned, and did so improperly, rapidly, recklessly, and furiously run and drive the same, that, on the *seventeenth* day of *December*, last past, at *Salem*, a certain locomotive steam engine and a certain train of cars drawn thereby, all belonging to said corporation, and run and driven then and there by the said servants and agents of said corporation, at a place in said *Salem* called *Ballard's* crossing, where said railroad crosses at grade a public and frequented highway" (*here described*), "did, with great speed and violence, suddenly overtake, run against, and strike the wagon and person of one *Benjamin Woodbury*, of *Salem* aforesaid, *yeoman*, the said *Woodbury* not then and there being in the employment of said corporation, and being then and there peaceably and lawfully driving a pair of horses attached to a wagon over said crossing and along said public highway, and him, the said *Woodbury*, by the said negligence and carelessness of the said corporation, and by the said unfitness and gross negligence, and by the said carelessness of their servants and agents aforesaid, in this State, did then and there injure, bruise, wound, and mangle in his limbs, body, and head, of which injuries, bruises, woundings, and mangling, he, the said *Woodbury*, then and there died." (*Here the administrator, widow, and children of the deceased were described.*) "And so the jurors aforesaid, upon their oaths aforesaid, do say that the life of the said *Woodbury*, he being a person not then and there in the employment of said corporation, was lost as aforesaid by reason of the negligence and care-

Form No. 17018.[1]

(Precedent in Com. *v.* Boston, etc., R. Corp., 11 Cush. (Mass.) 512.)[2]

[(*Commencing as in Form No. 10699.*)][3]

The jurors of the commonwealth aforesaid, on their oath present, that the *Boston and Worcester Railroad Corporation*, a body politic and corporation, duly and legally established in the commonwealth, were, on the *sixth* day of *November*, in the year of our Lord one thousand eight hundred and *forty-seven*, the proprietors of a certain railroad leading and extending from *Boston*, in the county of *Suffolk*, to *Worcester*, in the county of *Worcester*, through the town of *Brookline*, in the county of *Norfolk*, called and known by the name of the *Boston and Worcester* Railroad, and were common carriers of passengers over, upon, and along said railroad, and being such proprietors and common carriers of passengers, did by their agents and servants, on said *sixth* day of *November*, at said *Brookline*, in the county of *Norfolk* aforesaid, run, conduct, and drive a certain engine and train of cars, in one of which said cars, one *Richard W. Mordelia*, was then and there a passenger, over, upon, and along said railroad, and by their agents and servants, then and there had the custody, care and management of said railroad, engine, and cars, and by the gross negligence and carelessness of their said agents and servants, said railroad was suffered to be and then and there was out of repair and defective, and the rails thereon uneven and in a condition unsuitable and dangerous for the passage of engines and cars upon, over, and along the same, and the aforesaid engine and train of cars run, conducted and driven as aforesaid, were then and there, by the gross negligence and carelessness of the said agents and servants, run, conducted, and driven with great, unreasonable and improper speed, and in an unsafe and unskillful manner, by means of all which, the aforesaid car in which said *Richard W. Mordelia* was then and there a passenger as aforesaid, was then and there thrown with great violence from the track of said railroad and broken in pieces, where divers injuries, bruises and wounds were then and there inflicted on the head, body and limbs of said *Richard W. Mordelia*, of which said injuries, bruises, and wounds, the said *Richard W. Mordelia* then and there instantly died. And so the jurors aforesaid, on their oath aforesaid, do say that the life of said *Richard W. Mordelia*, being a passenger as aforesaid, was then and there lost by reason of the gross negligence and carelessness of the aforesaid agents and servants of said *Boston and Worcester Railroad Corporation*, in manner and form aforesaid; the names of which said agents and servants are to the jurors aforesaid unknown; whereby said *Boston and Wor-*

lessness aforesaid of the said corporation, proprietors of the said railroad as aforesaid, and by the unfitness and gross negligence and carelessness of the servants and agents aforesaid of said corporation, in this State, contrary," etc.

A verdict of guilty was sustained.

1. *Massachusetts.* — Pub. Stat. (1882), c. 112, §§ 212, 213.

See also list of statutes cited *supra*, note 1, p. 412.

2. Conviction under this indictment was affirmed.

3. The matter to be supplied within [ ] will not be found in the reported case.

cester Railroad Corporation have become liable to a fine not exceeding *five thousand* dollars nor less than *five hundred* dollars to be recovered by indictment to the use of the executor or administrator of said deceased person, for the benefit of his widow and heirs; and that *Edmond Hamilton*, of *Boston*, in the county of *Suffolk*, *joiner*, has been duly appointed, and now is administrator of said *Richard W. Mordelia*, deceased, and of his goods and estate, and that there is no widow nor any children of said *Richard W. Mordelia*; and that there are heirs of said *Richard W. Mordelia*, according to the law regulating the distribution of intestate personal estate among heirs now living, whose names are to the jurors aforesaid unknown; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.

[(*Signature and indorsements as in Form No. 10699.*)][1]

g. For Obstructing Highway.[2]

Form No. 17019.[3]

(Precedent in St. Louis, etc., R. Co. *v.* State, 52 Ark. 53.)[4]

[(*Title of court and cause as in Form No. 10682.*)

The grand jury of *Ouachita* County, in the name and by the authority of the State of *Arkansas*, accuse the defendant, the *St. Louis*, *Arkansas & Texas Railway Company*, of the crime of obstructing a public road, committed as follows, to wit:

That][5] the said defendant on the *first* day of *May*, 1888, in *Ouachita* County, *Arkansas*, did unlawfully on said day, and on divers other days and times continually for *four* weeks, obstruct a public road in the City of *Camden*, *Arkansas*, where the railroad crosses the road leading from the City of *Camden* to *Bradley's Ferry*, known as the *Bradley Ferry* road, by building an embankment across said road and failing to keep same in good condition, and suffering same to remain

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **Requisites of Complaint, Indictment or Information, Generally.**—For the formal parts of a complaint, indictment or information in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; INDICTMENTS, vol. 9. p. 615; INFORMATIONS IN CRIMINAL CASES, vol. 9, p. 768.

Where the indictment alleges such facts as meet the requirements of the statute defining the offense it is sufficient. State *v.* Baltimore, etc., R. Co., 120 Ind. 298.

That acts were not done in construction of railway, or if so that the defendant did not put the highway in repair within the time required by statute, must be stated. State *v.* Chicago, etc. R. Co., 63 Iowa 508.

Established Highway.—Where the indictment alleges that the road was and is "a common highway in *Putnam* county, made and laid out for the people of this state, to go, return and pass at their free pleasure and will on foot, on horseback and in vehicles," it is equivalent to an allegation that the road was and is "an established highway." Palatka, etc., R. Co. *v.* State, 23 Fla. 546.

3. *Arkansas.*—Sand. & H. Dig. (1894), § 1636.

See also list of statutes cited *supra*, note 1, p. 412.

4. It was held that this indictment was sufficient.

5. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

after he had been notified by *B. F. Sale*, Marshal of said town, against the peace and dignity of the State of *Arkansas*.

H. P. S.,
Prosecuting Attorney, etc.

[(*Indorsements.*)][1]

h. For Running Freight Train on Sunday.

Form No. 17020.[2]

(Precedent in State *v.* Southern R. Co., 119 N. Car. 815.)[3]

[(*Commencement as in Form No. 10711.*)][1]

The jurors for the State, upon their oath, present: That the *Southern Railway Company*, being a railroad company late of the county of *Guilford*, on the *15th* day of *December*, in the year of our Lord one thousand eight hundred and *ninety-five*, it being *Sunday*, with force and arms, at and in the county aforesaid, unlawfully and wilfully did permit a car, train of cars, and a locomotive to be run on its railroad in *Guilford* county, between the hours of sunrise and sunset, and after *9* o'clock *A.* M., the said car, train of cars and locomotive not being run for the purpose of transmitting the United States mail either with or without passengers, nor for carrying passengers exclusively:

Nor was said car, train of cars and locomotive run for the purpose of transporting fruits, vegetables, live stock or perishable freight exclusively, against the form of the statute in such cases made and provided, and against the peace and dignity of the State.

[(*Signature and indorsements as in Form No. 10711.*)][1]

2. Against Railroad Employees.

a. Brakeman, for Locking Passenger Car.

Form No. 17021.[4]

(*Commencing as in Form No. 10692, and continuing down to* *) being then and there an employee of the *Indiana Central Railroad Company*, a corporation organized and existing under the laws of the state of *Indiana*, and owning and operating a railroad for the transportation of freight and passengers in said county of *Posey*, to wit, a brakeman of a certain passenger train on the railroad of said *Indiana Central Railroad Company*, did unlawfully suffer and permit a certain passenger car composing said train of which he, the said *John Doe*, was then and there brakeman as aforesaid, to be locked while said car

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *North Carolina.* — Code (1883), § 1973.

See also list of statutes cited *supra*, note 1, p. 412.

3. Judgment against defendant under this indictment was affirmed.

4. *Indiana.* — Horner's Stat. (1896), § 2177.

See also list of statutes cited *supra*, note 1, p. 412.

was running on the track of said railroad in said county of *Posey*, in the state of *Indiana*, although said car did then and there contain certain passengers, to wit, one *Richard Roe* and one *Julia Doe*, contrary (*concluding as in Form No. 10692*).

b. Conductor.

(1) For Not Separating Races.

Form No. 17022.[1]

(*Venue and title of court as in Form No. 10680.*)

The grand jury of said county charge that before the finding of this indictment *John Doe* was a conductor on a passenger train of the *Alabama Central Railroad Company*, a corporation organized and existing under the laws of the state of *Alabama*, and owning and operating a railroad, which said railroad was not a street railroad, for the transportation of freight and passengers, between the city of *Mobile*, in said county of *Mobile*, and the city of *Montgomery*, in the county of *Montgomery*, in said state of *Alabama*; that said *John Doe*, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-nine*, being then and there a conductor, as aforesaid, in the employ of said *Alabama Central Railroad Company*, and having, as such conductor, charge of a passenger train on the railroad of said *Alabama Central Railroad Company*, did, at said county of *Mobile*, knowingly and unlawfully neglect and refuse to assign one *Richard Roe*, a man of and being of the colored race, to the car on said passenger train, of which the said *John Doe* was conductor as aforesaid, designated by said railroad for people of the colored race, but he, the said *John Doe*, as conductor of said train as aforesaid, did then and there permit the said *Richard Roe* to ride in a car on said train designated by said railroad company for people of the white race, from the city of *Mobile*, in said county, to the city of *Montgomery*, in said county of *Montgomery*, the said *Alabama Central Railroad Company*, having then and there provided equal and separate accommodation on said passenger train for people of the white and colored races, and having then and there provided for said train a car designated for the people of the colored race of equal accommodations to those of any other car on said train, contrary to the form of the statute in such case made and provided, against (*concluding as in Form No. 10680*).

(2) For Running Passenger Cars Without Tools.

Form No. 17023.[2]

(*Commencing as in Form No. 10692, and continuing down to* *) being then and there a conductor of a certain train of passenger cars, running over the tracks of the *Indiana Central Railroad Company*, a cor-

1. *Alabama.* — Laws (1891), c. 185.
See also list of statutes cited *supra*, note 1, p. 412.

2. *Indiana.* — Horner's Stat. (1896), § 2171.
See also list of statutes cited *supra*, note 1, p. 412.

poration organized and existing under the laws of the state of *Indiana*, and owning and operating a railroad for the transportation of freight and passengers in said county of *Posey*, did then and there, at said county of *Posey*, wilfully and unlawfully assist in running a certain passenger car, composing said passenger train and containing passengers, over the tracks of said railroad in said county of *Posey*, although said passenger car had not then and there been provided with an axe, sledge hammer, saw and bucket, placed in some convenient and conspicuous place in said passenger car, contrary (*concluding as in Form No. 10692*).

e. Driver and Stoker of Engine, for Negligently Driving Against Another Engine, Whereby Deceased Met His Death.

Form No. 17024.[1]

(Whart. Prec. Ind. & Pl. (1857), p. 137.)

Central Criminal Court, to wit:

The jurors of our lady the queen, upon their oaths present, that *Samuel Short*, late of the parish of *Richmond*, in the county of *Surrey*, *laborer*, and *William West*, late of the same place, *laborer*, on the *seventeenth* day of *November*, in the *twelfth* year of the reign of our sovereign lady *Queen Victoria*, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, in and upon *John Doe* feloniously and wilfully did make an assault. And the jurors aforesaid upon their oath aforesaid, do further present, that before and on the said *seventeenth* day of *November*, the said *Samuel Short* was employed by a certain body corporate, to wit, the *London and South-Western Railway Company*, for the purpose of conducting, driving, managing, and controlling certain locomotive steam-engines belonging to the said *London and South-Western Railway Company*, and that the said *William West* before and on the day and year aforesaid, was employed by the said *London and South-Western Railway Company*, for the purpose of assisting the said *Samuel Short* in the conducting, driving, management, and control of such locomotive steam-engines as aforesaid, and that, by virtue of such their respective employments, the said *Samuel Short* was, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, conducting and driving, and then and there had the management and control of a certain locomotive steam-engine, to and behind which a certain carriage, called a tender, was then and there attached, and which said locomotive steam-engine and tender were then and there the property of and belonging to the said *London and South-Western Railway Company*, and were then and there in and upon a certain side line of railway leading into and upon a certain main line, to wit, the *Richmond* Railway, and the said *William West* was then and there, the said *Samuel Short*, in and about the said conducting, driving, management, and control of the said locomotive steam-engine and

1. This indictment is set out in 3 Hawks' Crim. Cas., appendix, p. lvii.

tender, aiding and assisting, and that it then and there became and was the duty of the said *Samuel Short* and of the said *William West*, by virtue of their said employment, not to conduct or drive, or suffer or permit to be conducted or driven, the said locomotive steam-engine and tender from and off the said line of railway, into, upon, or across the said main line of railway, in case any train or engine should be then due, and about to arrive at that part of the said main line of railway where the same was joined by the said line of railway aforesaid; yet the said *Samuel Short* and the said *William West*, well knowing the premises, and well knowing that a certain train, to wit, a train consisting of a certain other locomotive steam-engine, with a certain other tender, and divers, to wit, *twenty* carriages attached thereto and drawn thereby, was then and there lawfully travelling, and being propelled on and along the said main line of railway, and was then due and about to arrive at that part of the said main line of railway where the same was joined by the side line of railway aforesaid; but disregarding their duty in that behalf, did, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, wilfully and feloniously, and with great force and violence, and in a wanton, negligent and improper manner, and contrary to their said duty in that behalf, and while the said train was so then and there due, and about to arrive as aforesaid, conduct and drive, and suffer and permit to be conducted and driven, the said first-mentioned locomotive steam-engine and tender from and off the said line of railway, into, upon, and across the said main line of railway, and into, upon, and against the said train so then and there lawfully travelling and being propelled on and along the said main line of railway as aforesaid; and that the said *Samuel Short* and the said *William West* did thereby, and by means of the said several premises, and by reason of the shock and concussion thereby given and communicated to the said first-mentioned locomotive steam-engine, then and there wilfully and feloniously, and with great force and violence, push, force, dash, drive, and jam, and cause to be pushed, forced, dashed, driven, and jammed in, upon, over, against, and between a certain part of the said first-mentioned locomotive steam-engine, to wit, the hinder part thereof, the said *John Doe*, who was then and there standing and being in and upon the said first-mentioned locomotive steam-engine, and did then and there, by means of the pushing, forcing, dashing, and driving and jamming aforesaid, wilfully and feloniously inflict and cause to be inflicted in and upon the head, to wit, in and upon the right side of the head of the said *John Doe*, divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs, and feet of the said *John Doe*, divers mortal wounds, bruises, contusions, burns, and scalds, of which said several mortal wounds, fractures, bruises, contusions, burns, and scalds, the said *John Doe*, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said *Samuel Short* and the said *William West*, the said *John Doe* in the manner and by the means aforesaid, wilfully and feloniously

did kill and slay, against the peace of our said lady the queen, her crown and dignity.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said *Samuel Short* and the said *William West*, on the day and year aforesaid, with force and arms, at the parish of *Richmond*, in the county of *Surrey*, and within the jurisdiction of the said court, in and upon the said *John Doe*, feloniously and wilfully did make an assault. And the jurors aforesaid, upon their oath aforesaid, do further present, that before and on the day and year aforesaid, the said *Samuel Short* was employed by a certain corporate body, to wit, the *London and South-Western Railway Company*, for the purpose of conducting, driving, managing, and controlling certain locomotive steam-engines belonging to the said *London and South-Western Railway Company*, and the said *William West*, before and on the day and year aforesaid, was employed by the said *London and South-Western Railway Company*, for the purpose of assisting the said *Samuel Short* in the conducting, driving, management, and control of such locomotive steam-engines as aforesaid, and that by virtue of such their respective employments, the said *Samuel Short* was, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, conducting and driving, and then and there had the management and control of a certain locomotive steam-engine, to and behind which a certain carriage, called a tender, was then and there attached, and which said locomotive steam-engine and tender were then and there the property of and belonging to the said *London and South-Western Railway Company*, and were then and there in and upon a certain side line of railway, leading into and upon a certain main line of railway, to wit, the *Richmond* Railway, and that the said *William West* was then and there, the said *Samuel Short*, in and about the said conducting, driving, management, and control of the said locomotive steam-engine and tender, aiding and assisting, and that it then and there became and was the duty of the said *Samuel Short* and of the said *William West*, by virtue of their said employment, not to conduct or drive, or suffer or permit to be conducted or driven, the said locomotive steam-engine and tender from and off the said line of railway, into, upon, or across the said main line of railway, in case any train or engine should be then due and about to arrive at that part of the said main line of railway where the same was joined by the said line of railway aforesaid; yet the said *Samuel Short* and the said *William West*, well knowing the premises, and well knowing that a certain train, consisting of another locomotive steam-engine, with a certain other tender, and divers, to wit, *twenty* carriages attached thereto, and drawn thereby, was then and there lawfully travelling and being propelled on and along the said main line of railway, and was then due and about to arrive at that part of the said main line of railway where the same was joined by the side line of railway aforesaid, but disregarding their duty in that behalf, did, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, wilfully and feloniously, and with great force and violence, wilfully and in a wan-

ton, negligent, and improper manner, contrary to their said duty in that behalf, and while the said train was so then and there due and about to arrive as aforesaid, conduct and drive, and suffer and permit to be conducted and driven, the said first-mentioned locomotive steam-engine and tender from and off the said line of railway, into, upon, and across the said main line of railway, and thereby and by reason of the said premises, and of the several negligent and improper conduct of the said *Samuel Short* and of the said *William West*, the said train so then travelling and being propelled on and along the said main line of railway, did then and there unavoidably, with great force and violence, strike, run, and impinge against the said first-mentioned locomotive steam-engine; and by means of the said several premises, and of the shock and concussion thereby given and communicated to the said first-mentioned locomotive steam-engine, the said *John Doe*, who was then and there standing and being in and upon the said first-mentioned locomotive steam-engine, was then and there, with great force and violence, pushed, forced, dashed, driven, and jammed in, upon, over, and between a certain part of the said first-mentioned locomotive steam-engine, to wit, the hinder part thereof, and by means of the said pushing, forcing, dashing, driving, and jamming, then and there were made and inflicted in and upon the head, to wit, in and upon the right side of the head of the said *John Doe*, divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs and feet of the said *John Doe*, divers mortal wounds, bruises, contusions, burns, and scalds, of which said several mortal wounds, fractures, bruises, contusions, burns and scalds, the said *John Doe*, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said *Samuel Short* and the said *William West* the said *John Doe*, in the manner and by the means aforesaid, wilfully and feloniously did kill and slay, against the peace of our said lady the queen, her crown and dignity.

Third count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said *Samuel Short* and the said *William West*, on the day and year aforesaid, with force and arms, at the parish of *Richmond* aforesaid, in the county of *Surrey* aforesaid, and within the jurisdiction of the said court, in and upon the said *John Doe*, feloniously and wilfully did make an assault, and that the said *Samuel Short* was then and there conducting and driving, and then and there had the management and control of a certain locomotive steam-engine, to and behind which a certain carriage, called a tender, was then and there attached, and which said locomotive steam-engine and tender were then and there in and upon a certain way, to wit, a certain side line of railway leading into and upon a certain main line of railway, to wit, the *Richmond* Railway, and that the said *William West* was then and there, the said *Samuel Short* in and about the said conducting, driving, management, and control of the said locomotive steam-engine and tender, aiding and assisting; and that it then and there became and was the duty of the said *Samuel Short*, and of the

said *William West*, to use all due and proper caution in and about the conducting and driving the said locomotive steam-engine and tender, from and off the said line of railway, in, upon, or across the said main line of railway, yet the said *Samuel Short* and the said *William West*, well knowing the premises, and not regarding their duty in that behalf, did not nor would use all due and proper caution in and about the conducting and driving of the said locomotive steam-engine and tender, from and off the said side line of railway, in, upon, or across the said main line of railway; but on the contrary thereof, did then and there, wilfully and feloniously, and with great force and violence, and without due and proper caution, and in a negligent and improper manner, and contrary to their said duty in that behalf, conduct and drive the said locomotive steam-engine and tender from and off the said side line of railway, into, upon, and across the said main line of railway, and into, upon, and against a certain train, to wit, a train consisting of another locomotive steam-engine, with a certain other tender, and divers, to wit, *twenty* carriages attached thereto, and drawn thereby, which said train was then and there lawfully travelling and being propelled on and along the said main line of railway; and that the said *Samuel Short* and *William West* did thereby and by means of the several premises, and by reason of the shock and concussion thereby given and communicated to the said first-mentioned locomotive steam-engine, then and there wilfully and feloniously, and with great force and violence, push, force, dash, drive, and jam, and cause to be pushed, forced, dashed, driven, and jammed in, upon, over, and between a certain part of the said first-mentioned locomotive steam-engine, to wit, the hinder part thereof, the said *John Doe*, who was then and there standing, and being in and upon the said first-mentioned locomotive steam-engine, and did then and there, by means of the said pushing, forcing, dashing, driving, and jamming, wilfully and feloniously inflict, and cause to be inflicted, in and upon the head, to wit, in and upon the right side of the head of the said *John Doe*, divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs, and feet, of the said *John Doe*, divers mortal wounds, bruises, contusions, burns, and scalds, of which said several mortal wounds, fractures, bruises, contusions, burns, and scalds, the said *John Doe*, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said *Samuel Short* and the said *William West* the said *John Doe*, in the manner and by the means aforesaid, wilfully and feloniously did kill and slay, against the peace of our said lady the queen, her crown and dignity.

Fourth count. — And the jurors aforesaid, upon their oath aforesaid, do further present, that the said *Samuel Short*, and the said *William West*, on the day and year aforesaid, with force and arms, at the parish of *Richmond* aforesaid, in the county of *Surrey* aforesaid, and within the jurisdiction of the said court, in and upon the said *John Doe*, feloniously did make an assault, and that the said *Samuel Short* was then and there conducting and driving, and then and there had

the management and control of a certain locomotive steam-engine, to and behind which a certain carriage called a tender, was then and there attached, and which said locomotive steam-engine and tender were then and there in and upon a certain way, to wit, a certain side line of railway, leading into and upon a certain main line of railway, to wit, the *Richmond* Railway, and that the said *William West* was then and there, the said *Samuel Short*, in and about the said conducting, driving, management, and control of the said locomotive steam-engine and tender, aiding and assisting, and that it then and there became and was the duty of the said *Samuel Short* and of the said *William West*, to use all due and proper caution in and about the conducting and driving the said locomotive steam-engine and tender from and off the said side line of railway, in, upon, or across the said main line of railway; yet the said *Samuel Short* and the said *William West*, well knowing the premises, and not regarding their duty in that behalf, did not, nor would use all due and proper caution in and about the conducting and driving of the said locomotive steam-engine and tender, from and off the said side line of railway, in, upon, or across the said main line of railway, but on the contrary thereof, did then and there wilfully and feloniously, and with great force and violence, and without due and proper caution, and in a negligent and improper manner, and contrary to their said duty in that behalf, conduct and drive the said locomotive steam-engine and tender, from and off the said line of railway, into, upon, and across the said main line of railway, and thereby and by reason of the said several premises, and of the said negligent and improper conduct of the said *Samuel Short* and of the said *William West*, a certain train, to wit, a train consisting of a certain other locomotive steam-engine, with a certain other tender, and divers, to wit, *twenty* carriages attached thereto, and drawn thereby, which said train was then and there lawfully travelling and being propelled on and along the said main line of railway, did then and there inadvertently, with great force and violence, strike, run, and impinge upon and against the said first-mentioned locomotive steam-engine, and by means of the said several premises, and of the shock and concussion thereby given and communicated to the said first-mentioned locomotive steam-engine, the said *John Doe*, who was then and there standing, and being in and upon the said first-mentioned locomotive steam-engine, was then and there with great force and violence, pushed, forced, dashed, driven, and jammed in, upon, against, over, and between a certain part of the said first-mentioned locomotive steam-engine, to wit, the hinder part thereof, and by means of the said pushing, forcing, dashing, driving, and jamming, then and there were made and inflicted in and upon the head, to wit, in and upon the right side of the head of the said *John Doe*, divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs and feet of the said *John Doe* divers mortal wounds, bruises, contusions, burns, and scalds, of which said several mortal wounds, fractures, bruises, contusions, burns, and scalds, the said *John Doe*, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court,

instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said *Samuel Short* and the said *William West* the said *John Doe*, in the manner and by the means aforesaid, wilfully and feloniously did kill and slay, against the peace of our said lady the queen, her crown and dignity.

Fifth count. — And the jurors aforesaid, upon their oath aforesaid, do further present, that the said *Samuel Short* and the said *William West*, on the day and year aforesaid, with force and arms, at the parish of *Richmond* aforesaid, in the county of *Surrey* aforesaid, and within the jurisdiction of the said court, in and upon the said *John Doe*, feloniously and wilfully did make an assault; and that the said *Samuel Short* and the said *William West*, a certain locomotive steam-engine, to and behind which a certain carriage called a tender, was then and there attached, and which said locomotive steam-engine and tender were then and there being forced and propelled by the power of steam on and along a certain way, to wit, a railway; and which said locomotive steam-engine and tender, the said *Samuel Short* was then and there managing, controlling, conducting and driving, in and along the said railway, and in the managing, controlling, conducting and driving whereof, the said *William West* was then and there the said *Samuel Short* aiding and assisting, did then and there wilfully and feloniously, by the wanton and felonious negligence of them and each of them respectively, and by the wilful and felonious disregard of the duties incumbent upon them, and each of them respectively, in that behalf, cause, occasion, permit and suffer to strike and run into, upon and against, and to be with great force and violence forced, driven and dashed into, upon and against a certain other locomotive steam-engine, to which said last-mentioned locomotive steam-engine a certain other tender and divers, to wit, *twenty* carriages, were then and there attached, and which said last-mentioned locomotive steam-engine and tender and carriages were then and there lawfully travelling and being propelled on and along the said railway, and that the said *Samuel Short* and the said *William West* did thereby, and by means of the said several premises, and by reason of the shock and concussion thereby caused and communicated to the said first-mentioned locomotive steam-engine and tender, then and there wilfully and feloniously, and with great force and violence, push, force, dash, drive and jam, and caused to be pushed, forced, dashed, driven and jammed in, upon, over and between a certain part of the said first-mentioned locomotive steam-engine, to wit, the hinder part thereof, the said *John Doe*, who was then and there standing and being in and upon the said first-mentioned locomotive steam-engine, and did then and there, and by means of the said pushing, forcing, dashing, driving and jamming, wilfully and feloniously inflict, and cause to be inflicted, in and upon the head, to wit, the right side of the head of the said *John Doe*, divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs and feet of the said *John Doe*, divers mortal wounds, contusions, bruises, burns and scalds, of which said several wounds, fractures, contusions, bruises, burns and scalds, the said *John Doe*, on the day and year aforesaid,

at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said *Samuel Short* and the said *William West* the said *John Doe*, in the manner and by the means aforesaid, wilfully and feloniously did kill and slay, against the peace of our said lady the queen, her crown and dignity.

Sixth count. — And the jurors aforesaid, upon their oath aforesaid, do further present, that the said *Samuel Short* and the said *William West*, on the day and year aforesaid, with force and arms, at the parish of *Richmond* aforesaid, in the county of *Surrey* aforesaid, and within the jurisdiction of the said court, in and upon the said *John Doe*, feloniously and wilfully did make an assault, and that the said *Samuel Short* and the said *William West*, a certain locomotive steam-engine, to and behind which a certain carriage called a tender was then and there attached, and which said locomotive steam-engine and tender were then and there being forced and propelled by the power of steam on and along a certain way, to wit, a railway, and which said locomotive steam-engine and tender the said *Samuel Short* was then managing, controlling, conducting and driving in and along the said railway, and in the managing, controlling, conducting and driving whereof, the said *William West* was then and there the said *Samuel Short* aiding and assisting, did then and there wilfully and feloniously, and by the wanton and felonious negligence of them and each of them respectively, and by the wilful and felonious disregard of the duties incumbent upon them and each of them respectively in that behalf, and with great force and violence, conduct, drive, and propel, and cause and permit to be conducted, driven and propelled to, upon, along and across a certain other part of the railway aforesaid, and thereby and by reason of the said several premises and of the said wilful and felonious negligence of the said *Samuel Short* and of the said *William West*, a certain train, to wit, a train consisting of a certain other locomotive steam-engine, with a certain other tender, and divers, to wit, *twenty* carriages attached thereto and drawn thereby, and which said train was then and there lawfully travelling and being propelled on and along the said last-mentioned part of the said line of railway, did then and there unavoidably and with great force and violence strike, drive, dash and impinge upon and against the said first-mentioned locomotive steam-engine; and by means of the said several premises and of the shock and concussion thereby given and communicated to the said first-mentioned locomotive steam-engine, the said *John Doe*, who then and there was standing and being in and upon the said first-mentioned locomotive steam-engine, was then and there with great force and violence pushed, forced, dashed, driven and jammed in, upon, over and between a certain part of the said first-mentioned locomotive steam-engine, to wit, the hinder part thereof, and by means of the said pushing, forcing, dashing, driving and jamming, then and there were inflicted in and upon the head, to wit, in and upon the right side of the head, of the said *John Doe*, divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs and feet of the said *John Doe*, divers mortal wounds, bruises,

contusions, burns and scalds, of which said mortal wounds, fractures, bruises, contusions, burns and scalds, the said *John Doe*, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said *Samuel Short* and the said *William West* the said *John Doe*, in the manner and by the means aforesaid, wilfully and feloniously did kill and slay, against the peace of our said lady the queen, her crown and dignity.

Seventh count. — And the jurors aforesaid, upon their oath aforesaid, do further present, that the said *Samuel Short* and the said *William West*, on the day and year aforesaid, with force and arms at the parish of *Richmond* aforesaid, in the county of *Surrey* aforesaid, and within the jurisdiction of the said court, in and upon the said *John Doe* feloniously and wilfully did make an assault, and that the said *Samuel Short* and *William West* a certain locomotive steam-engine, to and behind which a certain carriage called a tender was then and there attached, and which said locomotive steam-engine and tender were then and there the property of a certain corporate body, to wit, the *London and South-Western Railway Company*, and were then and there lawfully standing and being in and upon a certain railway, to wit, at and near a certain station belonging to the said railway, did then and there wilfully and feloniously and without any lawful authority in that behalf, and with great force and violence, conduct, drive and propel, and cause, permit and suffer to be conducted, driven and propelled away from the said station along, to, upon and across a certain other part of the railway aforesaid, and thereby and by reason of the said several premises, a certain train, to wit, a train consisting of a certain other locomotive steam-engine, with a certain other tender, and divers, to wit, *twenty* carriages attached thereto and drawn thereby, and which said train was then and there lawfully travelling and being propelled on and along the line of the said railway, did then and there unavoidably and with great force and violence strike, dash, drive and impinge upon and against the said first-mentioned locomotive steam-engine, and by means of the said several premises, and of the shock and concussion thereby given and communicated to the said first-mentioned locomotive steam-engine, the said *John Doe*, who then and there was standing and being in and upon the said first-mentioned locomotive steam-engine, was then and there with great force and violence pushed, forced, dashed, driven and jammed, in, upon, over and between a certain part of the said first-mentioned locomotive steam-engine, to wit, the hinder part thereof, and by means of the said pushing, forcing, dashing, driving and jamming, then and there were made and inflicted in and upon the head, to wit, in and upon the right side of the head of the said *John Doe* divers mortal wounds and fractures, and in and upon the body, to wit, in and upon the back, sides, belly, thighs, legs and feet of the said *John Doe* divers mortal wounds, bruises, contusions, burns and scalds, of which said several mortal wounds, fractures, bruises, contusions, burns and scalds the said *John Doe*, on the day and year aforesaid, at the parish

aforesaid, in the county aforesaid, and within the jurisidiction of the said court, instantly died, and so the jurors aforesaid, upon their oath aforesaid, do say, that the said *Samuel Short* and the said *William West* the said *John Doe*, in the manner and by the means aforesaid, wilfully and feloniously did kill and slay, against the peace of our said lady the queen, her crown and dignity.

d. Engineer.

(1) For Failing to Give Signal at Crossing.

(*a*) *In General.*

Form No. 17025.[1]

(*Commencing as in Form No. 10692, and continuing down to* *) being then and there an engineer in charge of a certain locomotive engine upon the railroad of the *Indiana Central Railroad Company*, a corporation organized and existing under the laws of the state of *Indiana*, and owning and operating a railroad for the transportation of freight and passengers in the said county of *Posey*, did then and there, in said county of *Posey*, knowingly and unlawfully fail and neglect, when such engine was then and there approaching a point where the track of said railroad crosses a certain public highway known as the *Cumberland Turnpike*, said highway not being within the limits of a city or town, to sound the whistle on said locomotive engine when said locomotive engine was distant from said crossing not more than *one hundred* rods, nor less than *eighty* rods, although said locomotive engine was then and there within said distance from said crossing, and did immediately pass over said crossing,* contrary (*concluding as in Form No. 10692*).

(*b*) *Whereby Person was Killed.*

Form No. 17026.[1]

(*Commencing as in Form No. 17025, and continuing down to* *) that by reason of said felonious and unlawful failure and neglect on the part of the said *John Doe* to sound said whistle at the place and time aforesaid, one *Richard Roe*, who was then and there upon said crossing, was then and there struck by said locomotive and injured, wounded and instantly killed, contrary to (*concluding as in Form No. 10692*).

(2) For Failing to Stop Train at Crossing of Another Railroad.

(*a*) *In General.*

Form No. 17027.[2]

(*Commencing as in Form No. 10692, and continuing down to* *) being

1. *Indiana.*— Horner's Stat. (1896), § 2178.
See also list of statutes cited *supra*, note 1, p. 412.

2. *Indiana.* — Horner's Stat. (1896), § 2172.
See also list of statutes cited *supra*, note 1, p. 412.

then and there the engineer of a certain locomotive running upon the track of the *Indiana Central Railroad Company*, a corporation organized and existing under the laws of the state of *Indiana*, and owning and operating a railroad for the transportation of freight and passengers in said county of *Posey*, on and over which railroad track passengers were then and there being transported, as such engineer, did then and there, in said county of *Posey*, unlawfully run said locomotive, of which he was in charge as aforesaid, across and upon the railroad track of the *Great Western Railroad Company*, a corporation organized and existing under the laws of the state of *Indiana*, over and upon which track passengers were then and there being transported in railway cars, without then and there first coming to a full stop before crossing such other track, and without first ascertaining that there was no other train or locomotive in sight approaching or about to pass upon and over such crossing over such other tracks of said *Great Western Railway Company*,* contrary (*concluding as in Form No. 10692*).

(*b*) *Whereby Person was Killed.*

Form No. 17028.[1]

(*Commencing as in Form No. 17027, and continuing down to* *) that by reason of such crossing as aforesaid, and the unlawful and felonious running of said locomotive by the said *John Doe*, as aforesaid, upon and across said track of said *Great Western Railway Company*, a certain passenger car attached to the said train on said *Great Western* railway then and there passing over said crossing as aforesaid, was then and there by said locomotive struck and thrown from said track and from said crossing and overturned and demolished, and then and there and thereby instantly killing one *Samuel Short*, who was then and there a passenger in said passenger car, contrary (*concluding as in Form No. 10692*).

(3) For Obstructing Highway.[2]

Form No. 17029.[3]

(*Commencing as in Form No. 10692, and continuing down to* *) being then and there a conductor (*or other person, as the case may be*) having charge of a passenger train on the railroad of the *Indiana Central Railroad Company*, a corporation organized and existing under the

1. *Indiana.* — Horner's Stat. (1896), § 2174.

See also list of statutes cited *supra*, note 1, p. 412.

2. Requisites of Complaint, Indictment or Information, Generally. — For the formal parts of a complaint, indictment or information in a particular jurisdiction see the titles Complaints, vol. 4, p. 1019; Indictments, vol. 9, p. 615; Informations in Criminal Cases, vol. 9, p. 768.

Name of railroad need not be stated. State *v.* Malone, 8 Ind. App. 8.

Where the indictment charges that defendant, being then and there a conductor, etc., did "unlawfully permit and suffer" a train "to remain and stand across" a street, and did "fail and neglect to leave a space of *sixty* feet to cross said street," it is not bad for duplicity. State *v.* Malone, 8 Ind. App. 8.

3. *Indiana.* — Horner's Stat. (1896), § 2176.

See also list of statutes cited *supra*, note 1, p. 412.

laws of the state of *Indiana*, and owning and operating a railroad in said county of *Posey* for the transportation of freight and passengers, did then and there, in said county of *Posey*, unlawfully permit and suffer said passenger train in his charge, as such engineer, as aforesaid, and the locomotive and cars composing said train, to remain standing across a certain public highway or street in the city of *Mount Vernon*, in said county of *Posey*, to wit, *Maple* street, for a longer period than *fifteen* minutes, to the hindrance of travel by the public upon said street, contrary (*concluding as in Form No. 10692*).

(4) For Stopping Train on Crossing of Another Railroad.

(*a*) *In General.*

Form No. 17030.[1]

(*Commencing as in Form No. 10692, and continuing down to* *) being then and there an engineer (*or conductor or other person, as the case may be*) having charge of a certain locomotive (or *railroad train*) on the railroad of the *Indiana Central Railroad Company*, a corporation organized and existing under the laws of the state of *Indiana*, and owning and operating a railroad for the transportation of freight and passengers in said county of *Posey*, as such engineer (*or conductor or other person, as the case may be*) and having charge of said locomotive (or *said railroad train*), did then and there permit said locomotive (or *said railroad train*) to be stopped and remain stationary upon a certain railroad crossing in the city of *Mount Vernon*, in said county of *Posey*, to wit, the crossing of the tracks of said *Indiana Central Railroad Company* with the tracks of the *Great Western Railway Company*, a corporation organized and existing under the laws of the state of *Indiana*, the same not being then and there done by agreement and under specific regulations adopted by the directors of said *Indiana Central Railroad Company* and said *Great Western Railway Company*,* contrary (*concluding as in Form No. 10692*).

(*b*) *Whereby Person was Killed.*

Form No. 17031.[1]

(*Commencing as in Form No. 17030, and continuing down to* *) that by reason of the crossing of the said *Indiana Central Railroad Company* and said *Great Western Railway Company*, and of said locomotive being unlawfully and feloniously stopped and kept standing on said crossing by said *John Doe* as aforesaid, a certain car then and there being moved upon the tracks of said *Great Western Railway Company*, and containing passengers, came in contact with and collided with said locomotive standing upon said crossing as aforesaid, and was then and there overturned and demolished, then and there and thereby injuring, wounding and bruising one *Richard Roe*, who was then and there a passenger in said car, in such a way and manner that he then and there died, contrary (*concluding as in Form No. 10692*).

1. *Indiana.* — Horner's Stat. (1896), § 2175. See also list of statutes cited *supra*, note 1, p. 412.

(5) For Untimely Crossing of Railroad Track.

(a) *In General.*

Form No. 17032.[1]

(*Commencing as in Form No. 10692, and continuing down to* *) being then and there an engineer in charge of a certain locomotive on the railroad of the *Indiana Central Railroad Company*, a corporation organized and existing under the laws of the state of *Indiana*, and owning and operating a railroad for the transportation of freight and passengers in said county of *Posey*, did then and there, as such engineer as aforesaid, knowingly and unlawfully permit said locomotive, in his charge as such engineer as aforesaid, to run upon and across the track then and there situate of the *Great Western Railway Company*, a corporation organized and existing under the laws of the state of *Indiana*, and owning and operating a railroad for the transportation of freight and passengers in said county of *Posey*, before a locomotive then and there being run upon the aforesaid track of the said *Great Western Railway Company* had passed over said crossing, although said locomotive on the track of the said *Great Western Railway Company* had then and there arrived at said crossing first,* contrary (*concluding as in Form No. 10692*).

(b) *Whereby Person was Killed.*

Form No. 17033.[1]

(*Commencing as in Form No. 17032, and continuing down to* *) that by reason of the said crossing of said *Indiana Central Railroad Company* and said *Great Western Railway Company* and of the unlawful and felonious running by the said *John Doe* of said locomotive upon and across said track of said *Great Western Railway Company*, a certain passenger car attached to said train on said *Great Western Railway Company* then and there passing over said crossing was by said locomotive then and there struck and overturned and demolished, and then and there and thereby injuring, wounding and bruising one *Richard Roe*, who was then and there a passenger in said car, so that he died, contrary (*concluding as in Form No. 10692*).

3. Against Third Persons.

a. For Attempting to Ride in Car Designated for Another Race.

Form No. 17034.[2]

(*Venue and title of court as in Form No. 10680.*)

The grand jury of said county charge that before the finding of this indictment, *John Doe*, at said county of *Mobile*, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and

1. *Indiana.* — Horner's Stat. (1896), § 2174.
See also list of statutes cited *supra*, note 1, p. 412.

2. *Alabama.* — Laws (1891), c. 185.
See also list of statutes cited *supra*, note 1, p. 412.

ninety-nine, was a passenger on a passenger train of the *Alabama Central Railroad Company*, a corporation organized and existing under the laws of the state of *Alabama*, and owning and operating a railroad, which said railroad was not a street railroad, between the city of *Mobile*, in said county of *Mobile*, and the city of *Montgomery*, in the county of *Montgomery*, in said state of *Alabama*, which said passenger train was provided with equal and separate accommodations for the white and colored races, to wit, a passenger car for people of the white race, and a passenger car for people of the colored race; that he, the said *John Doe*, on said *first* day of *January*, being a passenger on said passenger train as aforesaid, and being a person of the colored race, did knowingly, wrongfully and unlawfully enter and attempt to ride in a car on said passenger train not designated by said *Alabama Central Railroad Company* for people of his color and race, and he, the said *John Doe*, did then and there decline and refuse to leave said car and occupy the car on said passenger train designated for people of his race and color, said car so designated having equal accommodations with all other cars on said train, contrary to the form of the statute in such case made and provided, and against (*concluding as in Form No. 10680*).

b. For Climbing on Cars in Motion.

Form No. 17035.[1]

State of *Indiana*, } ss.
County of *Posey*. }

Richard Roe swears that on or about the *tenth* day of *March*, 1896, at said county, *John Doe* did climb upon a certain locomotive engine (or *car*) while the said locomotive engine (or *car*) was in motion upon the track of a railroad then and there situate in said county of *Posey* and state of *Indiana*, to wit, upon the track of the *Midland Railroad Company*, a corporation organized and existing under the laws of the state of *Indiana*, he, the said *John Doe*, not being a passenger or employee of said railroad company, contrary to the statute in such case made and provided, and against the peace and dignity of the state of *Indiana*.

Richard Roe.

Subscribed and sworn to before me this *tenth* day of *March*, 1896.

Abraham Kent, Justice of the Peace. (SEAL)

c. For Deceiving Engineer as to Approaching Train.

(1) In General.

Form No. 17036.[2]

(*Commencing as in Form No. 10692, and continuing down to* *) did then and there unlawfully and falsely report to one *Richard Roe*, then

1. *Indiana.* — Horner's Stat. (1896), § 2169.
See also list of statutes cited *supra*, note 1, p. 412.

2. *Indiana.* — Horner's Stat. (1896), § 2173.
See also list of statutes cited *supra*, note 1, p. 412.

and there being an engineer operating a certain locomotive on the railroad of the *Indiana Central Railroad Company*, a corporation organized and existing under the laws of the state of *Indiana*, and owning and operating a railroad for the transportation of freight and passengers in the county of *Posey*, and on which said railroad passengers were then and there being transported, and which said locomotive, being operated by said *Richard Roe* as aforesaid, was then and there approaching the crossing of the railroad track of the said *Indiana Central Railroad Company* and the railroad track of the *Great Western Railroad Company*, a corporation organized and existing under the laws of the state of *Indiana*, that there was then and there no train or locomotive upon the track of the said *Great Western* railroad in sight and approaching the said crossing, whereas in fact there was then and there upon the track of said *Great Western* railroad a locomotive in sight of said railroad crossing and then and there approaching the said crossing, as he, the said *John Doe*, did then and there well know,* contrary (*concluding as in Form No. 10692*).

(2) Whereby Person was Killed.

Form No. 17037.[1]

(*Commencing as in Form No. 17036, and continuing down to* *) that by reason of said felonious, unlawful and false statement and report made by the said *John Doe* to said engineer of the locomotive on said *Indiana Central* railroad as aforesaid, said engineer was then and there induced to and did run his locomotive upon and across said crossing, and did then and there and thereby collide with said locomotive and train on said *Great Western* railroad as aforesaid, which was then and there on said crossing, and did then and there and thereby, and by reason of said crossing and of said false statement and report so made by the said *John Doe* as aforesaid, strike with his said locomotive the said locomotive and train on the said *Great Western* railroad and did thereby injure, wound and bruise one *Richard Roe*, who was then and there the engineer of the locomotive on said *Great Western* railroad in such a manner that he, the said *Richard Roe*, then and there died, contrary (*concluding as in Form No. 10692*).

d. For Disturbing Fixture Attached to Switch of Railroad.[2]

1. *Indiana.* — Horner's Stat. (1896), § 2173.

See also list of statutes cited *supra*, note 1, p. 412.

2. Requisites of Complaint, Indictment or Information, Generally. — For the formal parts of a complaint, indictment or information in a particular jurisdiction see the titles Complaints, vol. 4, p. 1019; Indictments, vol. 9, p. 615; Informations in Criminal Cases, vol. 9, p. 768.

Where an indictment for the crime of wilfully and maliciously displacing and disturbing a fixture attached to a switch of a railroad charged defendant with "displacing and disconnecting the connecting rod of the said switch by taking the key out of the same, and by removing and displacing said rod, thereby releasing, loosening and unfastening the switch rail of the railroad," it was sufficient. Crawford *v.* Com., (Ky. 1896) 35 S. W. Rep. 114.

Form No. 17038.[1]

(Precedent in Rooney *v.* Com., 102 Ky. 374.)

[(*Commencement as in Form No. 10695.*)]

The grand jury of *Laural* county, in the name and by the authority of the commonwealth of *Kentucky*, accuse *John Rooney* of the crime of willfully and maliciously tearing up, displacing, breaking, and disturbing a fixture attached to the track and switch of a railroad in operation, whereby the engine and cars on said railroad might be upset, arrested, and thrown from the track and switch of said road, committed in manner and form as follows, viz.: The said *John Rooney* did on the *4th* day of *October*, 1897, and before the finding of this indictment in the county aforesaid, unlawfully, willfully, and maliciously tear up, displace, break, and disturb a fixture attached to the tracks and switches of the *Louisville & Nashville Railroad Company's* railroad, a railroad then in operation, viz., a switch light, by striking and hitting said switch light with a coupling pin, bars and pieces of iron and other hard substances, whereby the engine and cars on said railroad and switch thereof might be upset and thrown from said track and switch, against the peace and dignity of the commonwealth of *Kentucky*.

W. R. Ramsey, Commonwealth's Attorney
27th Judicial District of *Kentucky*.

Indorsed: "A true bill, *S. W. Brock*, Foreman."

e. For Placing Obstruction on Railroad.[2]

1. *Kentucky.* — Stat. (1894), § 807.

See also list of statutes cited *supra*, note 1, p. 412.

This indictment was held sufficient.

2. Requisites of Complaint, Indictment or Information, Generally. — For the formal parts of a complaint, indictment or information in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; INDICTMENTS, vol. 9, p. 615; INFORMATIONS IN CRIMINAL CASES, vol. 9, p. 768.

Where the indictment charges the offense substantially in the words of the statute, it is sufficient. Riley *v.* State, 95 Ind. 446; State *v.* Oliver, 55 Kan. 711.

Corporate character of railroad must be alleged, and the expression "railroad company" does not necessarily import a corporation. State *v.* Mead, 27 Vt. 722.

That railroad was owned or operated by an incorporated company need not be alleged. Walker *v.* State, 97 Ga. 213.

Persons whose lives were endangered need not be specified. Barton *v.* State, 28 Tex. App. 483.

Intent to endanger passengers need not be alleged. People *v.* Adams, 16 Hun (N. Y.) 549. And a charge that defendant placed an obstruction "so as to endanger the safety of a certain train" is sufficient. People *v.* Adams, 16 Hun (N. Y.) 549.

That obstruction did actually obstruct, hinder or delay the train need not be alleged. State *v.* Clemens, 38 Iowa 257.

Nature of obstruction need not be stated. Riley *v.* State, 95 Ind. 446.

Precedents. — Where the indictment charges that the defendant "wilfully and maliciously did place an obstruction on" a specified railroad, "which obstruction was of such a nature as to endanger the lives of persons being carried on said road," it is sufficient. McCarty *v.* State, 37 Miss. 411.

In State *v.* Johns, 124 Mo. 379, the indictment upon which a conviction was had charged the defendant "with the intent then and there, willfully, maliciously and feloniously, to obstruct the passage of a train of cars, then next to come along said track; and did then and there in manner and by the acts aforesaid, willfully, maliciously

Form No. 17039.[1]

(*Commencement as in Form No. 10685.*)

The grand jurors within and for said county, on their oaths present and inform, that *John Doe*, a transient person, now in the custody of the sheriff of *New Haven* county, at *Derby*, in said county of *New Haven*, on the *twenty-third* day of *December* in the year one thousand eight hundred and *ninety-eight*, with force and arms, did wilfully and maliciously put and place a large stone upon the track of the *New York, New Haven and Hartford Railroad Company*, a corporation established by the authority of this state, with the design to obstruct a locomotive engine used to draw cars upon said railroad, against (*concluding as in Form No. 10685*).

Form No. 17040.[2]

(Precedent in Com. *v.* Bakeman, 105 Mass. 54.)[3]

[(*Commencement as in Form No. 10699.*)

The jurors of the Commonwealth of *Massachusetts*, on their oath present, that *Joseph Bakeman*, late of *Northampton*, in the county of *Hampshire*,][4] on the *fifth* day of *March* now last past, wilfully, maliciously and unlawfully a certain engine and certain carriages of the *Connecticut River Railroad Company*, a corporation established by law, then and there lawfully passing over and along the railroad of said corporation there located and situate, did obstruct, by then and there placing and putting upon and across said railroad, there located and situate, *one* iron rail, and thereby the safety of divers persons, then and there lawfully riding, passing and being conveyed over and along said railroad at *Northampton* aforesaid in and upon the engine and carriages aforesaid, did endanger, [against the peace (*concluding as in Form No. 10699*).][4]

Form No. 17041.[5]

(Precedent in State *v.* Beckman, 57 N. H. 174.)[6]

[(*Commencement as in Form No. 10707.*)

The grand jurors for the state of *New Hampshire*, upon their oath

and feloniously obstruct the passage of a train of cars carrying passengers along and over said railroad, against the peace and dignity of the state."

In People *v.* Adams, 16 Hun (N. Y.) 549, the indictment charged that defendant on a day named, "with force and arms, willfully and maliciously and feloniously did place and put a certain obstruction, to wit, a locomotive engine, on the *New York Central and Hudson River* railroad (so called), so as to endanger the safety of a certain train, and the safety of said train was, by means and reason of said obstruction being put and placed on said railroad as aforesaid, greatly 'endangered,' against the form of the statute," etc.

It was held that this indictment charged an offense under the statute.

For form of indictment for obstructing railway held insufficient see State *v.* Mead, 27 Vt. 722.

1. This form is set out in 2 Rev. Swift's Dig. 833.

2. *Massachusetts.* — Pub. Stat. (1882), c. 112, § 203.

See also list of statutes cited *supra*, note 1, p. 412.

3. A conviction was sustained under this indictment.

4. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

5. *New Hampshire.* — Pub. Stat. & Sess. L. (1901), c. 266, § 1.

See also list of statutes cited *supra*, note 1, p. 412.

6. It was held that this indictment stated an offense under the statute.

present, that *Henry Beckman*, *yeoman*, in the county of *Rockingham* aforesaid,][1] on the *twenty-fourth* day of *October*, in the year of our Lord one thousand eight hundred and *seventy-five*, at *Seabrook*, in the county of *Rockingham* aforesaid, with force and arms, feloniously, wilfully and maliciously did place upon the track of the railroad of the *Eastern Railroad* in *New Hampshire*, in *Seabrook* aforesaid, *two* large pieces of wood called railroad sleepers, and *one* large piece of wood called a post — the same sleepers and post being then and there an obstruction on the track of said railroad to the passing of the railroad cars thereon — whereby the lives of sundry persons riding on the cars upon said railroad were greatly endangered, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

[(*Signature and indorsements as in Form No. 10707.*)][2]

Form No. 17042.[3]

Precedent in State *v.* Wentworth, 37 N. H. 197.)[4]

[(*Commencement as in Form No. 10707.*)

The grand jurors for the state of *New Hampshire*, on their oath present, that *John Wentworth* and *John Stone*, *yeomen*, in the county of *Strafford* aforesaid, on the *fourth* day of *March* in the year of our Lord one thousand eight hundred and *fifty-seven*, at *Somersworth*, in the county of *Strafford* aforesaid,][1] with force and arms, feloniously, wilfully and maliciously did place upon the track of the railroad of the *Boston and Maine Railroad*, in *Somersworth* aforesaid, in the county aforesaid, *two* iron rails, *two* large stones, and *two* large pieces of wood, being an obstruction to the passing of the railroad cars thereon, whereby the lives of sundry persons, to wit, *twenty* persons, riding in said cars upon said railroad, were greatly endangered, [contrary (*concluding as in Form No. 10707*).][1]

Form No. 17043.[5]

(Precedent in Barton *v.* State, 28 Tex. App. 483.)[6]

[(*Commencement as in Form No. 10721.*)

The grand jurors for the county of *Colorado* and state aforesaid, duly organized as such at the *January* Term, A. D. 1890, of the *District* Court for said county, upon their oath in said court present, that *Anarew Barton*, on or about the *first* day of *January*, one thousand eight hundred and *ninety*, and anterior to the presentment of this indictment, in the county of *Colorado* and state of *Texas*,][1] did wilfully place an obstruction, to-wit, a large piece of timber and

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. *New Hampshire.* — Pub. Stat. & Sess. L. (1901), c. 266, § 1.

See also list of statutes cited *supra*, note 1, p. 412.

4. This indictment was held sufficient.

5. *Texas.* — Pen. Code (1895), art. 785.

See also list of statutes cited *supra*, note 1, p. 412.

6. It was held that this indictment was sufficient.

rocks, upon the track of a railroad there situated, to-wit, the track of the *Galveston, Harrisburg & San Antonio Railroad*, whereby the lives of persons were endangered, [against (*concluding as in Form No. 10721*).][1]

f. For Stopping Train with Intent to Commit Robbery.[2]

Form No. 17044.[3]

(Precedent in State *v.* West, 157 Mo. 312.)[4]

In the *Circuit* Court of *Pettis* county, *Missouri*, *April* term, 1899. State of *Missouri*, county of *Pettis*, ss.

The grand jurors for the State of *Missouri*, duly impaneled, sworn and charged to inquire within and for the body of the county of *Pettis* and State aforesaid, upon their oath present and charge that heretofore, to wit, on the *twenty-ninth* day of *November*, 1898, at the county of *Pettis* and State of *Missouri*, *James L. West* and *Eli J. Stubblefield*, unlawfully and feloniously did stop, detain and arrest the progress of a certain railway passenger and express train, the property of the *Missouri Pacific Railway Company*, a corporation duly organized and existing under the laws of the State of *Missouri*, by then and there giving to the engineer of said train a danger signal by swinging a lighted lantern across the track of said railway in front of said train, which said railway train was then and there upon and moving along the railroad track and railway of the said *Missouri Pacific Railway Company* within said county of *Pettis* and State of *Missouri*, with the felonious intent then and there to commit robbery thereon, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State.

[(*Signature and indorsements as in Form No. 10703.*)][5]

g. For Wrecking Train.

Form No. 17045.[6]

(*Commencing as in Form No. 10825, and continuing down to* *) did then and there unlawfully, feloniously and wilfully remove, displace

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

2. **Requisites of Complaint, Indictment or Information, Generally.** — For the formal parts of a complaint, indictment or information in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; INDICTMENTS, vol. 9, p. 615; INFORMATIONS IN CRIMINAL CASES, vol. 9, p. 768.

Where the information alleges that defendant "feloniously threw out a switch with intent to derail a passenger train, and then and there feloniously boarded the passenger train at said station with intent then and there to rob said passenger train," it does not charge two offenses. People *v.* Thompson, 115 Cal. 160; People *v.* Thompson, 111 Cal. 242.

3. *Missouri.* — Rev. Stat. (1899), § 1955.

See also list of statutes cited *supra*, note 1, p. 412.

4. This indictment was held sufficient.

5. The matter to be supplied within [ ] will not be found in the reported case.

6. *Kansas.* — Gen. Stat. (1897), c. 100, § 111.

See also list of statutes cited *supra*, note 1, p. 412.

This form is based on the information in State *v.* Oliver, 55 Kan. 711, which was held sufficient.

and injure certain rails on the track of the *Atchison, Topeka & Santa Fe Railroad Company*, then and there being operated by said *Atchison, Topeka & Santa Fe Railroad Company*, a corporation duly organized under and by virtue of the laws of the state of *Kansas*, by removing bolts from fish-plates and drawing spikes from both sides of rails and prying rails out of line, with the intent and for the purpose of derailing and wrecking the trains of said railroad company, and injuring it, and for the purpose of and with the intent to kill and wound its passengers and employees, contrary to (*concluding as in Form No. 10825*).

RAPE.

By Arnoldus Vanderhorst.

CROSS-REFERENCES.

For other Forms of Indictment for Assault with Intent to Commit Rape, see the title ASSAULT, vol. 2, *Forms Nos.* 2460–2464.

For Forms of Indictment for Burglary with Intent to Commit Rape, see the title BURGLARY, vol. 4, *Forms Nos.* 4915–4919.

See also the titles ABDUCTION OF WOMEN, vol. 1, p. 93; *COMPELLING MARRIAGE OR DEFILEMENT*, vol. 4, p. 1017; *and the GENERAL INDEX to this work.*

I. In General.[1]

1. **Statutes** relating to the crime of rape in general exist in the following jurisdictions, to wit:

Alabama. — Crim. Code (1896), §§ 5444–5450.

Arizona. — Pen. Code (1901), § 230 *et seq.*

Arkansas. — Sand. & H. Dig. (1894), §§ 1862–1867.

California. — Pen. Code (1897), §§ 261–264.

Colorado. — Mills' Anno. Stat. (1891), §§ 1211, 1212.

Connecticut. — Laws (1895), c. 236.

Delaware. — Rev. Stat. (1893), p. 924, c. 127, §§ 10, 11.

District of Columbia. — Comp. Stat. (1894), c. 16, § 22 *et seq.*

1. Criminal Complaint.[1]

Florida. — Rev. Stat. (1892), § 2396.
Georgia. — 3 Code (1895), §§ 93, 94.
Idaho. — Rev. Stat. (1887), §§ 6766–6768; Laws (1899), p. 215.
Illinois. — Starr & C. Anno. Stat. (1896), c. 38, pars. 386, 387.
Indiana. — Horner's Stat. (1896), §§ 1917, 1918.
Iowa. — Code (1897), §§ 4756, 4758.
Kansas. — Gen. Stat. (1897), c. 100, §§ 31, 32.
Kentucky. — Stat. (1894), §§ 1152–1154.
Louisiana. — Rev. Laws (1897), § 787; Laws (1896), p. 165, No. 115.
Maine. — Stat. (Supp. 1895), c. 118, § 17.
Maryland. — Pub. Gen. Laws (1888), art. 27, § 232; Laws (1892), c. 204.
Massachusetts. — Stat. (1893), c. 466.
Michigan. — Comp. Laws (1897), § 11489.
Minnesota. — Stat. (1894), § 6524; Laws (1899), c. 72.
Mississippi. — Anno. Code (1892), §§ 1281, 1282.
Missouri. — Rev. Stat. (1899), §§ 1837–1839.
Montana. — Pen. Code (1895). §§ 450–453.
Nebraska. — Comp. Stat. (1899), § 6661.
Nevada. — Comp. Laws (1900), § 4698.
New Hampshire. — Laws (1897), c. 35.
New Jersey. — Gen. Stat. (1895), p. 1096, § 250.
New Mexico. — Comp. Laws (1897), §§ 1090, 1095.
New York. — Cook's Pen. Code (1898), §§ 278–280.
North Carolina. — Code (1883), §§ 1101–1105; Laws (1895), c. 295.
North Dakota. — Rev. Codes (1895), §§ 7156–7159.
Ohio. — Bates' Anno. Stat. (1897), §§ 6816, 6817.
Oklahoma. — Laws (1895), c. 20, art. 2.
Oregon. — Hill's Anno. Laws (1892), § 1733.
Pennsylvania. — Bright. Pur. Dig. (1894), p. 535.
Rhode Island. — Gen. Laws (1896), c. 277, § 5; c. 281, § 3.
South Carolina. — Crim. Stat. (1893), §§ 114, 115.
South Dakota. — Dak. Comp. Laws (1887), §§ 6522–6527; Laws (1893), p. 229.
Tennessee. — Code (1896), §§ 6451–6458.
Texas. — Pen. Code (1895), arts. 633, 635–640.
Utah. — Rev. Stat. (1898), §§ 4217–4221.
Vermont. — Laws (1898), p. 90.
Virginia. — Code (Supp. 1898), § 3680.
Washington. — Ballinger's Anno. Codes & Stat. (1897), §§ 7062, 7063.
West Virginia. — Code (1899), c. 144, § 15.
Wisconsin. — Stat. (1898), §§ 4381–4383.
Wyoming. — Rev. Stat. (1887), §§ 882, 883.
United States. — Rev. Stat. (1878), § 5345; 25 Stat. at L. (1889), c. 120.

1. Requisites of Criminal Complaint, Generally. — For the formal parts of a criminal complaint in a particular jurisdiction see the title CRIMINAL COMPLAINTS, vol. 5, p. 930.

For statutory requisites see list of statutes cited *supra*, note 1, p. 538.

Precedent.—In Turner *v.* People, 33 Mich. 363, the complaint was as follows:

"State of *Michigan*, *Huron* County, ss.

The complaint and examination on oath and in writing of *Emma Thompson*, of the township of *Lake*, taken and made before me, *George McKay*, a justice of the peace for the township of *Lake*, in said county, upon the *third* day of *May*, A. D. 1875, who, being duly sworn, says that heretofore, to-wit: on the *fourth* day of *January*, A. D. 1873, at the township and in the county aforesaid, *Albert Turner*, late of the township of *Lake*, in the county of *Huron*, on the *fourth* day of *January*, in the year of our Lord one thousand eight hundred and *seventy-three*, with force and arms, at the township aforesaid in the county aforesaid, in and upon one *Emma Thompson*, a female of the age of *ten* years or more, to wit: of the age of *thirteen* years, then and there being, violently and feloniously did make an assault, and her, the said *Emma Thompson*, then and there by force and against her will, feloniously did ravish and carnally know, against the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of *Michigan*.

And *Emma Thompson* aforesaid, upon her oath aforesaid, does further say, that heretofore on other times, to-wit:

Form No. 17046.[1]

State of *Michigan*, } ss.
Huron County. }

The complaint of *Julia Roe*, of the township of *Lake*, in said county of *Huron*, made before me, *Abraham Kent*, a justice of the peace of the township of *Lake*, in said county of *Huron*, on the *tenth* day of *May*, in the year of our Lord one thousand eight hundred and *ninety-eight*, who, being duly sworn, on her oath says that *John Doe*, late of the township of *Lake*, in said county of *Huron*, on the *fifth* day of *May* in the year of our Lord one thousand eight hundred and *ninety-eight*, with force and arms, at the township aforesaid, in the county aforesaid, in and upon one *Ruth Roe*, a female of the age of *sixteen* years or more, to wit, of the age of *twenty-two* years, then and there being, violently and feloniously did make an assault, and her, the said *Ruth Roe*, then and there, by force and against her will, feloniously did ravish and carnally know, against the form of the statute in such case made and provided, and against the peace and dignity of the people of *Michigan*.

Wherefore the said *Julia Roe* prays that the said *John Doe* may be apprehended and held to answer this complaint, and further be dealt with in relation to the same as law and justice may require.

Julia Roe.

Taken, sworn and subscribed to before me this *third* day of *May*, A. D. 1898.

Abraham Kent, Justice of the Peace.

on the *twentieth* day of *January*, A. D. 1873, and on divers days and times between the said *twentieth* day of *January*, A. D. 1873, and the *thirtieth* day of *September*, A. D. 1874, at the township of *Lake* and in the county of *Huron* aforesaid, *Albert Turner*, late of the township of *Lake* in the county of *Huron* aforesaid, in and upon one *Emma Thompson*, single woman and not the wife of the said *Albert Turner*, a female of the age of *ten* years or more, to wit: of the age of *thirteen* years, then and there being, violently and feloniously did make an assault, and her, the said *Emma Thompson*, then and there by force and against her will, feloniously did ravish and carnally know, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of *Michigan*; wherefore the said *Emma Thompson* prays that the said *Albert Turner* may be apprehended and held to answer this complaint, and further dealt with in relation to the same as law and justice may require.

her
Emma × *Thompson.*
mark

In presence of *James H. Hall.*

Taken, subscribed and sworn to before me the day and year first above written. *George McKay*,
Justice of the Peace."

It was held that this complaint, though informal and inartificial, was sufficiently certain in its allegations.

Insufficient Form.—A complaint which charged that the defendant, at, etc., "upon one *A*, a female child, * * * did then and there unlawfully, feloniously and forcibly make a violent assault upon her, the said *A*, then and there unlawfully and feloniously did ravish and carnally know," was held to be fatally uncertain, for the reason that the last clause of the charging part has no conjunctive connection with, and hence is not qualified by, that which goes before. Strader *v.* State, 92 Ind. 376.

1. *Michigan.*— Comp. Laws (1897), § 11489.

See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 1, p. 539.

Form No. 17047.[1]

(Precedent in Jackson *v.* State, 91 Wis. 256.)

State of *Wisconsin*, } ss.
County of *Iowa*. }

State of Wisconsin }
vs. }
William T. Jackson. }

Mildreth Daniels, being duly sworn, on oath says that on the *7th* day of *July*, 1894, at said county, *William T. Jackson* did, with force and arms, in and upon this complainant, *Mildreth Daniels*, a female of the age of *twelve* years and more, to wit, of the age of *fourteen* years, violently and feloniously make an assault, and her, the said *Mildreth Daniels*, then and there, with force and against her will, violently and feloniously ravish and carnally know, against the peace and dignity of the state of *Wisconsin*.

Mildreth Daniels.

Subscribed and sworn to before me this *6th* day of *August*, 1894.

H. Pitts, J. P.

2. Indictment or Information.[2]

1. *Wisconsin.* — Stat. (1898), § 4381.

See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 1, p. 539.

This form was embodied in the answer of the district attorney to a plea in abatement in the case. No objection was made to the complaint.

2. Requisites of Indictment or Information, Generally. — For the formal parts of an indictment or information in a particular jurisdiction see the titles INDICTMENTS, vol. 9, p. 615; INFORMATIONS IN CRIMINAL CASES, vol. 9, p. 768.

For statutory requisites see list of statutes cited *supra*, note 1, p. 538.

Indictment must charge all of the essential elements of the offense. State *v.* Goldston, 103 N. Car. 323; Parker *v.* Territory, 9 Okla. 109. An indictment is, however, sufficiently certain if it charges the offense in plain and intelligible language, and with such precision as will enable the defendant to plead the judgment rendered upon it in bar of another prosecution for the same crime. Greenlee *v.* State, 4 Tex. App. 345.

At common law, an allegation that the defendant "forcibly ravished" a female covered the various instances which constituted the crime of rape, whether the force was actual or constructive, but under statutes which classify these instances, and include additional means, the indictment should advise the defendant in which of the different ways he is charged with having committed the offense. State *v.* Hann, 73 Minn. 140; State *v.* Vorey, 41 Minn. 134.

In Words of Statute. — Where there is a statute governing the offense, the common-law strictness is not required. If the indictment charges the offense substantially in the words of the statute, it is sufficient. Leoni *v.* State, 44 Ala. 110; People *v.* Burke, 34 Cal. 661; Holton *v.* State, 28 Fla. 303; Weinzorpflin *v.* State, 7 Blackf. (Ind.) 186; State *v.* Enright, 90 Iowa 520; State *v.* Newton, 44 Iowa 45; State *v.* Hart, 33 Kan. 218; State *v.* Williams, 32 La. Ann. 335; Com. *v.* Fogerty, 8 Gray (Mass.) 489; Smith *v.* State, 41 Tex. 352; Smith *v.* Com., 85 Va. 924. The exact words of the statute need not, however, be followed. Equivalent words, or words clearly and intelligently setting forth the offense, are sufficient. Weinzorpflin *v.* State, 7 Blackf. (Ind.) 186; State *v.* Newton, 44 Iowa 45; State *v.* Hart, 33 Kan. 218; State *v.* Williams, 32 La. Ann. 335.

Where the words of the statute are, "shall unlawfully and forcibly have carnal knowledge of a woman against her will," and the terms of the indictment were, "feloniously did ravish and carnally know, by force and against her will," it was held that there was no

difference in the sense of the two sets of words, and that the indictment did not depart widely from the language of the act and was sufficient. Weinzorpflin *v.* State, 7 Blackf. (Ind.) 186.

Common-law Form Sufficient. — A common-law indictment, although the offense is governed by statute, is ordinarily sufficient. Anderson *v.* State, 34 Ark. 257; Weinzorpflin *v.* State, 7 Blackf. (Ind.) 186.

Joinder of Defendants. — All persons present, aiding and assisting in the accomplishment of the crime, are equally guilty and may be jointly indicted as principals. Dennis *v.* State, 5 Ark. 230; State *v.* Comstock, 46 Iowa 265; Strang *v.* People, 24 Mich. 1; State *v.* Harris, 150 Mo. 56; People *v.* Batterson, (Supreme Ct. Gen. T.) 6 N. Y. Crim. 173; State *v.* Jordan, 110 N. Car. 491.

Description of Defendant — *Sex.* — That defendant is a male person need not be alleged. Warner *v.* State, 54 Ark. 660; People *v.* Wessel, 98 Cal. 352; State *v.* Williams, 32 La. Ann. 335; Brown *v.* State, 72 Miss. 997.

Age. — The age of defendant, or that he was over or under a certain age, need not be stated. People *v.* Wessel, 98 Cal. 352; People *v.* Ah Yek, 29 Cal. 576; Sutton *v.* People, 145 Ill. 279; Com. *v.* Scannel, 11 Cush. (Mass.) 547; State *v.* Ward, 35 Minn. 182; State *v.* Sullivan, 68 Vt. 540. And if age be alleged the averment may be rejected as surplusage. Sutton *v.* People, 145 Ill. 279.

Capacity of defendant to commit crime need not be stated. Warner *v.* State, 54 Ark. 660; People *v.* Wessel, 98 Cal. 352; State *v.* Williams, 32 La. Ann. 335.

Description of Injured Person — *Name.* — The name of the injured person should be specified in the indictment. Com. *v.* Kennedy, 131 Mass. 584.

"*Female.*" — That the injured party was a female need not be alleged in so many words in the indictment. Warner *v.* State, 54 Ark. 660; Barker *v.* State, 40 Fla. 178; Joice *v.* State, 53 Ga. 50; State *v.* Hussey, 7 Iowa 409; Tillson *v.* State, 29 Kan. 452; State *v.* Fielding, 32 Me. 585; State *v.* Hammond, 77 Mo. 157; State *v.* Warner, 74 Mo. 83; State *v.* Farmer, 4 Ired. L. (26 N. Car.) 224; Bowles *v.* State, 7 Ohio (pt. II) 243; Hill *v.* State, 3 Heisk. (Tenn.) 317; Battle *v.* State, 4 Tex. App. 595; Taylor *v.* Com., 20 Gratt. (Va.) 825. If from an examination of all the language employed the sex of the person is shown. State *v.* Hussey, 7 Iowa 409; Battle *v.* State, 4 Tex. App. 595. Or where it must be presumed from the name used that the party is a female. Tillson *v.* State, 29 Kan. 452. Although it is better to aver that the injured party is a woman, or female. Battle *v.* State, 4 Tex. App. 595. The pronoun "her" sufficiently indicates that the person injured is a female. Warner *v.* State, 54 Ark. 660; Barker *v.* State, 40 Fla. 178; Joice *v.* State, 53 Ga. 50; Tillson *v.* State, 29 Kan. 452; State *v.* Fielding, 32 Me. 585; State *v.* Hammond, 77 Mo. 157; State *v.* Warner, 74 Mo. 83; State *v.* Farmer, 4 Ired. L. (26 N. Car.) 224; Bowles *v.* State, 7 Ohio (pt. II) 243; Hill *v.* State, 3 Heisk. (Tenn.) 317; Taylor *v.* Com., 20 Gratt. (Va.) 825.

"*Woman.*" — Where the indictment uses the word "female," it is equivalent to the word "woman" and is sufficient. Myers *v.* State, 85 Ala. 11; Robertson *v.* State, 31 Tex. 36; Gibson *v.* State, 17 Tex. App. 574.

Human Being. — That the injured party was a human being need not be stated. Anderson *v.* State, 34 Ark. 257; State *v.* Ward, 35 Minn. 182.

Maid or Married Woman. — That the injured party was a maid or a married woman need not be stated. State *v.* Hadden, 49 S. Car. 308.

Wife of Defendant. — That the injured party was not the wife of the defendant need not be alleged. People *v.* Estrada, 53 Cal. 600; State *v.* White, 44 Kan. 514; Com. *v.* Fogerty, 8 Gray (Mass.) 489; Com. *v.* Scannel, 11 Cush. (Mass.) 547; State *v.* Williams, 9 Mont. 179; Caidenas *v.* State, (Tex. Crim. 1897) 40 S. W. Rep. 980. But in *Oklahoma*, under the statute, it is necessary that an indictment should contain this averment. Parker *v.* Territory, 9 Okla. 109.

Person in Being. — The indictment need not allege that the injured person was alive and in being. Greenlee *v.* State, 4 Tex. App. 345.

Age. — The age of the person injured, or that she was over or under the statutory age of consent, need not be alleged. State *v.* Gaul, 50 Conn. 578; McLaughlin *v.* Com., (Ky. 1896) 35 S. W. Rep. 1030; State *v.* Fielding, 32 Me. 585; Com. *v.* Sugland, 4 Gray (Mass.) 7; Mobley *v.* State, 46 Miss. 501; State *v.* Houx, 109 Mo. 654; Hall *v.* State, 40 Neb. 320; State *v.* Storkey,

63 N. Car. 7; State *v.* Haddon, 49 S. Car. 308; Hill *v.* State, 3 Heisk. (Tenn.) 317; Nicholas *v.* State, 23 Tex. App. 317. But where the indictment is for rape, and charges the act to have been accomplished with force and against the will of the prosecutrix, without any allegation as to her age, there can be no conviction for carnally knowing and abusing a female under the statutory age of consent, where it is shown that she actually consented to the act. Warner *v.* State, 54 Ark. 660; Bonner *v.* State, 65 Miss. 293; State *v.* Johnson, 100 N. Car. 494; Jenkins *v.* State, 34 Tex. Crim. 201. *Contra*, McMath *v.* State, 55 Ga. 303; Lawrence *v.* Com., 30 Gratt. (Va.) 845.

Time — *Generally.* — An indictment which charges the commission of the crime on or about a certain day is sufficient. State *v.* Thompson, 10 Mont. 549.

Impossible Date. — Although the indictment alleges the offense to have been committed on an impossible date, yet it is sufficient. McMath *v.* State, 55 Ga. 303.

Place. — Indictment or information must show that the offense was committed in the county in which the indictment or information is found. People *v.* O'Neil, 48 Cal. 257. But that offense was committed in any particular place in the county need not be stated. O'Connell *v.* State, 6 Minn. 279. And an indictment is not vitiated by failing to allege that the prosecutrix was within the county at the time of the commission of the offense. People *v.* Mills, 17 Cal. 276.

Assault. — An indictment for rape need not charge in terms that an assault was made upon the injured party: to charge that defendant did feloniously ravish is sufficient. O'Connell *v.* State, 6 Minn. 279; Williams *v.* State, 1 Tex. App. 90. But where the information or indictment charges an assault and also a rape, only one crime is charged, as the words charging the assault will be construed as including the crime of rape. State *v.* Elswood, 15 Wash. 453.

Carnal knowledge of the body of the female need not be alleged in the indictment. Com. *v.* Squires, 97 Mass. 59.

Manner in which carnal knowledge was had need not be particularly alleged. McMath *v.* State, 55 Ga. 303.

Allegation of Force — *Generally.* — It is essential that the indictment should charge that the act was committed by force and against the will of the female. State *v.* Murphy, 6 Ala. 765; Sullivant *v.* State, 8 Ark. 400; Com. *v.* Fogerty, 8 Gray (Mass.) 489; Don Moran *v.* People, 25 Mich. 356; People *v.* Maxon, 57 Hun (N. Y.) 367; State *v.* Powell, 106 N. Car. 635; State *v.* Jim, 1 Dev. L. (12 N. Car.) 142; Elschlep *v.* State, 11 Tex. App. 301. But an indictment in the language of the statute is sufficient, although it does not use the terms "with force" or "against the will." State *v.* Black, 63 Me. 210.

Character of force used need not be set out at length in the indictment. Cooper *v.* State, 22 Tex. App. 419.

"*Against Her Will.*" — It is sufficient to allege that the act was "against her will," that averment being equivalent to "against her will and consent." State *v.* Gaul, 50 Conn. 578.

"*Against the will and consent of the female*" is equivalent to an averment that the act was "without her consent." State *v.* Jackson, 46 La. Ann. 547.

"*Felonious*" *and* "*Against Her Will.*" — Where the indictment charged the rape to have been "felonious" and "against her will," without the use of the word "forcibly," it was held to be sufficient. State *v.* Johnson, 67 N. Car. 55.

"*Force and Violence.*" — And an allegation of "force and violence" is sufficient to imply resistance on the part of the female. People *v.* Pacheco, 70 Cal. 473.

"*Forcibly and against her will*" is sufficient. McMath *v.* State, 55 Ga. 303.

"*Ravish.*" — It is sufficient if the indictment charges that the defendant did "ravish and carnally know" the injured person, and it is not necessary to charge that the offense was committed "forcibly and against her will." Harman *v.* Com., 12 S. & R. (Pa.) 69. The word "ravish," when used in an indictment, implies force, and that the act was accomplished against the will of the woman. Williams *v.* State, 1 Tex. App. 90.

"*Violently.*" — That act was done "violently" is sufficient. State *v.* Daly, 16 Oregon 240. And satisfies a statute defining the crime as by "force, threats, or fraud." Walling *v.* State, 7 Tex. App. 625; Gutierrez *v.* State, 44 Tex. 587. And is the equivalent of "forcibly." State *v.* Williams, 32 La. Ann. 335; State *v.* Mueller, 85 Wis.

203. But see *contra* State *v.* Blake, 39 Me. 322, holding that the use of the word "violently" was not a sufficient allegation of force.

"*Violently and Against Her Will.*" — Where the indictment charged that the act was done "violently and against her will," it was held sufficient, although the statute defining the crime uses the words "by force and against the will" of the female. Com. *v.* Fogerty, 8 Gray (Mass.) 489.

Technical Words—"*Feloniously.*"—The indictment must charge that the act was done "feloniously." Sullivant *v.* State, 8 Ark. 400; Hall *v.* Com. (Ky. 1894) 26 S. W. Rep. 8; State *v.* Porter, 48 La. Ann. 1539; Hays *v.* State, 57 Miss. 783; State *v.* Scott, 72 N. Car. 461. To charge that the assault was made feloniously is not sufficient. That the defendant "feloniously did ravish" must be alleged. Hays *v.* State, 57 Miss. 783.

Where the indictment charges that defendant "violently and feloniously then and there, forcibly and against her will, did ravish and carnally know," it is defective, as it fails to charge the consummation of the offense to have been felonious. State *v.* Porter, 48 La. Ann. 1539. To charge that the accused "feloniously did make an assault and her then and there, forcibly and against her will, ravish and carnally know," is not sufficient, as the indictment must charge that the offense was feloniously done. Hays *v.* State, 57 Miss. 783. But in State *v.* Casford, 76 Iowa 330, it was held that where the indictment charged that the defendant unlawfully, wilfully and feloniously did make an assault on the injured party, and did then and there ravish and carnally know her, forcibly and against her will, the consummation of the offense was sufficiently charged, although the word "felonious" was not repeated in connection with the charge of ravishing and carnally knowing. That the assault was felonious need not, however, be charged. State *v.* Hutchinson, 95 Iowa 566; Fizell *v.* State, 25 Wis. 364. And it has been held that the complete omission of the word "feloniously" from the indictment does not render the same defective. Territory *v.* Godfrey, 6 Dak. 46; Com. *v.* Scannel, 11 Cush. (Mass.) 547; Asher *v.* Territory, 7 Okla. 188.

Ravish. — At common law, the indictment must charge that the accused did ravish, and the use of the word "rape" instead of "ravish" is not sufficient. Davis *v.* State, 42 Tex. 226. And in all cases it is best to use the word "ravish" in charging the offense. O'Connell *v.* State, 6 Minn. 279; Christian *v.* Com., 23 Gratt. (Va.) 954. Although it has been held that where the indictment is otherwise sufficient, and sets forth the crime substantially in the language of the governing statute, failure to use the word "ravish" does not render the indictment defective. Wilkey *v.* Com., (Ky. 1898) 47 S. W. Rep. 219; Christian *v.* Com., 23 Gratt. (Va.) 954; Tway *v.* State, 7 Wyo. 74.

In *New York*, the word "ravish" is indispensable, and where it is omitted the indictment is defective. Gouglemann *v.* People, (Supreme Ct. Gen. T.) 3 Park. Crim. (N. Y.) 15.

"*Unlawfully.*" — Where the indictment omits the word "unlawfully," but is in accordance with the common-law definition of the offense, it is sufficient. Weinzorpflin *v.* State, 7 Blackf. (Ind.) 186. And where the statute uses the word "unlawfully," an indictment qualifying the act as "feloniously" done is sufficient, the two words being substantially equivalent. Barnard *v.* State, 88 Wis. 656.

Negative Averments.—Where the statute defining the crime contains a negative averment which is an important part of the definition of the offense, such negative averment must be embodied in the indictment. Parker *v.* Territory, 9 Okla. 109.

Joinder of Offenses — *Generally.* — A count in an indictment is not bad for charging two offenses: if but one offense is sufficiently charged, the defective part of the indictment will be rejected. State *v.* Knock, 142 Mo. 515.

Rape and Assault with Intent to Commit Rape. — A count charging rape may be joined with a count charging assault with intent to commit rape. People *v.* Tyler, 35 Cal. 553; Joice *v.* State, 53 Ga. 50; Johnson *v.* State, 14 Ga. 55; State *v.* Sutton, 4 Gill (Md.) 494; Cook *v.* State, 24 N. J. L. 843. And in People *v.* Draper, 28 Hun (N. Y.) 1, it was held that an indictment which charged rape, and also an assault with intent to commit rape, in one count, was not bad for duplicity.

Rape and Bastardy. — An indictment in three counts, the first charging assault and battery, the second assault and battery with intent to commit rape,

the third charging felonious rape with an averment of the commission of bastardy, was held not subject to the objection of misjoinder. Com. *v.* Lewis, 140 Pa. St. 561.

Rape and Carnal Knowledge. — An indictment may contain a count charging rape and another count charging carnal knowledge of a female under the age of consent. Grimes *v.* State, 105 Ala. 86; Beason *v.* State, 72 Ala. 191; McAvoy *v.* State, (Tex. Crim. 1899) 51 S. W. Rep. 928.

Rape and Fornication. — A count for rape may be joined with a count for fornication in the same indictment. Jackson *v.* State, 91 Wis. 253.

Rape and Incest. — An indictment may contain one count charging rape and another count charging incest. Owens *v.* State, 35 Tex. Crim. 345; Porath *v.* State, 90 Wis. 527.

Concluding Against Form of the Statute. — The crime of rape being a common-law offense, and the purpose of the statutes being not so much to define the crime as to prescribe the punishment, an indictment need not conclude, "against the form of the statute." O'Connell *v.* State, 6 Minn. 279. *Contra*, State *v.* Dick, 2 Murph. (6 N. Car.) 388, where it was held that such conclusion is essential.

Surplusage. — Where an indictment for rape charged that the defendant, "with force and arms, in and upon one *Z. T.*, a female, violently and feloniously did make an assault and her the said *Z. T.* then and there violently and by force and against he will did ravish and carnally know," it was held sufficient. The words "and against he will," it was stated, might be rejected as surplusage, leaving the remaining allegations sufficient to charge the offense. Williams *v.* State, 1 Tex. App. 90.

In Downs *v.* State, 60 Ark. 521, the indictment charged that "the said *Will Downs*, in the county and state aforesaid, on the *first* day of *December*, 1894, in and upon one *Polly Bridenbough*, a female, forcibly and feloniously did make an assault, and upon her the said *Polly Bridenbough*, then and there, forcibly and against her will, feloniously did ravish and carnally know, against the peace and dignity of the state of *Arkansas*." It was held that the repetition of the word "upon" must be regarded as a clerical error, and therefore treated as surplusage.

Precedents. — In Leoni *v.* State, 44 Ala. 110, the following indictment was held sufficient, notwithstanding the objection that the offense was not charged to have been "against her will," the words "forcibly ravished" sufficiently charging the offense:

"The State of *Alabama*, *Mobile* County. } *City* Court of *Mobile*, *June* Term, 1869.

The grand jury of said county charge, that, before the finding of this indictment, *Gaetano Leoni* forcibly ravished *Elizabeth Lazzaro*, a female, against the peace and dignity of the State of *Alabama*."

An indictment was held sufficient which charged that "the said *Edward Warner* did, on the *24th* day of *July*, 1890, in the county and district aforesaid, feloniously, forcibly, unlawfully, and against her consent, carnally know *Jennie Jones*," etc. Warner *v.* State, 54 Ark. 660.

In Anderson *v.* State, 34 Ark. 257, this indictment was held sufficient:

"The grand jury of *Drew* county, etc., etc., accuse *James Anderson* of the crime of rape, committed as follows, to-wit: The said *James Anderson*, in the county aforesaid, on or about the *twenty-third* day of *September*, A. D. 1878, did feloniously make an assault in and upon one *Eliza Burks*, a female; and that he, the said *James Anderson*, did then and there feloniously ravish and carnally know her, the said *Eliza Burks*, forcibly, and against her will, contrary to the statute in such cases made and provided, and against the peace and dignity of the state of *Arkansas*."

Where the indictment charged that "the said *Peter Burke*, on the *18th* day of *May*, A. D. 1867, at the county of *Mendocino*, did have carnal knowledge of a female, named *Elizabeth Harris*, forcibly and against the will of the said *Elizabeth Harris*, contrary to the form of the statute," etc., it was held to be sufficient. People *v.* Burke, 34 Cal. 661.

In Anderson *v.* State, 104 Ind. 467, the indictment was as follows:

"State of *Indiana*, *Noble* county. } ss.

In the *Noble Circuit* Court, of the *June* term, 1884.

State of Indiana v. *John Anderson.* } Indictment.

The grand jury of the county of *Noble*, upon their oath, do present that

John Anderson, on the *18th* day of *June*, 1884, at the county of *Noble*, in and upon one *Josephine Fielding*, a woman, did forcibly and feloniously make an assault, and her, the said *Josephine Fielding*, then and there, forcibly and against her will, feloniously did ravish and carnally know, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of *Indiana*."

It was held that this indictment was not as full, formal and explicit as the old forms required, and as it might easily have been made, but notwithstanding was substantially a good indictment under the present criminal code; that the fact that the state was not named in the body of the indictment did not vitiate it, the naming of the state in the caption being sufficient, as the caption must be considered a part of the indictment.

In Richie *v.* State, 58 Ind. 355, the charging part of the indictment was as follows: "That *Richard Richie*, late of said county, on the *31st* day of *July*, 1877, at said county and State aforesaid, did then and there unlawfully, in a rude and insolent manner, touch, strike and wound *Martha F. Dean*, a woman, and did then and there her, the said *Martha F. Dean*, a woman, unlawfully, forcibly, and against her will, feloniously ravish and carnally know." It was held, despite urgent objection, that under this indictment defendant might be found guilty of assault and battery only, without regard to the crime of rape.

In Mills *v.* State, 52 Ind. 187, the following indictment was held to charge but one offense, that of rape:

"State of *Indiana*, *Lagrange* county, ss. In the *March* term of the *Lagrange Circuit* Court, A. D. 1874. *The State of Indiana* v. *Jacob Mills*.

The grand jurors for the county of *Lagrange*, upon their oath, present that, at said county and state, on the *24th* day of *April*, A. D. 1872, *Jacob Mills* did, in a rude, insolent and angry manner, unlawfully touch, strike and wound *Lovinna Draggoo*, a woman, and did, then and there, her, the said *Lovinna Draggoo*, a woman, unlawfully, forcibly, and against her will, feloniously ravish and carnally know.

Cyrus M. Wade, Special Pros. Att'y."

In State *v.* Spidle, 42 Kan. 441, the indictment contained five counts, each charging a separate offense. The third, fourth and fifth counts were as follows:

"Third count: And the jurors aforesaid on their oaths aforesaid, do further find and present, that the said *Jacob B. Spidle*, on the *30th* day of *June*, 1888, in the county of *Ness* and state of *Kansas* aforesaid, did then and there unlawfully, feloniously and forcibly make an assault upon one *Alfaretta Salisbury*, and her, the said *Alfaretta Salisbury*, against the will of her, the said *Alfaretta Salisbury*, then and there forcibly, unlawfully and feloniously did ravish and carnally know; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Kansas*.

Fourth count: And the jurors aforesaid on their oaths aforesaid, do further find and present, that the said *Jacob B. Spidle*, on the *13th* day of *July*, 1888, in the county of *Ness* and state of *Kansas* aforesaid, did then and there, in and upon one *Alfaretta Salisbury*, unlawfully, forcibly and feloniously make an assault on her, the said *Alfaretta Salisbury*, being over the age of *eighteen* years, then and there forcibly and against her will, feloniously did ravish and carnally know; contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the state of *Kansas*.

Fifth count: And the jurors aforesaid on their oaths aforesaid, do further find and present, that the said *Jacob B. Spidle*, on the *1st* day of *August*, 1888, in the county of *Ness* and state of *Kansas* aforesaid, did then and there unlawfully, feloniously and forcibly make an assault upon the said *Alfaretta Salisbury*, and her, the said *Alfaretta Salisbury*, did forcibly, unlawfully and feloniously and carnally know, without the consent of her, the said *Alfaretta Salisbury*; contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the state of *Kansas*."

These counts were all sufficient. The district attorney elected to stand on the third.

In Wilkey *v.* Com., (Ky. 1898) 47 S. W. Rep. 219, the indictment, omitting formal parts, was as follows:

"The grand jurors of the county of *Hopkins* in the name and by the authority of the commonwealth of *Kentucky* accuse *Frank Wilkey* of the crime of rape committed in manner and form as follows, to wit: The said

Wilkey in the said county of *Hopkins*, on the —— day of *May*, 1897, and before the finding of this indictment, did unlawfully, willfully, forcibly and violently have sexual intercourse with and carnally know *Jennie Tyre*, a female of and above *twelve* years of age, without the consent and against the will of the said *Jane Tyre*, against the peace and dignity of the commonwealth of *Kentucky*."

It was objected that this indictment was defective because the word "ravish" does not appear, but the court held the charge sufficient without the use of that word, inasmuch as the term "ravish" is not used in the Kentucky statute to define the crime of rape.

It was also held that the use of the christian name "Jennie" and again "Jane" in reference to the prosecutrix was not a material variance.

In Com. *v.* Fogerty, 8 Gray (Mass.) 489, an indictment which charged that defendant, "with force and arms in and upon *Agnes O'Connor*, a female of the age of *ten* years and more, in the peace of said commonwealth then and there being, violently and feloniously did make an assault, and her the said *Agnes* then and there violently and against her will feloniously did ravish and carnally know, against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided," was held to be sufficient.

In Com. *v.* Scannel, 11 Cush. (Mass.) 547, an indictment which charged that defendant "in and upon one *Mary Moran*, of *Methuen*, in the county of *Essex*, in the peace of the commonwealth then and there being, an assault did make, the said *Mary Moran* being then and there a female of the age of *ten* years and more, and her the said *Mary Moran* then and there did ravish and carnally know, by force and against her will, etc.," was held to be insufficient in failing to allege that the assault was made with force and arms.

In O'Connell *v.* State, 6 Minn. 279, the indictment charged that defendant, on, etc., "in this county of *Wright* did feloniously ravish, and, forcibly and against her will, carnally know one *Barbara Oehrlein*, a woman of the age of *ten* years and upwards, against the peace and dignity of the state of *Minnesota*." It was held that this indictment was sufficient not only under the statute but at common law.

In State *v.* Harris, 150 Mo. 56, the indictment was as follows:

"The grand jurors of the State of *Missouri*, impaneled, sworn and charged to inquire and true presentment make within and for the body of the county of *Dunklin*, and State aforesaid, upon their oath present and charge that *William J. Harris*, *Coon Owen* and *Henry Justice*, on or about the *15th* day of *April*, A. D. 1894, at the county of *Dunklin* and State of *Missouri*, in and upon one *Lizzie Edwards*, a female about the age of *fourteen* years, unlawfully, violently and feloniously, did make an assault, and her, the said *Lizzie Edwards*, then and there unlawfully, forcibly and against her will, feloniously did ravish and carnally know; against the peace and dignity of the State."

It was urged that this indictment was defective in that it charged an impossibility, to wit: three persons committed the rape at the same time and on the same person. But the indictment was sustained, the court saying: "It was entirely competent and proper to charge all three of the defendants jointly."

In State *v.* Warner, 74 Mo. 83, the indictment was as follows:

"The grand jury for the State of *Missouri*, empaneled, sworn and charged to inquire within and for the body of the county of *Cass*, and State aforesaid, upon their oaths present and charge that *Henry Warner*, on the *24th* day of *March*, in the year of our Lord 1881, at the county of *Cass*, and State of *Missouri*, in and upon one *Mary A. Culberson*, unlawfully, violently and feloniously did make an assault, and her, the said *Mary A. Culberson*, then and there unlawfully, forcibly and against her will, feloniously did ravish and carnally know, against the peace and dignity of the State."

This indictment was held sufficient, although it did not allege that the injured person was a woman.

In State *v.* Hatfield, 72 Mo. 518, the following form of indictment was approved:

"The grand jurors of the State of *Missouri* summoned from the body of *Dallas* county, impanelled, charged, and sworn, upon their oath present, that *William Hatfield*, late of the county aforesaid, on the *seventeenth* day of *October*, 1878, at the said county of *Dallas* and State aforesaid, did, in and

upon a certain woman, viz: one *C. D.*, unlawfully, violently, forcibly, willfully and feloniously make an assault, and her, the said *C. D.* then and there in the said county of *Dallas*, unlawfully, violently, willfully and feloniously, and against her will, feloniously ravish and carnally know her the said *C. D.*, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

In State *v.* Laxton, 78 N. Car. 564, it was held that an indictment which charged as follows: "The jurors, etc., present that *James Laxton*, etc., with force and arms in and upon one *Nancy L. Barlow*, in the peace of God and the state then and there being, violently and feloniously did make an assault, and her the said *Nancy L. Barlow* then and there, violently and against her will, feloniously did ravish and carnally know, against," etc., was sufficient.

In People *v.* Batterson, (Supreme Ct. Gen. T.) 6 N. Y. Crim. 173, an indictment was held sufficient which in the first count charged that the defendant did violently and feloniously make an assault "and her, the said *Sophia Kaiser*, then and there, against her will and without her consent, and by forcibly overcoming her resistance, feloniously and forcibly did ravish, carnally know and have sexual intercourse with" her, and in the second count charged the commission of the crime against the will and without the consent of prosecutrix, "her resistance then and there being prevented by fear of immediate and great bodily harm, which she then and there had reasonable cause to believe would be inflicted upon her," etc.

In State *v.* Farmer, 4 Ired. L. (26 N. Car.) 224, the indictment was as follows:

"State of *North Carolina*, } ss.
Bertie County. }

Superior Court of Law, *Spring* Term, 1844.

The Jurors for the State, upon their oaths, present, that *Jesse Farmer*, late of *Bertie* County, *laborer*, on the *fourth* day of *March*, in the year one thousand eight hundred and *forty-four*, with force and arms, in said County, in and upon one *Mary Ann Taylor*, in the peace of the State then and there being, violently and feloniously did make an assault, and her the said *Mary Ann Taylor* then and there, violently and against her will, feloniously did ravish and carnally know, against the form of the statute in such cases made and provided, and against the peace and dignity of the State." This indictment was held sufficient.

In Hill *v.* State, 3 Heisk. (Tenn.) 317, the indictment charged "that *Lewis Hill*, (*colored*,) late of said county, (of *Greene*,) on the *12th* day of *July*, A. D. 1871, as to-wit in the county aforesaid, unlawfully, forcibly, violently and feloniously did make an assault upon one *Sarah M. Malone*, in the peace of the State then and there being, and he, the said *Lewis Hill*, did then and there unlawfully, forcibly and feloniously have carnal knowledge of her, the said *Sarah M. Malone*, against the will of the said *Sarah M. Malone*."

It was held that this indictment was amply sufficient in the description of the prosecutrix, though not alleging in terms either her sex or age.

In Mitchell *v.* Com., 89 Va. 826, the first count of the indictment charged that "*Jesse Mitchell*, on the *22d* day of *June*, 1891, and in said county, in and upon one *Janie Thraves*, the said *Janie Thraves* then being a female over the age of *twelve* years — to-wit, of the age of *twelve* years — violently and feloniously did make an assault, and her (the said *Janie Thraves*) then and there — to-wit, on the day and year aforesaid, at the county aforesaid — feloniously did ravish and carnally know, against her will and by force, against the peace and dignity of the commonwealth of *Virginia*." The second and last count in the indictment charged that "the said *Jesse Mitchell*, in the county aforesaid, in and upon one *Janie Thraves*, a female over the age of *twelve* years — to-wit, of the age of *twelve* years — violently and feloniously an assault did make, with intent her (the said *Janie Thraves*) then and there, on the day and year aforesaid, in the county aforesaid, feloniously and against her will, by force, to carnally know," etc.; and that "the said *Jesse Mitchell*, in the manner and form aforesaid, did then and there feloniously attempt to commit rape upon the said *Janie Thraves*, against the peace and dignity of the commonwealth of *Virginia*."

It was held that this indictment was sufficient.

In Jackson *v.* State, 91 Wis. 253, the information as amended was as follows:

Form No. 17048.[1]

(3 Chit. Crim. L. (5th Am. from 2d Lond. ed.) 815.)

Essex, to wit:

The jurors for our lord the king upon their oath present that *John Doe*, late of the parish of *West Ham*, in the county of *Essex*, *laborer*, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the *twenty-first* day of *February*, in the *sixth* year of the reign of our sovereign lord *George IV*, by the grace of God, of Great Britain and Ireland king, defender of the faith, with force and arms, at the parish of *West Ham* aforesaid, in the county of *Essex* aforesaid, in and upon one *Sarah Roe*, spinster, in the peace of God and of our said lord the king then and there being, violently and feloniously did make an assault and her, the said *Sarah Roe*, against the will of her, the said *Sarah Roe*, then and there feloniously did ravish and carnally know, against the form of the statute in such case made and provided, and against the peace of our said lord the king, his crown and dignity.

Form No. 17049.[1]

(1 Archb. Crim. Pr. and Pl. (8th ed.) 999.)

Essex, to wit:

The jurors for our Lady the Queen, upon their oath present, that *John Doe*, on the *third* day of *May*, in the year of our Lord one thousand eight hundred and *seventy-seven*, in and upon one *Sarah Roe*, feloniously and violently did make an assault, and her, the said *Sarah Roe*, then violently and against her will, feloniously did ravish and carnally know; against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Form No. 17050.[2]

(Ala. Crim. Code (1896), § 4923, No. 70.)[3]

(*Venue and title of court as in Form No. 10680.*)

The grand jury of said county charge, that, before the finding of

"Count 1. — I, *G. R. Whitman*, district attorney for said county, hereby inform the court that on the *7th* day of *July*, A. D. 1894, at said county, *William T. Jackson* did with force and arms, in and upon one *Mildreth Daniels*, a female of the age of *ten* years or more, to wit, of the age of *fourteen* years, violently and feloniously make an assault, and her, the said *Mildreth Daniels*, then and there, by force and against her will, violently and feloniously did ravish and carnally know, against the peace and dignity of the state of *Wisconsin*.

Count 2. — I further inform the court that on the *7th* day of *July*, A. D. 1894, at said county, *William T. Jackson* did commit fornication and have sexual intercourse with one *Mildreth Daniels*, a (single) female of previous chaste character and under the age of *fifteen* years, to wit, of the age of *fourteen* years, against the peace and dignity of the state of *Wisconsin*."

It was held that a count for rape might be joined with one for fornication founded on the same transaction, and the court might properly refuse to require an election between counts.

1. See, generally, *supra*, note 2, p. 541.

2. *Alabama.* — Crim. Code (1896), § 5444.

See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 2, p. 541.

3. **Statutory Form Sufficient.** — It is sufficient to follow the form prescribed

this indictment, *John Doe* forcibly ravished *Julia Roe*, a woman, against the peace and dignity of the state of *Alabama*.

(*Signature and indorsements as in Form No. 10680.*)

Form No. 17051.[1]

(Sand. & H. Dig. Ark. (1894), p. 1666, No. 178.)

Pulaski Circuit Court.

State of Arkansas against *John Doe.* } Indictment.

The grand jury of *Pulaski* county, in the name and by the authority of the state of *Arkansas*, accuse *John Doe* of the crime of rape, committed as follows, viz.: The said *John Doe* did, on the *tenth* day of *January*, 1894, in the county aforesaid, feloniously, forcibly, unlawfully and against her consent, carnally know *Emma Dean*, against the peace and dignity of the state of *Arkansas*.

William Gay, Prosecuting Attorney.

Witnesses: *Richard Roe*, *Emma Dean* and *Thomas Knox*.

Form No. 17052.[2]

(Precedent in People *v.* Snyder, 75 Cal. 323.)[3]

[(*Title of court and cause as in Form No. 10816.*)

John H. Snyder is accused by the district attorney by this information of the crime of rape, committed as follows: The said *John H. Snyder* on or about the *first* day of *January*, in the year of our Lord eighteen hundred and *eighty-seven*, at the said city and county of *San Francisco*, state of *California*,][4] with force and arms, in and upon one *Louisa Bell*, a female over the age of *ten* years, who was not then and there the wife of the said *John H. Snyder*, violently and feloniously did make an assault, and her, the said *Louisa Bell*, then and there, to wit, on the day and year last aforesaid, feloniously did ravish and carnally know and accomplish with her an act of sexual intercourse by force and violence, and against her will and resistance, contrary to the form [force and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of *California*.

Daniel Webster, District Attorney of said City and County of *San Francisco*.][5]

by the statute. Beason *v.* State, 72 Ala. 191; Johnson *v.* State, 50 Ala. 456.

1. *Arkansas.* — Sand. & H. Dig. (1894), § 1862.

See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 2, p. 541.

2. *California.* — Pen. Code (1897), § 261.

See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 2, p. 541.

3. It was held that this information was sufficient.

4. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

5. The matter enclosed by [ ] will not be found in the reported case.

Form No. 17053.[1]

(2 Rev. Swift's Dig. 826.)

(*Commencing as in Form No. 10685, and continuing down to* *) in and upon *Julia Roe*, of said town of *Derby*, in the peace then and there being, violently and feloniously did make an assault, and her the said *Julia Roe*, against her will, then and there feloniously did ravish and carnally know, against the peace (*concluding as in Form No. 10625*).

Form No. 17054.[2]

(Precedent in Barker *v.* State, 40 Fla. 179.)[3]

[(*Commencement as in Form No. 10688*)][4] that one *George Barker*, late of the county of *Duval* and State of *Florida*, on the *17th* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-seven*, in the county and State aforesaid, with force and arms in and upon one *Mabel Bettelini* did make an assault, and her, the said *Mabel Bettelini*, then and there feloniously did ravish and carnally know, forcibly and against the will of her, the said *Mabel Bettelini*, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of *Florida*.

[(*Signature and indorsements as in Form No. 10688.*)][4]

Form No. 17055.[5]

(*Commencing as in Form No. 10691, and continuing down to* *) feloniously and forcibly did make an assault in and upon one *Julia Roe*, then and there being a female, and did then and there feloniously have carnal knowledge of the said *Julia Roe*, forcibly and against her will, contrary (*concluding as in Form No. 10691*).

Form No. 17056.[6]

(*Commencing as in Form No. 10692, and continuing down to* *) in a rude, insolent and angry manner, did unlawfully touch and strike one *Julia Roe*, a woman, and he, the said *John Doe*, did then and there her, the said *Julia Roe*, forcibly and against her will, feloniously ravish and carnally know, contrary (*concluding as in Form No. 10692*).

Form No. 17057.[7]

(*Commencing as in Form No. 10694, and continuing down to* *) did then and there, unlawfully, feloniously and forcibly make an assault

1. *Connecticut.* — Laws (1895), c. 236.
See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 2, p. 541.

2. *Florida.* — Rev. Stat. (1892), § 2396.
See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 2, p. 541.

3. In this case judgment of conviction was affirmed.

4. The matter to be supplied within [] will not be found in the reported case.

5. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 38, par. 386.
See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 2, p. 541.

6. *Indiana.* — Horner's Stat. (1896), § 1917.
See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 2, p. 541.

7. *Kansas.* — Gen. Stat. (1897), c. 100, § 31.
See also list of statutes cited *supra*,

upon one *Julia Roe*, and her, the said *Julia Roe*, then and there forcibly, unlawfully and feloniously, and against her will and consent, unlawfully, feloniously and forcibly did ravish and have carnal knowledge of her, the said *Julia Roe*, contrary (*concluding as in Form No. 10694*).

Form No. 17058.[1]

(Bullitt's Crim. Code Ky. (1895), p. 147.)

(*Title of court and cause as in Form No. 10695.*)

The grand jury of *Franklin* county, in the name and by the authority of the commonwealth of *Kentucky*, accuse *John Doe* of the crime of rape, committed as follows, viz.: the said *John Doe*, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-nine*, in the county aforesaid, unlawfully, feloniously and violently made an assault upon *Julia Roe*, and then and there forcibly, and against her will and consent, ravished and had carnal knowledge of her, against the peace and dignity of the commonwealth of *Kentucky*.

(*Signature and indorsements as in Form No. 10695.*)

Form No. 17059.[2]

(Precedent in Com. *v.* Sugland, 4 Gray (Mass.) 7.)[3]

[(*Commencing as in Form No. 10699, and continuing down to* *)][4] with force and arms, in and upon one *Julia A. Alvord*, in said *Williamsburgh*, then and there in the peace of said commonwealth being, did violently and feloniously make an assault, and her, the said *Julia A. Alvord*, did then and there, by force and against her will, feloniously ravish and carnally know, against the peace of said commonwealth, and contrary [(*concluding as in Form No. 10699*).][4]

Form No. 17060.[5]

(*Title of court and cause as in Form No. 10701.*)

John Doe is accused by the grand jury of the county of *Ramsey*, by this indictment, of the crime of rape, committed as follows:

The said *John Doe*, on the *first* day of *January*, A. D. 1899, in the city of *St. Paul*, in this county, did feloniously ravish one *Julia Roe*, and did then and there feloniously, forcibly and against her will, and without her consent, carnally know her, the said *Julia Roe*, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Minnesota*.

(*Date, signature and indorsements as in Form No. 10701.*)

note 1, p. 538; and, generally, *supra*, note 2, p. 541.

1. *Kentucky.* — Stat. (1894), § 1154.

See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 2, p. 541.

2. *Massachusetts.* — Stat. (1893), c. 466.

See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 2, p. 541.

3. It was held that this indictment duly charged the offense and was sufficient.

4. The matter to be supplied within [ ] will not be found in the reported case.

5. *Minnesota.* — Laws (1899), c. 72.

See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 2, p. 541.

Form No. 17061.[1]

(*Commencing as in Form No. 10703, and continuing down to* *) in and upon one *Julia Roe*, a woman, unlawfully, violently and feloniously did make an assault, and her, the said *Julia Roe*, then and there unlawfully, forcibly and against her will, feloniously did ravish and carnally know, contrary (*concluding as in Form No. 10703*).

Form No. 17062.[2]

(*Title of court and cause as in Form No. 10704.*)

John Doe is accused by the grand jury of the county of *Silver Bow*, by this indictment, of the crime of rape, committed as follows:

The said *John Doe*, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-nine*, at the county of *Silver Bow*, with force and arms, in and upon one *Julia Roe*, then and there being a female, feloniously, violently, forcibly and unlawfully did make an assault, and her, the said *Julia Roe*, then and there feloniously, violently, forcibly and unlawfully and against her will, did ravish and carnally know, contrary (*concluding as in Form No. 10704*).

Form No. 17063.[3]

(*Commencing as in Form No. 10708, and continuing down to* *) in and upon the body of one *Julia Roe*, a woman, in the peace of God and this state then and there being, an assault did make, and her, the said *Julia Roe*, then and there violently, and against her will, feloniously did ravish and carnally know, contrary (*concluding as in Form No. 10708*).

Form No. 17064.[4]

(*Title of court and cause as in Form No. 10710.*)

The grand jury of the county of *Suffolk* by this indictment accuse *John Doe* of the crime of rape, committed as follows:

The said *John Doe*, on the *first* day of *January*, 1899, at the village of *Northport*, in the town of *Huntington*, in this county, with force and arms, in and upon *Julia Roe*, she then and there being a female, violently, forcibly and feloniously did make an assault, and her, the said *Julia Roe*, then and there violently, forcibly and against her will, feloniously did ravish and carnally know.

Daniel Webster,
District Attorney of the County of *Suffolk*.

1. *Missouri.* — Rev. Stat. (1899), § 1837.
See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 2, p. 541.

2. *Montana.* — Pen. Code (1895), § 450.
See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 2, p. 541.

3. *New Jersey.* — Gen. Stat. (1895), p. 1096, § 250.
See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 2, p. 541.

4. *New York.* — Cook's Pen. Code (1898), § 278.
See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 2, p. 541.

Form No. 17065.[1]

(Precedent in State *v.* Johnson, 100 N. Car. 495.)[2]

State of *North Carolina*, } *Superior* Court,
Edgecombe County. } *Fall* Term, 1887.

The jurors for the State, upon their oath, present: That *Van Johnson*, late of the County of *Edgecombe*, on the *5th* day of *March*, anno Domini 1887, at and in the County aforesaid, with force and arms, in and upon one *Dilsey Ann Hyman*, in the peace of God and the State of *North Carolina* then and there being, violently and feloniously did make an assault, and her, the said *Dilsey Ann Hyman*, then and there violently, forcibly and against her will, feloniously did ravish and carnally know, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

Geo. H. White, Solicitor.

Form No. 17066.[3]

(Hill's Anno. Laws Oregon (1892), p. 1002, No. 7.)

(*Commencing as in Form No. 10715, and continuing down to* *) forcibly did ravish *Julia Doe*, a woman of the age of *fourteen* years or upwards, contrary (*concluding as in Form No. 10715*).

Form No. 17067.[4]

(*Commencing as in Form No. 10720, and continuing down to* *) forcibly and feloniously did make an assault upon one *Julia Roe*, a woman in the peace of the state then and there being, and he, the said *John Doe*, did then and there, forcibly and feloniously, and against her will, have carnal knowledge of her, the said *Julia Roe*, to the evil example of all others in like cases offending, contrary (*concluding as in Form No. 10720*).

Form No. 17068.[5]

(*Commencing as in Form No. 10721, and continuing down to* *) in and upon *Julia Roe*, a woman, make an assault, and did then and there, by force, threats and fraud, and without the consent of her, the said *Julia Roe*, unlawfully have carnal knowledge of the said *Julia Roe*, against (*concluding as in Form No. 10721*).

1. *North Carolina.* — Code (1883), § 1101.

See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 2, p. 541.

2. It was held that this indictment was sufficient where drawn without reference to the age of the victim, but as the defense was that the victim voluntarily assented to the intercourse, and it was shown that she was under the age of consent, a judgment of conviction was reversed on the ground that the indictment should have charged that she was under the age prescribed by the statute.

3. *Oregon.*—Hill's Anno. Laws (1892), § 1733.

See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 2, p. 541.

4. *Tennessee.* — Code (1896), § 6451.

See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 2, p. 541.

5. *Texas.* — Pen. Code (1895), art. 633.

See also list of statutes cited *supra*,

Form No. 17069.[1]

(*Commencing as in Form No. 10723, and continuing down to* *) with force and arms, unlawfully and feloniously, in and upon the body of one *Julia Roe*, of said *Woodstock*, a woman (or *maid* or *damsel*, as the case may be), an assault did make, and her, the said *Julia Roe*, with like force and arms, then and there unlawfully and feloniously did carnally know and ravish the said *Julia Roe* by force and against her will, contrary (*concluding as in Form No. 10723*).

Form No. 17070.[2]

(*Commencing as in Form No. 10724, and continuing down to* *) in and upon one *Julia Roe*, the said *Julia Roe* then being a female over the age of *fourteen* years, to wit, of the age of *eighteen* years, violently, forcibly and feloniously did make an assault, and her, the said *Julia Roe*, then and there, to wit, on the day and year aforesaid, at the county aforesaid, feloniously did ravish and carnally know, by force and against the will of her, the said *Julia Roe*, against (*concluding as in Form No. 10724*).

Form No. 17071.[3]

(*Commencing as in Form No. 10727, and continuing down to* *) with force and arms, in and upon one *Julia Roe*, did violently and feloniously make an assault, and her, the said *Julia Roe*, then and there, by force and against her will, violently and feloniously did ravish and carnally know, against the peace (*concluding as in Form No. 10727*).

II. BY FRAUD.

1. In General.[4]

Form No. 17072.[5]

(*Title of court and cause as in Form No. 10725.*)

John Doe is accused by the grand jury of the state of *Washington*, for the county of *Spokane*, by this indictment, of the crime of rape, committed as follows:

note 1, p. 538; and, generally, *supra*, note 2, p. 541.

1. *Vermont.* — Laws (1898), p. 90, No. 118, § 1.

See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 2, p. 541.

This form is substantially the indictment in Aikens' Prac. F. 235, No. 182.

2. *Virginia.* — Code (Supp. 1898), § 3680.

See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 2, p. 541.

3. *Wisconsin.* — Stat. (1898), § 4381.

See also list of statutes cited *supra*, note 1, p. 538; and, generally, *supra*, note 2, p. 541.

4. Requisites of Indictment or Information, Generally. — For the formal parts of an indictment or information in a particular jurisdiction see the titles INDICTMENTS, vol. 9, p. 615; INFORMATIONS IN CRIMINAL CASES, vol. 9, p. 768.

Particular Kind of Fraud. — While it is better practice to set out at least enough in the indictment to indicate what particular kind of fraud the prosecution relies on, yet a general indictment charging fraud will authorize the proof of the means employed. Franklin *v.* State, 34 Tex. Crim. 203.

5. *Washington.* — Ballinger's Anno. Codes & Stat. (1897), § 7062.

See also list of statutes cited *supra*, note 1, p. 538.

The said *John Doe*, on the *first* day of *January*, 1899, in the county of *Spokane* aforesaid, unlawfully and feloniously did induce one *Julia Roe*, a female then and there being, to submit to sexual intercourse with him, the said *John Doe*, by deceit, deception, imposition and fraud practiced by him, the said *John Doe*, upon the said *Julia Roe*, as follows, to wit, (*specifying the deceit, deception, imposition or fraud practiced*), and he, the said *John Doe*, then and there, by means of such deceit, deception, imposition and fraud, unlawfully and feloniously did carnally know the said *Julia Roe*.

Dated (*concluding as in Form No. 10725*).

2. By Personating Husband of Married Woman.[1]

Form No. 17073.[2]

(*Venue and title of court as in Form No. 10680.*)

The grand jury of said county charge that, before the finding of this indictment, *John Doe* did falsely personate the husband of one *Sarah Roe*, a married woman then and there being, and did by such false personation deceive her, the said *Sarah Roe*, and by means of such deception he, the said *John Doe*, did then and there gain access to her, the said *Sarah Roe*, and of her, the said *Sarah Roe*, then and there unlawfully and feloniously did have carnal knowledge, against the peace and dignity of the state of *Alabama*.

(*Signature and indorsements as in Form No. 10680.*)

Form No. 17074.[3]

Territory of Arizona }
against }
John Doe. }

In the *District* Court of the *Second* Judicial District of the Territory of *Arizona*, in and for the county of *Gila*, the *first* day of *February*, 1899.

John Doe is accused by the grand jury of the county of *Gila*, by this indictment, of the crime of rape, committed as follows:

The said *John Doe*, on the *first* day of *January*, A. D. 1899, at the county of *Gila*, did pretend to be the husband of one *Julia Roe*, a female then and there being, and not the wife of the said *John Doe*, with intent to induce the said *Julia Roe* to believe him, the said *John Doe*, to be her husband, and he, the said *John Doe*, did then and there, by such pretense of being the husband of the said *Julia Roe*,

1. **Statutory provisions** relating to and punishing unlawful intercourse with a married woman, had by false personation of husband, exist in the following states:
Alabama. — Crim. Code (1896), § 5449.
Arizona. — Pen. Code (1901), § 230.
California. — Pen. Code (1897), § 261.
Idaho. — Laws (1899), p. 215.
Montana. — Pen. Code (1895), § 450.
North Carolina. — Code (1883), §§ 1103, 1104.
North Dakota. — Rev. Codes (1895), § 7156.
Oklahoma. — Laws (1895), c. 20, art. 2.
South Dakota. — Laws (1893), p. 229.
Tennessee. — Code (1896), § 6453.
Texas. — Pen. Code (1895), art. 636.
Utah. — Rev. Stat. (1898), § 4217.

2. *Alabama*. — Crim. Code (1896), § 5449.
See also list of statutes cited *supra*, note 1, this page.

3. *Arizona*. — Pen. Code (1901), § 230.

induce the said *Julia Roe* to believe him, the said *John Doe*, to be her husband, and she, the said *Julia Roe*, induced by such pretense practiced by the said *John Doe* as aforesaid, did submit to an act of sexual intercourse with him, the said *John Doe*, and he, the said *John Doe*, then and there, by such pretense by him practiced, did accomplish an act of sexual intercourse with her, the said *Julia Roe*.

(*Signature and indorsements as in Form No. 10681.*)

Form No. 17075.[1]

(*Title of court and cause as in Form No. 10711.*)

The jurors for the state upon their oath present, that *John Doe*, late of the county of *Wake*, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-nine*, at and in the county aforesaid, did falsely and fraudulently personate the husband of one *Sarah Roe*, a married woman then and there being, and, by means of such fraud in personating the husband of said *Sarah Roe*, unlawfully and feloniously did then and there have carnal knowledge of the said *Sarah Roe*, against the form of the statute (*concluding as in Form No. 10711*).

Form No. 17076.[2]

(*Title of court and cause as in Form No. 10720.*)

The jurors of the state of *Tennessee*, duly elected, impaneled, sworn and charged to inquire in and for the body of the county of *Hamilton* aforesaid, on their oath present that *John Doe*, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-nine*, in said *Hamilton* county, state of *Tennessee* aforesaid, did pretend to be the husband of one *Sarah Roe*, a married woman then and there being, and, under such pretense of being the husband of the said *Sarah Roe*, wilfully, maliciously, and without her consent, then and there did carnally know the said *Sarah Roe*, to the evil example of all others in like cases offending, contrary (*concluding as in Form No. 10720*).

Form No. 17077.[3]

In the name and by the authority of the state of *Texas*.

The grand jurors of the county of *Freestone*, state aforesaid, duly organized as such, at the *January* Term, 1899, of the *District* Court of said county, upon their oaths in said court present that *John Doe*, on or about the *first* day of *January*, one thousand eight hundred and *ninety-nine*, and anterior to the presentment of this indictment,

See also list of statutes cited *supra*, note 1, p. 556.

1. *North Carolina.* — Every person who shall have carnal knowledge of any married woman by fraud in personating her husband, shall be guilty of a felony and punished by imprisonment in the penitentiary at hard labor for not less than ten nor more than twenty years. Code (1883), § 1103.

See also list of statutes cited *supra*, note 1, p. 556.

2. *Tennessee.* — Any person who wilfully or maliciously has carnal knowledge of a married woman without her consent, under the semblance of her husband, or pretending to be her husband, shall be punished as in the case of rape. Code (1896), § 6453.

See also list of statutes cited *supra*, note 1, p. 556.

3. *Texas.* — Pen. Code (1895), art. 636.

See also list of statutes cited *supra*, note 1, p. 556.

in the county of *Freestone* and state of *Texas*, did falsely and fraudulently personate the husband of one *Sarah Roe*, a woman then and there being, and he, the said *John Doe*, then and there, by such fraud in personating the husband of the said *Sarah Roe* as aforesaid, unlawfully and feloniously, and without her consent, did have carnal knowledge of the said *Sarah Roe*, against (*concluding as in Form No. 10721*).

3. By Use of Drugs.[1]

Form No. 17078.[2]

(*Commencing as in Form No. 10694, and continuing down to* *) in and upon one *Julia Roe*, a woman of the age of *eighteen* years and upward, unlawfully and feloniously an assault did make, and then and there unlawfully and feloniously, and without her consent, have carnal knowledge of her, the said *Julia Roe*, by administering to her a certain substance, liquid or potion, to wit, (*specifying the same*) by inhalation (*or otherwise, as the case may be*, or *a certain substance, liquid or potion the name of which, and the method by which the same was administered, being to the grand jurors unknown*), which said substance, liquid or potion did produce in her, the said *Julia Roe*, such stupor and imbecility of mind and weakness of body as to prevent any effectual resistance on the part of her, the said *Julia Roe*, and did prevent any resistance by her, the said *Julia Roe*, to and against him, the said *John Doe*, whereby and by reason whereof the said *John Doe* then and there her, the said *Julia Roe*, so as aforesaid unlawfully, forcibly, and without her consent, feloniously did ravish and carnally know, contrary (*concluding as in Form No. 10694*).

III. By Threats.[3]

1. Statutes relating to carnal intercourse with a female by the use of drugs or intoxicating substances exist in the following states:

Alabama.— Crim. Code (1896), § 5446.
Arizona. — Pen. Code (1901), § 230.
Arkansas. — Sand. & H. Dig. (1894), § 1867.
California. — Pen. Code (1897), § 261.
Idaho. — Laws (1899), p. 215.
Iowa. — Code (1897), § 4758.
Kansas. — Gen. Stat. (1897), c. 100, § 32.
Louisiana. — Rev. Stat. (1897), § 787.
Minnesota. — Laws (1899), c. 72.
Mississippi. — Anno. Code (1892), § 1282.
Missouri. — Rev. Stat. (1899), § 1839.
Montana. — Pen. Code (1895), § 450.
New Mexico. — Comp. Laws (1897), § 1090.
New York. — Cook's Pen. Code (1898), § 278.
North Dakota. — Rev. Codes (1895), § 7156.
Oklahoma.— Laws (1895), c. 20, art. 2.
South Dakota. — Laws (1893), p. 229.
Tennessee. — Code (1896), § 6454.
Texas. — Pen. Code (1895), art. 636.
Utah. — Rev. Stat. (1898), § 4217.
Washington. — Ballinger's Anno. Codes & Stat. (1897), § 7063.

Indictment in Common Form Sufficient. — In People *v.* Snyder, 75 Cal. 323, it was held that an information alleging force and violence would support a conviction, where the proof showed the rape to have been committed by the use of a drug.

2. *Kansas.* — Gen. Stat. (1897), c. 100, § 32.

See also list of statutes cited *supra*, note 1, this page.

3. Statutory provisions relating to carnal knowledge, where the female is prevented by threats and the fear of

Form No. 17079.[1]

(*Commencing as in Form No. 10683, and continuing down to* *.) The said *John Doe*, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-nine*, at the said city and county of *San Francisco*, in and upon one *Julia Roe*, a female then and there being, and not the wife of the said *John Doe*, unlawfully and feloniously did make an assault, and then and there unlawfully and feloniously, and without her consent, did have carnal knowledge of her, the said *Julia Roe*, by threats of great and immediate bodily harm to her, the said *Julia Roe*, accompanied by apparent power of execution, on the part of him, the said *John Doe*, by which said threats of great and immediate bodily harm then and there made by the said *John Doe*, with apparent power of immediate execution, she, the said *Julia Roe*, having then and there reasonable cause to believe and to fear that the said threats would be then and there executed to her great and immediate bodily harm, was prevented from offering any resistance to and against him, the said *John Doe*, whereby and by reason whereof he, the said *John Doe*, unlawfully and forcibly, and without her consent, feloniously did carnally know the said *Julia Roe*, contrary (*concluding as in Form No. 10683*).

IV. OF DAUGHTER OR SISTER.

Form No. 17080.[2]

(*Commencing as in Form No. 10713, and continuing down to* *) in and upon one *Julia Doe*, then and there being, unlawfully, violently and feloniously did make an assault, and her, the said *Julia Doe*, then and there forcibly and against her will, feloniously did ravish and carnally know, she, the said *Julia Doe*, then and there being the

bodily harm from resisting the act, exist in the following states:

Arizona. — Pen. Code (1901), § 230.
California. — Pen. Code (1897), § 261.
Idaho. — Laws (1899), p. 215.
Minnesota. — Laws (1899) c. 72.
Montana. — Pen. Code (1895), § 450.
New York. — Cook's Pen. Code (1898), § 278.
North Dakota. — Rev. Codes (1895), § 7156.
Oklahoma. — Laws (1895), c. 20, art. 2.
South Dakota. — Laws (1893), p. 229.
Texas. — Pen. Code (1895), art. 635.
Utah. — Rev. Stat. (1898), § 4217.

Requisites of Indictment or Information, Generally. — For the formal parts of an indictment or information in a particular jurisdiction see the titles INDICTMENTS, vol. 9, p. 615; INFORMATIONS IN CRIMINAL CASES, vol. 9, p. 768.

Nature of Threats. — An indictment is sufficient to charge rape if it alleges in general terms that it was accompanied by force, by threats or by fraud, or all of these means together. It is not necessary that it should allege the character of the force or specify the threats. Cooper *v.* State, 22 Tex. App. 419.

Age of Injured Person. — Indictment for rape by means of force, threats or fraud, without the consent of the woman, need not allege that the woman was over the age of ten years, and if alleged need not be proved. Nicholas *v.* State, 23 Tex. App. 317.

1. *California.* — Pen. Code (1901), § 261.

See also, generally, *supra*, note 3, p. 558.

2. *Ohio.* — Bates' Anno. Stat. (1897), § 6817.

See also list of statutes cited *supra*, note 1, p. 538.

This indictment is set out in Whart. Prec. Ind. and Pl. (1857), p. 158.

daughter (or *sister*, as the case may be) of the said *John Doe*, and he, the said *John Doe*, then and there well knowing the said *Julia Doe* to be his daughter (or *sister*), contrary (*concluding as in Form No. 10713*).

V. WHERE FEMALE IS MENTALLY UNSOUND.[1]

Form No. 17081.[2]

(*Commencing as in Form No. 10683, and continuing down to* *.) The said *John Doe*, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-nine*, at said city and county of *San Francisco*, did then and there unlawfully and feloniously accomplish an act of sexual intercourse with one *Julia Roe*, a female then and there being, and not the wife of him, the said *John Doe*, she, the said *Julia Roe*, being at the time of the commission of the said act incapable through lunacy and other unsoundness of mind from giving legal consent to the said act, contrary (*concluding as in Form No. 10683*).

1. Statutory provisions relating to rape or carnal abuse of an imbecile, lunatic, or one mentally deficient, exist in the following states:

Arizona. — Pen. Code (1901), § 230.
California. — Pen. Code (1897), § 261.
Idaho. — Laws (1899), p. 215.
Indiana. — Horner's Stat. (1896), § 1918.
Iowa. — Code (1897), § 4758.
Kentucky. — Stat. (1894), § 1155.
Maryland. — Laws (1892), c. 204.
Minnesota. — Laws (1899), c. 72.
Montana. — Pen. Code (1895), § 450.
New Mexico. — Comp. Laws (1897), § 1090.
New York. — Cook's Pen. Code (1898), § 278.
North Dakota. — Rev Codes (1895), § 7156.
Oklahoma. — Laws (1895), c. 20, art. 2.
South Dakota. — Laws (1893), p. 229.
Texas. — Pen. Code (1895), art. 633.
Utah. — Rev. Stat. (1898), § 4217.
Virginia. — Code (Supp. 1898), § 3680.
Washington. — Ballinger's Anno. Codes & Stat. (1897), § 7063.

Requisites of Indictment or Information, Generally. — For the formal parts of an indictment or information in a particular jurisdiction see the titles INDICTMENTS, vol. 9, p. 615; INFORMATIONS IN CRIMINAL CASES, vol. 9, p. 768.

Force and Violence. — An indictment for carnal intercourse with an imbecile need not allege that the act was done by force or against the will of the injured party. State *v.* Enright, 90 Iowa 520; State *v.* Austin, 109 Iowa 118; Caruth *v.* State, (Tex. Crim. 1894) 25 S. W. Rep. 778. Or without the consent of the injured party. Caruth *v.* State, (Tex. Crim. 1894) 25 S. W. Rep. 778.

Precedent. — In State *v.* Hann, 73 Minn. 140, the indictment was as follows: That defendant "did wrongfully, unlawfully, and feloniously, without the consent of *B.*, a female of the age of *16* years, and not the wife of the said *William Hann*, forcibly ravish and have sexual intercourse with the said *B.*; that then and there the said *B.* was an imbecile, and was of unsound mind; and that, by reason of such imbecility and unsoundness of mind, the said *B.* was then and there incapable of giving consent to said ravishing and sexual intercourse; and that then and there, in manner aforesaid, the said *William Hann* committed the crime of rape, contrary to the form," etc.

It was held that this indictment was sufficient and that the most that could possibly be urged against it was that it charged the commission of the crime in two different ways.

2. *California.* — Pen. Code (1901), § 261.

See also, generally, *supra*, note 1, this page.

Form No. 17082.[1]

(*Commencing as in Form No. 10692, and continuing down to* *) being then and there a person of the age of *seventeen* years and upward, to wit, of the age of *thirty* years, did then and there have carnal knowledge of one *Julia Roe*, a woman then and there being, and not being the wife of him, the said *John Doe*, she, the said *Julia Roe*, being then and there insane, and he, the said *John Doe*, then and there well knowing her, the said *Julia Roe*, to be insane, contrary (*concluding as in Form No. 10692*).

Form No. 17083.[2]

(Precedent in State *v.* Enright, 90 Iowa 520.)[3]

[(*Commencing as in Form No. 10693, and continuing down to* *)][4] did willfully, unlawfully, and feloniously ravish and carnally know one *Martha Curran*, then and there being, the said *Martha Curran* being then and there a girl of the age of *fourteen* years, and naturally imbecile and weak in mind, and deficient in understanding, to such an extent that she did not know or comprehend the nature of the act, and naturally of such imbecility of mind and weakness of body as to prevent her making effectual resistance to said defendant and his unlawful act, [contrary (*concluding as in Form No. 10693*).][5]

Form No. 17084.[6]

(Precedent in Caruth *v.* State, (Tex. Crim. 1894) 25 S. W. Rep. 778.)[7]

[(*Commencing as in Form No. 10721, and continuing down to* *)][4] in and upon one *Ella Ledford*, a woman, make an assault, and did then and there ravish and have carnal knowledge of the said *Ella Ledford*, she being then and there other than his wife, and being then and there so mentally diseased at the time as to have no will to oppose the act of carnal knowledge, and he (the said *Caruth*) then and there knowing her (the said *Ella Ledford*) to be so mentally diseased, contrary [(*concluding as in Form No. 10721*).][4]

VI. Where Female is Unconscious of the Nature of the Act.[8]

1. *Indiana.* — Horner's Stat. (1896), § 1918.
See also, generally, *supra*, note 1, p. 560.

2. *Iowa.* — Code (1897), § 4758.
See also, generally, *supra*, note 1, p. 560.

3. This indictment was held to be in all respects sufficient.

4. The matter to be supplied within [ ] will not be found in the reported case.

5. The matter supplied and to be supplied within [ ] will not be found in the reported case.

6. *Texas.* — Pen. Code (1895), art. 633.
See also, generally, *supra*, note 1, p. 560.

7. This indictment was held sufficient against the objection that there was no allegation as to the nonconsent of the female. It was held to be unnecessary to charge that the act was committed with or without consent, the question of consent being immaterial.

8. **Statutory provisions** relating to carnal knowledge of a female, where she is at the time unconscious of the nature of the act, exist in the following states:
Arizona. — Pen. Code (1901), § 230.
California. — Pen. Code (1897), § 261.
Idaho. — Laws (1899), p. 215.
Minnesota. — Laws (1899), c. 72.

Form No. 17085.[1]

(*Commencing as in Form No. 10722, and continuing down to* *) in and upon one *Julia Roe*, a female then and there being, and not the wife of the said *John Doe*, unlawfully and feloniously an assault did make, and then and there unlawfully and feloniously, and without her consent, did have carnal knowledge of her, the said *Julia Roe*, she, the said *Julia Roe*, being, at the time of the commission thereof, unconscious of the nature of the said act of sexual intercourse, and he, the said *John Doe*, then and there, at the time of committing the said act, well knowing the said *Julia Roe* to be unconscious of the nature thereof, contrary (*concluding as in Form No. 10722*).

VII. WHERE FEMALE IS UNDER THE AGE OF CONSENT.[2]

Montana. — Pen. Code (1895), § 450.
New York. — Cook's Pen. Code (1898), § 278.
North Dakota. — Rev. Codes (1895), § 7156.
Oklahoma. — Laws (1895), c. 20, art. 2.
South Dakota. — Laws (1893), p. 229.
Utah. — Rev. Stat. (1898), § 4217.

Indictment in Common Form Sufficient. — Under a common-law indictment for rape, the accused may be convicted where it is shown that the act was accomplished upon a female so drunk as to be utterly senseless and incapable of consenting. This ruling was on the ground that the words "without her consent" and "against her will" are synonymous. Com. *v.* Burke, 105 Mass. 376.

1. *Utah.* — Rev. Stat. (1898), § 4217.

See also, generally, *supra*, note 8, p. 561.

2. **Statutory provisions** relating to the offense of rape, where the female is under the age of consent, exist in the following states:

Alabama. — Crim. Code (1896), §§ 5447, 5448.
Arizona. — Pen. Code (1901), § 230.
Arkansas. — Sand. & H. Dig. (1894), § 1865.
California. — Pen. Code (1897), § 261.
Colorado. — Mills' Anno. Stat. (1891), § 1211.
Connecticut. — Laws (1895), c. 236.
Delaware. — Rev. Stat. (1893), p. 924, c. 127, § 10.
Florida. — Rev. Stat. (1892), § 2396.
District of Columbia. — Comp. Stat. (1894), c. 16, § 24.
Idaho. — Laws (1899), p. 215.
Illinois. — Starr & C. Anno. Stat. (1896), c. 38, par. 386.
Indiana. — Horner's Stat. (1896), § 1917.
Iowa. — Code (1897), § 4756.
Kansas. — Gen. Stat. (1897), c. 100, § 31.
Kentucky. — Stat. (1894), § 1155.
Louisiana. — Laws (1896), p. 165, No. 115.
Maine. — Stat. (Supp. 1895), c. 118, § 17.
Maryland. — Laws (1892), c. 204.
Massachusetts. — Stat. (1893), c. 466.
Michigan. — Comp. Laws (1897), § 11489.
Minnesota. — Stat. (1894), § 6524.
Mississippi. — Anno. Code (1892), § 1281.
Missouri. — Rev. Stat. (1899), §§ 1837, 1838.
Montana. — Pen. Code (1895), § 450.
Nebraska. — Comp. Stat. (1899), § 6661.
Nevada. — Comp. Laws (1900), § 4698.
New Hampshire. — Laws (1897), c. 35.
New Jersey. — Gen. Stat. (1895), p. 1096, § 250.
New Mexico. — Comp. Laws (1897), §§ 1090, 1095.
New York. — Cook's Pen. Code (1898), § 278.
North Carolina. — Code (1883), § 1101; Laws (1895), c. 295.
North Dakota. — Rev. Codes (1895), §§ 7156, 7159.
Ohio. — Bates' Anno. Stat. (1897), § 6816.
Oklahoma. — Laws (1895), c. 20, art. 2.
Oregon. — Hill's Anno. Laws (1892), § 1733.
Pennsylvania. — Bright. Pur. Dig. (1894), p. 535, § 367.
Rhode Island. — Gen. Laws (1896), c. 281, § 3.

South Carolina. — Crim. Stat. (1893), § 115

South Dakota. — Laws (1893), p. 229.

Tennessee. — Code (1896), §§ 6455, 6456.

Texas. — Pen. Code (1895), art. 633.

Utah. — Rev. Stat. (1898), §§ 4217, 4221.

Vermont. — Laws (1898), p. 90.

Virginia. —.Code (Supp. 1898), § 3680.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 7062.

West Virginia. — Code (1899), c. 144, § 15.

Wisconsin. — Stat. (1898), § 4382.

Wyoming. — Rev. Stat. (1887), § 882.

United States. — 25 Stat. at L. (1889), c. 120.

Requisites of Indictment or Information, Generally. — For the formal parts of an indictment or information in a particular jurisdiction see the titles INDICTMENTS, vol. 9, p. 615; INFORMATIONS IN CRIMINAL CASES, vol. 9, p. 768.

Description of Injured Person — *Age.* — That the injured person was under the statutory age of consent must be stated. People *v.* Gardner, 98 Cal. 127; Bonner *v.* State, 65 Miss. 293; Mobley *v.* State, 46 Miss. 501; State *v.* Johnson, 100 N. Car. 494; State *v.* Farmer, 4 Ired. L. (26 N. Car.) 224; State *v.* Haddon, 49 S. Car. 308; Mosely *v.* State, 9 Tex. App. 137; State *v.* Wheat, 63 Vt. 673.

In *North Carolina*, it has been held that if the female be forcibly ravished, although she be under the age of consent, her age need not be alleged in the indictment. State *v.* Johnson, 100 N. Car. 494.

In Evans *v.* State, 52 N. J. L. 261, it was questioned whether an indictment which charged a rape, and also charged that the girl was under sixteen, could be altered by the court so as to change it from rape into an indictment for the statutory offense of carnally abusing a girl.

Sufficient Averment of Age. — The age of the injured party is sufficiently averred if in the indictment it is shown by necessary implication to be within the age specified in the statute. Inman *v.* State, 65 Ark. 508; People *v.* Mills, 17 Cal. 276; State *v.* Newton, 44 Iowa 45.

In People *v.* Mills, 17 Cal. 276, the indictment alleged the female to be "under *ten* years, to wit, of the age of *nine* years and upward."

Female Child. — An indictment for abusing and carnally knowing a female child under the age of ten years need not describe the infant as a female child. State *v.* Goings, 4 Dev. & B. L. (20 N. Car.) 152.

Spinster. — Omission of the word "spinster" in the indictment does not vitiate it. State *v.* Goings, 4 Dev. & B. L. (20 N. Car.) 152.

Not the Wife of Defendant. — An indictment for carnally knowing a female under the age of consent need not allege that the injured party was not the wife of the accused. The fact of marriage, if it exists, is a matter of defense, to be shown by the accused on trial. State *v.* White, 44 Kan. 514; Com. *v.* Fogerty, 8 Gray (Mass.) 489; Com. *v.* Scannel, 11 Cush. (Mass.) 547; State *v.* Williams, 9 Mont. 179; State *v.* Halbert, 14 Wash. 306. And this rule holds good even where the surname of the injured party as alleged in the indictment is the same as that of the accused. State *v.* Halbert, 14 Wash. 306.

In *Oklahoma*, it is held that under the statute defining the crime the indictment must negative the fact of the injured party being the wife of the defendant. Parker *v.* Territory, 9 Okla. 109; Young *v.* Territory, 8 Okla. 525.

In *Texas*, the indictment must contain this negative averment. Edwards *v.* State, 37 Tex. Crim. 242; Dudley *v.* State, 37 Tex. Crim. 543.

Age of Defendant. — The indictment need not allege the age of the defendant. If he were under the age specified in the statute, such fact is a matter of defense. People *v.* Ah Yek, 29 Cal. 575; Sutton *v.* People, 145 Ill. 279; Com. *v.* Scannel, 11 Cush. (Mass.) 547; State *v.* Sullivan, 68 Vt. 540.

Force and Violence. — The indictment need not allege that the act was committed by force and violence, these being immaterial factors. People *v.* Rangod, 112 Cal. 669; Holton *v.* State, 28 Fla. 303; Porter *v.* People, 158 Ill. 370; Bonner *v.* State, 65 Miss. 293; State *v.* Horne, 20 Oregon 485; State *v.* Haddon, 49 S. Car. 308; Mosely *v.* State, 9 Tex. App. 137; State *v.* Wheat, 63 Vt. 673; *In re* Lane, 135 U. S. 443.

Unlawfully. — The indictment need not charge that the act was done unlawfully, it being a crime at common law. Barnard *v.* State, 88 Wis. 656.

Want of Consent. — An indictment

need not allege that the act was committed without the consent or against the will of the injured party. People *v.* Rangod, 112 Cal. 669; Holton *v.* State, 28 Fla. 303; State *v.* Woods, 49 Kan. 237; Davis *v.* State, 31 Neb. 247; Farrell *v.* State, 54 N. J. L. 416.

Precedents. — Where an indictment contains two counts, the first charging that the defendant Andrew Beason, "before the finding of this indictment, forcibly ravished *Virginia Beard*, a female," and the second charging that defendant "did carnally know, or abuse in the attempt to carnally know, *Virginia Beard*, a female under the age of *ten* years," it is sufficient and is not bad for duplicity. Beason *v.* State, 72 Ala. 191.

In Inman *v.* State, 65 Ark. 508, the indictment charged that the defendant "unlawfully and feloniously did make an assault on one *Daisy Wise*, a female child under the age of puberty, to wit: of the age of *fourteen* years, and her, the said *Daisy Wise*, unlawfully and feloniously did carnally know and abuse." It was held that this indictment sufficiently charged the offense to have been committed upon a female under the age of sixteen years.

Where an indictment charges that the defendant "did unlawfully and feloniously have carnal knowledge of a certain female child named *M. A. W.*, she, the said *M. A. W.*, then being under *ten* years of age, to wit, of the age of *nine* years and upward," it is sufficient. People *v.* Mills, 17 Cal. 276.

In Holton *v.* State, 28 Fla. 303, an indictment which charged as follows: "The grand jurors for the State of *Florida*, duly chosen, empaneled and sworn diligently to enquire and true presentment make, in and for the body of the county of *Columbia*, and *Third* Judicial District of said State, upon their oaths present: That *Frank Holton*, late of said county, *laborer*, on the *first* day of *August*, A. D. 1890, at and in the county, circuit and State aforesaid, with force and arms, unlawfully did then and there carnally know and have carnal intercourse with one *Irene Alexander*, an unmarried female under the age of *seventeen* years; and that the said *Irene Alexander* thereby became pregnant with child and was delivered of a child. So the jurors aforesaid, upon their oaths aforesaid, do say that the said *Frank Holton*, at the time aforesaid, and in the county, State and circuit aforesaid, did commit the crime of having carnal intercourse with an unmarried female under the age of *seventeen* years of age, against the peace and dignity of the State of *Florida*, and contrary to the form of the statute in such cases made and provided," was held sufficient.

In Batterson *v.* State, 63 Ind. 531, the indictment was as follows:

"The grand jurors for the county of *St. Joseph*, in the State of *Indiana*, good and lawful men, duly and legally empanelled, sworn and charged in the *St. Joseph Circuit* Court of said State, at the *December* term, 1878, to enquire into felonies and certain misdemeanors in and for the body of said county of *St. Joseph*, in the name and by the authority of the State of *Indiana*, on their oath do present, that one *John Batterson*, late of said county, on the *23d* day of *November*, A. D. 1878, at said county and State aforesaid, did then and there, in a rude, insolent and angry manner, unlawfully and feloniously touch one *Sarah A. Mell*, a woman child, then and there under *twelve* years of age, and did then and there unlawfully and feloniously have carnal knowledge of her, the said *Sarah A. Mell*, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of *Indiana*."

This indictment was not questioned.

In State *v.* Newton, 44 Iowa 45, the indictment charged that on, etc., at etc., the defendant, "upon one *Jerusha A. L.*, a female child under the age of —— years, to wit: *seven* years of age, did feloniously make an assault with intent the said *Jerusha A. L.*, feloniously to ravish and carnally know, by force and against her will." It was held that this charge alleged with a sufficient degree of certainty that the female was a child under the age of ten years.

In State *v.* White, 44 Kan. 514, an information was sufficient which charged as follows: "That on or about the *12th* day of *May*, 1889, in said county of *Norton* and state of *Kansas*, one *Charles W. White* did then and there unlawfully and feloniously commit the crime of rape, by then and there unlawfully, feloniously and carnally knowing one *Lottie Linden*, she, the said *Lottie Linden*, then and there being a female under the age of *eighteen* years; con-

trary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Kansas*."

In State *v.* Spidle, 42 Kan. 441, the indictment contained five counts, each charging a separate offense. The first two counts were as follows:

"At the *January* term of said court, 1889, the jurors of the grand jury of said county, duly impaneled, sworn, and charged to inquire and true presentment make of all public offenses against the laws of the state of *Kansas*, cognizable by said court, committed or triable in said county, on their oaths do find and present, that on the *1st* day of *April*, 1888, in the county of *Ness* and state of *Kansas*, one *Jacob B. Spidle* did then and there unlawfully, feloniously and carnally know one *Alfaretta Salisbury*, she, the said *Alfaretta Salisbury*, being then and there a female person under the age of *eighteen* years; contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the state of *Kansas*.

Second count: And the jurors aforesaid on their oaths aforesaid, do further find and present, that the said *Jacob B. Spidle*, on the *10th* day of *April*, 1888, in the county of *Ness* and state of *Kansas* aforesaid, did then and there unlawfully, feloniously and carnally know, ravish and have sexual intercourse with one *Alfaretta Salisbury*, then and there being a female person under the age of *eighteen* years and of the age of *seventeen* years; contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the state of *Kansas*."

In State *v.* Crawford, 39 Kan. 257, the following indictment is set out:

"At the *September* term of said court, 1887, the jurors of the grand jury of said county, duly impanelled and sworn and charged to inquire and true presentment make of all public offenses against the laws of the state of *Kansas* cognizable by said court, committed or triable within said county, on their oath do find and present, that on the *21st* day of *August*, 1887, in the county of *Lyon* and state of *Kansas*, *J. H. Crawford* then and there being, did then and there unlawfully, feloniously, carnally know, seduce and have sexual intercourse with *Cora Ballard*, the said *Cora Ballard* being then and there a female person under the age of *eighteen* years and of the age of *sixteen* years and no more, the said *J. H. Crawford* being then and there a male person over the age of *twenty-one* years, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of *Kansas*."

In this case the conviction in the lower court was overruled on grounds of evidence, but the form of the indictment was not questioned.

In Com. *v.* Sullivan, 6 Gray (Mass.) 477, the indictment charged that defendant, "in and upon one *Bridget Collins*, a female child under the age of *ten* years, to wit, of the age of *eight* years, feloniously did make an assault, and her, the said *Bridget Collins*, then and there feloniously did unlawfully and carnally know and abuse; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided." It was held that the indictment was not fatally defective because of the omission of the words "she then and there being," or other like words, after the first mention of the name of injured party, nor by the omission to repeat her age after the second mention of her name.

In State *v.* Gilbreath, 130 Mo. 500, the indictment was as follows:

"The grand jurors for the state of *Missouri*, duly impaneled, charged, and sworn to inquire within and for the body of the county of *Camden*, and true presentment make, upon their oaths present and charge that one *Andrew Gilbreath*, on the *twenty-ninth* day of *May*, in the year 1893, in the —— of ——, at the township of ——, in the county of *Camden* aforesaid, unlawfully and willfully, then and there did, in and upon one *Neltha Coffey*, a female child under the age of *fourteen* years, to wit, of the age of *eleven* years, unlawfully and feloniously, did make an assault, and her, the said *Neltha Coffey*, then and there unlawfully and feloniously did carnally know and abuse, against the peace and dignity of the state."

In this case the judgment of conviction in the lower court was reversed for error in granting and refusing certain instructions, but the form of the indictment was not questioned.

The following form of indictment is set out in Farrell *v.* State, 54 N. J. L. 416:

"*Mercer Oyer and Terminer and General Jail Delivery, January* Term, 1891. *Mercer* County, to wit — The grand inquest of the State of *New Jersey*, in and for the body of the county of *Mercer*, upon their respective oath — Present, that *John Farrell*, late of the city of *Trenton*, in the said county of *Mercer*, on the *fifth* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-one*, with force and arms, at the city of *Trenton* aforesaid, in the county aforesaid, and within the jurisdiction of this court, in and upon the body of one *Mamie E. Morgan*, in the peace of God and this state then and there being, an assault did make, and her, the said *Mamie E. Morgan*, being then and there a woman under the age of *sixteen* years, he, the said *John Farrell*, being then and there above the age of *sixteen* years, did unlawfully and carnally abuse and other wrongs to the said *Mamie E. Morgan* then and there did to the great damage of the said *Mamie E. Morgan*.

Bayard Stockton,
Prosecutor of the Pleas."

In People *v.* Flaherty, 79 Hun (N. Y.) 48, the indictment charged that the defendant "did wickedly and feloniously perpetrate an act of sexual intercourse with one *Mary Sweeney*, a female not his wife, the said *Mary Sweeney* being at said time a female under the age of *sixteen* years, contrary to the statute in such case made and provided, and against the peace of the People of the State of *New York* and their dignity." It was held that this indictment was sufficient.

In People *v.* Maxon, 57 Hun (N. Y.) 367, the indictment was as follows:

"The grand jury of the county of *Ulster*, in the State of *New York*, by this indictment accuse *Daniel Maxon*, late of the city of *Kingston*, in the county of *Ulster* and State of *New York*, of the crime of rape, committed as follows:

The said *Daniel Maxon*, on the *twenty-fifth* day of *December*, in the year of our Lord one thousand eight hundred and *eighty-eight*, with force and arms at the city of *Kingston*, in the county of *Ulster* and State of *New York*, in and upon one *Augusta Brandes*, a female under the age of *sixteen* years, to wit: of the age of *fifteen* years, and not the wife of him, the said *Daniel Maxon*, violently, forcibly and feloniously did make an assault, and her, the said *Augusta Brandes*, then and there violently, forcibly, without her consent and against her will, willfully and feloniously did have sexual intercourse with, ravish and carnally know, against the form of the statute in such case made and provided and against the peace of the People of the State of *New York* and their dignity.

Second Count. And the grand jury aforesaid, by this indictment further accuse the said *Daniel Maxon*, late of the city of *Kingston*, in the county of *Ulster* and State of *New York*, of the crime of rape, committed as follows:

The said *Daniel Maxon* afterwards, to wit: On the *twenty-fifth* day of *December*, in the year of our Lord one thousand eight hundred and *eighty-eight*, at the city of *Kingston*, in the county of *Ulster* and State of *New York*, with force and arms, in an upon one *Augusta Brandes*, a female under the age of *sixteen* years, to wit: of the age of *fifteen* years, and not the wife of him, the said *Daniel Maxon*, feloniously did make an assault, and her, the said *Augusta Brandes*, then and there willfully and feloniously did have sexual intercourse with, ravish and carnally know, against the form of the statute in such case made and provided and against the peace of the People of the State of *New York* and their dignity."

It was held that the first count charged the crime as defined under section 278 of the penal code. The second count charged the crime as committed upon a female under the age of consent. The testimony did not establish the acts charged in the first count, but did establish the acts charged in the second. The defendant could not be convicted under the second count, because, to establish the crime of rape, the act must be committed against the will and without the consent of the female.

In State *v.* Goings, 4 Dev. & B. L. (20 N. Car.) 152, the indictment charged that defendant "on the *twenty-sixth* day of *May*, in the year of our Lord one thousand eight hundred and *thirty-eight*, with force and arms, in the county of *Cumberland* aforesaid, in and upon one *Mary M. Cook*, an infant under the age of *ten* years, to wit, of the age of *seven* years, in the peace of God and the State then and there being, feloniously did make an assault, and her the said *Mary M. Cook*, then and there feloniously, did unlawfully and carnally know and abuse, against

the form of the statute in such case made and provided, and against the peace and dignity of the State." A conviction under this indictment was sustained.

In Fields *v.* State, 39 Tex. Crim. 488, the indictment alleged that defendant, "*W. S. Fields* in and upon *Alice Requardt*, a female then and there under the age of *fifteen* years, did make an assault, and the said *W. S. Fields* did then and there ravish and have carnal of the said *Alice Requardt*, the said *Alice Requardt* not being then and there the wife of the said *W. S. Fields*." It was objected that the indictment failed to charge carnal knowledge, the word "knowledge" being left out, but the court held that the word "ravish" supplied the defect and charged by implication carnal knowledge against the will and without the consent of the female.

In Lawrence *v.* Com., 30 Gratt. (Va.) 845, the indictment charged that defendant "on the *eighth* day of *August*, in the year one thousand eight hundred and *seventy-seven*, and in the county aforesaid, with force and arms on and upon one *Serena Coleman*, a female child under the age of *twelve* years, to-wit: of the age of *eleven* years and *eleven* months, feloniously did make an assault; and her, the said *Serena Coleman*, then and there unlawfully, feloniously, violently and against her will, and by force did ravish and carnally know her, the said *Serena Coleman*, against the peace and dignity of the Commonwealth of *Virginia*." Under this indictment the defendant was convicted.

In State *v.* Gifford, 19 Wash. 464, the charging part of the indictment, which was approved by the court, was as follows: "*Elmer Gifford* is hereby charged with a public offense, to-wit, the crime of rape, committed as follows, to-wit: That on the *7th* day of *July*, A. D. 1897, and within *three* years next before the filing of this information, at the county of *Spokane* and state of *Washington*, the said defendant, *Elmer Gifford*, then and there in the said county and state being, then and there unlawfully and feloniously did carnally know one *Flossie Fuller*, the said *Flossie Fuller* then and there being a female child under the age of *eighteen* years, and not the wife of the said *Elmer Gifford*, contrary to the statute," etc.

In State *v.* Elswood, 15 Wash. 453, the information was as follows:

"Comes now *C. A. Mantz*, county and prosecuting attorney for *Stevens* county, state of *Washington*, and by this his information charges the defendant, *Henry Elswood*, of the crime of rape, committed as follows, to wit: The said *Henry Elswood* in *Stevens* county, state of *Washington*, on, to-wit, the *26th* day of *July*, 1895, and before the filing of this information, in and upon one *Ressie Lutjens*, a female child, under the age of *twelve* years, to-wit, of the age of *ten* years, feloniously did make an assault, and her the said *Ressie Lutjens* then and there feloniously did ravish, carnally know and abuse, contrary to the statute in such case made and provided."

It was claimed that this information was bad for the reason that it charged two distinct crimes, first, that of assault, and, second, that of rape. It was held that the information charged but one offense, and was sufficient.

In Barnard *v.* State, 88 Wis. 656, the information was as follows: "I, *Hiram O. Fairchild*, district attorney for said county, hereby inform the court that on the *19th* day of *April*, 1893, at said county, *John Barnard* did, upon one *Jennie Vander Bogart*, a female child under the age of *twelve* years, feloniously make an assault, and her, the said *Jennie Vander Bogart*, then and there feloniously did carnally know and abuse, against," etc. It was held to be sufficient.

In *In re* Lane, 135 U. S. 443, the indictment, omitting formal parts, was as follows: "At the term of the *District* Court *of the United States of America* in and for the said District of *Kansas*, begun and held at *Wichita*, in said district, on the *2d* day of *September*, in the year of our Lord one thousand eight hundred and *eighty-nine*, the grand jurors of the United States of America duly empanelled and sworn and charged to inquire of offenses committed within that part of the said district lying north of the *Canadian* River and east of *Texas* and the *one hundredth* meridian, not set apart and occupied by the *Cherokee*, *Creek* and *Seminole Indian* tribes, upon their oaths do find and present that *Charles Lane*, whose more full christian name is to the grand jurors aforesaid unknown, late of that part of the public domain acquired by the United States of America by the act of Congress approved March 2, 1889, commonly known as *Oklahoma*, and being a part of the

Form No. 17086.[1]

(3 Chit. Crim. L. (5th Am. from 2d Lond. ed.) 815.)

(*Commencing as in Form No. 10678, and continuing down to* *) in and upon one *Sarah Roe*, *spinster*, a woman child under the age of *ten* years, to wit, of the age of *nine* years and upwards, in the peace of God and our said lord the king then and there being, feloniously did make an assault and her, the said *Sarah Roe*, then and there wickedly, unlawfully and feloniously did carnally know and abuse, against the form (*concluding as in Form No. 17048*).

Form No. 17087.[2]

(Ala. Crim. Code (1896), § 4923, No. 25.)

(*Commencing as in Form No. 10680, and continuing down to* *) *John Doe* did carnally know, or abuse in the attempt to carnally know, one *Julia Roe*, a girl under the age of *fourteen* years, against (*concluding as in Form No. 10680*).

Form No. 17088.[3]

(*Commencing as in Form No. 10692, and continuing down to* *) did then and there, in a rude, insolent and angry manner, unlawfully and

district of *Kansas* aforesaid, on or about the *4th* day of *July*, in the year of our Lord one thousand eight hundred and *eighty-nine*, at that part of the district of *Kansas* aforesaid, the same being a place and district of country under the exclusive jurisdiction of the United States and within the exclusive jurisdiction of this court, with force of arms, in and upon one *Frances M. Skeed*, a female under the age of *sixteen* years, then and there being, violently and feloniously did make an assault, and her, the said *Frances M. Skeed*, then and there, forcibly and against her will, feloniously did ravish and carnally know, against the peace and dignity of the United States of America, and contrary to the form of the statute in such cases made and provided."

This case came to the United States supreme court, in its original jurisdiction, on a petition for a writ of habeas corpus, which was denied. The form of the indictment was objected to on the ground that it contained the double charge of rape at common law and carnal abuse under act of congress 1889 (25 U. S. Stat. at L., c. 120), which provides a punishment for any person who shall "carnally and unlawfully know any female under the age of sixteen years." It was also urged that the indictment was bad because not signed by the district attorney. These objections were overruled in the lower court, and in the supreme court opinion it is said, with reference to these points, "The allegation that the offense was by violence and against the will of the woman, with the other allegations in the indictment, describe the offense of rape. The allegation that the defendant had carnal knowledge of a female under sixteen years of age makes out the offense under the statute of 1889. But the view of the court was that the allegation that the carnal knowledge was against the will of the woman may be rejected as surplusage and the rest of the indictment be good under the statute referred to. And as the court instructed the jury in accordance with that view of the subject, and as the jury found the prisoner guilty not of the crime of rape but of the smaller crime of carnal knowledge of a female under sixteen years of age, the action of the court on that subject is probably correct." It was also held that the signature of the district attorney was not essential.

1. See, generally, *supra*, note 2, p. 562.

2. *Alabama.* — Crim. Code (1896), § 5447.

See also, generally, *supra*, note 2, p. 562.

3. *Indiana.* — Horner's Stat. (1896), § 1917.

See also, generally, *supra*, note 2, p. 562.

feloniously touch one *Julia Roe*, a female child under the age of *fourteen* years, to wit, of the age of *ten* years, and her, the said *Julia Roe*, he, the said *John Doe*, then and there did unlawfully and feloniously ravish and carnally know, contrary (*concluding as in Form No. 10692*).

Form No. 17089.[1]

(*Commencing as in Form No. 10694, and continuing down to* *) unlawfully and feloniously did carnally know one *Julia Roe*, she, the said *Julia Roe*, being then and there a female person under the age of *eighteen* years, to wit, of the age of *fourteen* years, contrary (*concluding as in Form No. 10694*).

Form No. 17090.[2]

(*Commencing as in Form No. 10699, and continuing down to* *) with force and arms, at *Boston* aforesaid, in the county aforesaid, in and upon one *Julia Roe*, a woman child under the age of *sixteen* years, to wit, of the age of *twelve* years, feloniously did make an assault, and her, the said *Julia Roe*, then and there, feloniously did unlawfully and carnally know and abuse, against (*concluding as in Form No. 10699*).

Form No. 17091.[3]

(Precedent in State *v.* Houx, 109 Mo. 658.)[4]

[(*Commencing as in Form No. 10703, and continuing down to* *)][5] in and upon one *Mattie Sidenstricker*, a female child under the age of *twelve* years, to-wit, of the age of *ten* years, unlawfully and feloniously did make an assault, and her, the said *Mattie Sidenstricker*, then and there unlawfully and feloniously did carnally know and abuse [(*concluding as in Form No. 10703*).][5]

Form No. 17092.[6]

(Precedent in State *v.* Williams, 9 Mont. 179.)[7]

[(*Commencing as in Form No. 10704, and continuing down to* *)][5] with force and arms, in and upon one *Mary Williams*, then and there being a female child under the age of *fifteen* years, to wit, of the age of *thirteen* years, feloniously, violently, and unlawfully did make an assault, and her, the said *Mary Williams*, then and there feloniously did ravish and carnally know, contrary [(*concluding as in Form No. 10704*).][5]

1. *Kansas.* — Gen. Stat. (1897), c. 100, § 31.
See also, generally, *supra*, note 2, p. 562.

2. *Massachusetts.* — Stat. (1893), c. 466.
See also, generally, *supra*, note 2, p. 562.
This indictment is set out in Whart. Prec. Ind. and Pl. (1857), p. 158.

3. *Missouri.* — Rev. Stat. (1899), § 1837.
See also, generally, *supra*, note 2, p. 562.

4. This indictment was held sufficient and the conviction was affirmed.

5. The matter to be supplied within [ ] will not be found in the reported case.

6. *Montana.* — Pen. Code (1895), § 450.
See also, generally, *supra*, note 2, p. 562.

7. This indictment was held to be sufficient. Under the present statute, the age of consent is sixteen years.

Form No. 17093.[1]

(*Commencing as in Form No. 10713, and continuing down to* *) being then and there a male person of the age of *eighteen* years and upward, in and upon one *Julia Roe*, a female child under the age of *sixteen* years, to wit, of the age of *eight* years, then and there being, unlawfully, forcibly and feloniously did make an assault, and her, the said *Julia Roe*, then and there unlawfully and feloniously did carnally know and abuse, with her consent, contrary (*concluding as in Form No. 10713*).

Form No. 17094.[2]

(Precedent in Asher *v.* Territory, 7 Okla. 190.)[3]

[(*Title of court and cause as in Form No. 10714.*)][4]

The grand jurors of the Territory of *Oklahoma*, inquiring in and for the body of *Logan* county, duly impaneled and sworn, upon their oaths do present: That on the *20th* day of *February*, 1897, at the county of *Logan*, in said Territory, one *James Asher*, then and there being, in and upon one *Belle Overstreet*, a female under the age of *fourteen* years, of previous chaste and virtuous character, did make an assault, and with her, the said *Belle Overstreet*, he the said *James Asher* then and there did have sexual intercourse, she the said *Belle Overstreet* not being the wife of him, the said *James Asher*; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the Territory of *Oklahoma*.

J. C. Strang, County Attorney.

Form No. 17095.[5]

(*Commencing as in Form No. 10723, and continuing down to* *) with force and arms, unlawfully and feloniously in and upon the body of *Julia Roe*, a woman under the age of *sixteen* years, to wit, of the age of *twelve* years, feloniously and unlawfully an assault did make, and her the said *Julia Roe*, then and there, with like force and arms, feloniously and unlawfully did carnally know and abuse, contrary (*concluding as in Form No. 10723*).

Form No. 17096.[6]

(*Commencing as in Form No. 10727, and continuing down to* *) upon one *Julia Roe*, a female child under the age of *fourteen* years, to wit,

1. *Ohio.* — Bates' Anno. Stat. (1897), § 6816.

See, also, generally, *supra*, note 2, p. 562.

This form is set out in Whart. Prec. Ind. and Pl. (1857), p. 159.

2. *Oklahoma.* — Laws (1895), c. 20, art. 2.

See also, generally, *supra*, note 2, p. 562.

3. It was contended that this indictment was defective in that it did not charge the offense to have been committed "feloniously" or "with felonious intent," but the indictment was upheld, inasmuch as the Oklahoma statute defining rape does not use the word "felonious" or refer to the intent. In other respects, also, the crime is charged substantially in the language of the statute.

4. The matter to be supplied within [ ] will not be found in the reported case.

5. *Vermont.* — Laws (1898), p. 90.

See also, generally, *supra*, note 2, p. 562.

This form is substantially the indictment in Aikens' Prac. F., p. 235, No. 182.

6. *Wisconsin.* — Stat. (1898), § 4382.

See also, generally, *supra*, note 2, p. 562.

of the age of *ten* years, did feloniously make an assault, and her, the said *Julia Roe*, then and there did unlawfully and carnally know and abuse, against (*concluding as in Form No. 10727*).

VIII. ASSAULT WITH INTENT TO COMMIT RAPE.

1. Criminal Complaint.[1]

Form No. 17097.[2]

(Precedent in Tillson *v.* State, 29 Kan. 454.)[3]

Before *Geo. M. Everline*, a Justice of the Peace in and for the County of *Anderson*, in the State of *Kansas*.

The State of *Kansas*, plaintiff, v. *Philip Masterson*, defendant. } Complaint for an assault with intent to commit rape.

The State of *Kansas*, County of *Anderson*. } ss.

J. N. Cline being first duly sworn, deposes and says that on the *tenth* day of *July*, 1*881*, at and in the county of *Anderson* and state of *Kansas*, *Philip Masterson* did then and there unlawfully, willfully, and feloniously make an assault upon one *Ruth Cline*, [a woman],[3] then and there being, with intent her, the said *Ruth Cline*, violently, forcibly, and against her will, then and there unlawfully and feloniously to ravish and carnally know; and deponent prays that process may be issued against the said *Philip Masterson*, and that he be dealt with according to law.

J. N. Cline.

Sworn to and subscribed before me this *twenty-ninth* day of *July*, 1*881*.

Geo. M. Everline, J. P.

Form No. 17098.[4]

(Precedent in People *v.* Lynch, 29 Mich. 277.)[5]

State of *Michigan*, County of *Bay*. } ss.

The complaint of *Michael Carney*, taken and made before me, a justice of the peace of the city of *Bay City*, in said county, upon the

1. **Requisites of Criminal Complaint — Generally.** — For the formal parts of a criminal complaint in a particular jurisdiction see the title CRIMINAL COMPLAINTS, vol. 5, p. 930.

Where assault and battery is charged in the language of the statute creating the offense, and the felony of attempt to rape is described in appropriate terms, the affidavit is sufficient. Polson *v.* State, 137 Ind. 519.

2. *Kansas.* — Gen. Stat. (1897), c. 100, § 39.

3. It was objected to this complaint that it did not show that the injured party was a female child or woman. It was held that the use of the name "*Ruth Cline*" and of the personal pronoun "her" was amply sufficient to indicate the sex of the party and that the complaint was sufficient. The form set out in the text has been amended so as to avoid this objection.

4. *Michigan.* — Comp. Laws (1897), § 11490.

5. It was held that the language in which the offense was described in this complaint was as full and formal as it is required to be in an indictment or information and that the complaint was

seventeenth day of *May*, A. D. 1873, who being duly sworn says, that heretofore, to wit: On the *second* day of *May*, A. D. 1873, at the city of *Bay City*, and in the county aforesaid, one *Timothy Lynch*, late of *Bay City*, in the county of *Bay*, with force and arms in and upon one *Mary Carney*, a female child of the age of *ten* years and more, to wit, of the age of *fourteen* years, in the peace of the people of the State of *Michigan* then and there being, did make an assault with intent her, the said *Mary Carney*, by force, and against her will, then and there, feloniously to ravish and to carnally know, and other wrongs to her, the said *Mary Carney* then and there did, against the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of *Michigan*. Whereof the said *Michael Carney* prays that said *Timothy Lynch* may be apprehended and held to answer this complaint, and further dealt with in relation to the same as law and justice may require.

Michael Carney.

Taken, subscribed, and sworn to before me the day and year first above written.

John Hargadon, Justice of the Peace.

2. Indictment or Information.

a. In General.[1]

sufficient. Since this complaint was filed, the age of consent in Michigan has been raised, and under the present statute it is sixteen years.

1. Requisites of Indictment or Information, Generally. — For the formal parts of an indictment or information in a particular jurisdiction see the titles INDICTMENTS, vol. 9, p. 615; INFORMATIONS IN CRIMINAL CASES, vol. 9, p. 768.

In an indictment for attempt to commit a rape, the offense of rape must be described with all the precision and certainty of the terms required in an indictment for rape. Christian *v.* Com., 23 Gratt. (Va.) 954. The indictment need not further describe the crime which is attempted than to call it a rape. State *v.* Hanlon, 62 Vt. 334. The word "ravish," as descriptive of the offense attempted, is not necessary, but the words attempting "feloniously carnally to know" are sufficient. Christian *v.* Com., 23 Gratt. (Va.) 954.

Where the indictment alleges that the defendant, by verbal solicitation, tried to obtain the consent of a female child under the age of twelve years to have sexual intercourse with him, it is insufficient to charge attempt to rape: to constitute the crime under statute, there must be an actual attempt. State *v.* Harney, 101 Mo. 470.

In Language of Statute. — Where the indictment charges the offense in the language of the statute, it is sufficient. State *v.* Meinhart, 73 Mo 562; State *v.* Hanlon, 62 Vt. 334. The indictment need not follow strictly the language of the statute, however, in describing the offense: words conveying the same meaning, or their equivalent, are sufficient. People *v.* Girr, 53 Cal. 629.

That accused was a male need not be stated. Greenlee *v.* State, 4 Tex. App. 345.

Description of Injured Person — *Name.* — Name of the person injured should be stated in the indictment or information. Bradford *v.* State, 54 Ala. 230; Nugent *v.* State, 19 Ala. 540; Com. *v.* Kennedy, 131 Mass. 584.

Age. — That the injured party was either under or over the age of consent need not be stated. State *v.* Smith, 9 Houst. (Del.) 588.

Not Wife of Defendant. — The indictment need not allege that the injured party was not the wife of the defendant. People *v.* Estrada, 53 Cal. 600.

Acts done toward consummation of offense should be set forth. State *v.* Frazier, 53 Kan. 87; Cunningham *v.*

Com., 88 Va. 37; Christian *v.* Com., 23 Gratt. (Va.) 954. But to aver that defendant "violently and feloniously made an assault" in the attempt is sufficient. Cunningham *v.* Com., 88 Va. 37.

Assault — *Generally.*—The indictment or information should charge an assault. Bradford *v.* State, 54 Ala. 230; People *v.* Girr, 53 Cal. 629; People *v.* Estrada, 53 Cal. 600; Greer *v.* State, 50 Ind. 267; People *v.* McDonald, 9 Mich. 150; State *v.* Little, 67 Mo. 624; Blackburn *v.* State, 39 Tex. 153; Greenlee *v.* State, 4 Tex. App. 345. The indictment need not allege an assault in terms: the words "feloniously ravish" are sufficient. O'Connell *v.* State, 6 Minn. 279.

Means by which assault was made need not be stated: it is enough to charge that the defendant made an assault. State *v.* Hanlon, 62 Vt. 334.

Felonious. — That the assault was felonious must be charged. Williams *v.* State, 8 Humph. (Tenn.) 585. But see Jones *v.* State, 3 Heisk. (Tenn.) 445, holding that it is not necessary to charge that the assault was felonious.

With Force and Violence. — That assault was made with intent to carnally know the injured party forcibly and against her will must be alleged. Sullivant *v.* State, 8 Ark. 400; State *v.* Blake, 39 Me. 322; State *v.* Powell, 106 N. Car. 635; Smith *v.* State, 12 Ohio St. 466. That the assault was made with actual violence need not be charged. State *v.* Wells, 31 Conn. 210.

Where the indictment charged that the assault was violent and felonious, and that the ravishing was felonious and against the will of the female, it was held to be sufficient. State *v.* Johnson, 67 N. Car. 55.

Where an indictment charged that the defendant made an assault with the intent then and there the said female, "against her will, and without her consent, then and there feloniously to rape and carnally know," it was held that the indictment was defective in not charging the essential elements of the crime, the use of the word "rape" being insufficient to imply force, threats or fraud in the commission of the offense. Hewitt *v.* State, 15 Tex. App. 80.

Fraud. — Particular kind of fraud practiced should be set out in the indictment. Franklin *v.* State, 34 Tex. Crim. 203. But a general charge of attempt to rape by fraud is sufficient and authorizes proofs of the means employed. Franklin *v.* State, 34 Tex. Crim. 203.

Felonious Intent. — The indictment must allege that the defendant did assault, etc., with an intent, etc., feloniously to ravish and carnally know. Sullivant *v.* State, 8 Ark. 400; Com. *v* Kennedy, 131 Mass. 584; State *v.* Powell, 106 N. Car. 635; State *v.* Russell, 91 N. Car. 624; State *v.* Scott, 72 N. Car. 461; Smith *v.* State, 12 Ohio St. 466. An indictment charging an intention to ravish instead of intent is sufficient. State *v.* Tom, 2 Jones L. (47 N. Car.) 414.

Where the indictment alleged that the defendant "unlawfully and wilfully did make an assault and did then and there unlawfully attempt to carnally know," it was held to be fatally defective, because of the failure to charge the intent with which the act was committed, such intent being an essential ingredient of the offense sought to be charged, to wit, assault with intent to rape. State *v.* Goldston, 103 N. Car. 323.

Technical Words — "*Ravish.*" — The word "ravish." as descriptive of the offense attempted, is not necessary: the words attempting "feloniously carnally to know" are sufficient. Christian *v.* Com., 23 Gratt. (Va.) 954.

"*Unlawfully.*" — The indictment in describing the crime must use the word "unlawfully" or some equivalent word. Greer *v.* State, 50 Ind. 267. The use of the word "feloniously" is, however, sufficient. Greer *v.* State, 50 Ind. 267.

Resistance on Part of Female. — An indictment is sufficient which alleges that defendant made an assault with an intent to commit an act of sexual intercourse by force and violence, and against the will of the woman, without alleging that the force and violence was against her resistance. People *v.* Brown, 47 Cal. 447.

Where the indictment alleged that the defendant feloniously made an assault and attempted by force, threats and violence to have carnal knowledge of a female without her consent, it was held to be equivalent to a statement that she resisted. Harmon *v.* Territory, 5 Okla. 368.

Duplicity. — Where the indictment charges assault with intent to ravish, and also charges a battery, it is not

bad for duplicity. Com. *v.* Thompson, 116 Mass. 346.

Where the indictment charged that defendant with force and arms in the county aforesaid, in and upon one Eliza Conely, being then and there a free white woman, feloniously did make an assault, and her the said Eliza Conely then and there feloniously did attempt to ravish and carnally know, by force and against her will, and in said attempt did forcibly choke and throw down the said Eliza Conely, etc., it is not bad for duplicity. The last allegation, being nothing more than a description somewhat more minute of the manner of the assault than was required, may be rejected as surplusage. Green *v.* State, 23 Miss. 509.

Precedents — *Sufficient.* — In Pleasant *v.* State, 13 Ark. 360, the following indictment, charging a negro slave with attempt to commit rape upon a white woman, was held sufficient: "That *Pleasant*, a negro man slave, the property of one *James Milton*, on the *twenty-ninth* day of *November*, in the year of our Lord one thousand eight hundred and *fifty-one*, with force and arms, in the county of *Union* aforesaid, upon one *Sophia Fulmer*, the said *Sophia Fulmer*, then and there, being a white woman, in the peace of the State, then and there being, wilfully and feloniously did make an assault, and her, the said *Sophia*, did, then and there, beat, wound, and ill-treat, with intent, her, the said *Sophia Fulmer*, violently, forcibly, and against her will, then and there, feloniously, to ravish and carnally know, and other wrongs, to the said *Sophia Fulmer*, then and there did, contrary," etc.

An indictment charging that defendant "did willfully, feloniously, and of his malice aforethought, commit an assault upon the person of *Caroline Waldfogal*, with intent her, the said *Caroline Waldfogal*, then and there to rape," is sufficient, although not in the words of the statute. People *v.* Girr, 53 Cal. 629.

Where the information charged that defendant "on the *4th* day of *February*, 1862, at said town of *Colchester*, with force and arms, in and upon one *Abby Wells*, a single woman, in the peace then and there being, did make an assault, and her, the said *Abby Wells*, did then and there beat, bruise, wound and ill-treat, so that her life was then and there greatly despaired of, with an intent her, the said *Abby Wells*, violently and against her will, then and there feloniously to ravish and carnally know; against the peace, contrary to the form of the statute in such case made and provided, and of evil example," it was held to be sufficient, although it did not charge in the terms of the statute that the attempt was made with violence. State *v.* Wells, 31 Conn. 210.

Where the indictment charged that the assault was made "with the intent then and there wilfully, forcibly and feloniously, and against her will, to have carnal knowledge of said woman," it was held to be sufficient. Dooley *v.* State, 28 Ind. 239.

Where the indictment charged that defendant, "in and upon one *Catherine Webb*, otherwise called *Catherine E. Webb*, violently and feloniously did make an assault, with intent her, the said *Catherine Webb*, otherwise called as aforesaid, then and there, by force and against her will, violently and feloniously to ravish and carnally know," it was held that the intent to ravish was well alleged. Com. *v.* McCarty, 165 Mass. 37.

Where the indictment charged that defendant "in and upon the body of *Susan W. Attaquin* feloniously an assault did make, and her the said *Susan W. Attaquin* did then and there beat, bruise, strike and wound, with intent, then and there, her the said *Susan W. Attaquin* feloniously and violently to ravish and carnally know, by force and against her will," it was held to be sufficient. Com. *v.* Thompson, 116 Mass. 346.

In Hall *v.* State, 40 Neb. 320, the information was as follows:

"Of the *October* term of the *district* court of *Nemaha* county, in the year 1893, *A. J. Burnham*, prosecuting attorney for said county of *Nemaha*, in the name and by the authority and on behalf of the state of *Nebraska*, information makes that *William Hall*, then and there being a male person and over the age of *seventeen* years, in the said county, and on the *14th* day of *September*, A. D. 1893, in and upon one *Maggie Holthus*, a female under the age of *fifteen* years, did then and there violently, unlawfully, and feloniously beat and ill treat, with intent to injure her, the said *Maggie Holthus*, forcibly and against her will feloniously to ravish and carnally know; contrary to the form of the statute in such cases made and provided and against the

peace and dignity of the state of *Nebraska*."

It was sought to overthrow this information on the ground that it failed to charge that the person committing the offense was of the age of eighteen years or more, under the statute providing for the carnal abuse of a female under fifteen years with her consent, by a male of the age of eighteen years or upward. The court, however, sustained the information, saying, "The charge is not for attempting to have sexual intercourse with the prosecutrix with her consent, but for unlawfully attempting so to do, 'forcibly and against her will;' hence the age of the prosecutrix, as well as that of the accused, it was wholly unnecessary to allege, and that portion of the information describing the ages of the parties may be regarded as surplusage."

In State *v.* Barnes, 122 N. Car. 1031, the indictment was as follows: "The jurors for the State, upon their oath, present that *J. B. Barnes*, late of the County of *Nash*, on the *6th* day of *October*, in the year of our Lord one thousand eight hundred and *ninety-seven*, with force and arms, at and in the County aforesaid, in and upon one *Cora Yarboro*, then and there being, unlawfully and feloniously did make an assault and her, the said *Cora Yarboro*, then and there forcibly, violently, and against her will, then and there feloniously to abuse, ravish and carnally know; and other wrongs to the said *Cora Yarboro* then and there did, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

It was held that the omission in this indictment of the words "with intent" did not operate as a ground for arrest of judgment, as it could not be shown that the defendant was prejudiced thereby.

In O'Meara *v.* State, 17 Ohio St. 515, the second count of the indictment was as follows: "And the grand jurors aforesaid, on their oaths and affirmations aforesaid, do further present, that the said *Thomas O'Meara*, on the *fourth* day of *August*, in the year eighteen hundred and *sixty-seven*, with force and arms, at the county of *Hamilton* aforesaid, on and upon one *Sarah Doren* (then and there a female child, other than the daughter or sister of him, the said *Thomas O'Meara*, as he, the said *Thomas O'Meara*, then and there well knew), then and there being, unlawfully and forcibly did make an assault, and her, the said *Sarah Doren*, did then and there unlawfully beat, wound, and ill-treat, with intent then and there and thereby her, the said *Sarah Doren*, unlawfully, forcibly, and against the will of her, the said *Sarah Doren*, to ravish and carnally know, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of *Ohio*." It was held that this was sufficient.

In Franklin *v.* State, 34 Tex. Crim. 203, the indictment, omitting the formal commencement, was as follows:

"That *Aldridge Franklin*, on or about the *8th* day of *October*, one thousand eight hundred and *ninety-three*, and anterior to the presentment of this indictment, in the county of *Collin*, state of *Texas*, did then and there unlawfully, in and upon *D. M. Pennington*, a woman, make an assault with the intent then and there to commit the offense of rape upon the said *D. M. Pennington*, by then and there, without the consent of the said *D. M. Pennington*, attempting by force and fraud to have carnal knowledge of her, the said *D. M. Pennington*. And the grand jurors aforesaid, upon their oaths in said court, do further present, that the said *Aldridge Franklin* did then and there, with the intent then and there to commit the offense of rape upon the said *D. M. Pennington*, attempt by force and fraud to have carnal knowledge of the said *D. M. Pennington*, without the consent of the said *D. M. Pennington*; and the grand jurors aforesaid, upon their oaths in said court, do further present, that the said *Aldridge Franklin* did then and there, with the intent then and there to commit the offense of rape upon the said *D. M. Pennington*, a married woman, attempt by fraud to have carnal knowledge of the said *D. M. Pennington* without the consent of the said *D. M. Pennington*, against the peace and dignity of the State."

A motion to quash this indictment was overruled, and the defendant was convicted and his conviction affirmed.

An indictment for an assault with intent to rape, which charged that the accused "with force, threats and fraud, in and upon one *Mary Johnson*, alias *Mary Gibson*, a female then and there being, unlawfully and feloniously an assault did make, with the unlawful

Form No. 17099.[1]

Middlesex, to wit:

The jurors of our lady the queen, upon their oath present, that *John Doe*, late of the parish of *St. Paul, Covent Garden*, in the county of *Middlesex*, *yeoman*, on the *twentieth* day of *February*, in the *twelfth* year of the reign of our sovereign lady *Victoria*, by the grace of God of the United Kingdom of Great Britain and Ireland queen, defender of the faith, with force and arms, at said parish of *St. Paul*, at *Covent Garden*, in said county of *Middlesex*, on one *Julia Roe*, did make an assault, and her, the said *Julia Roe*, then and there did beat, wound and ill treat, so that her life was greatly despaired of, with

and felonious intent then and there, of him, the said *James Gibson*, without the consent and against the will of her, the said *Mary Johnson*, alias *Mary Gibson*, to carnally know and to ravish," etc., was held to be sufficient; that the words "without the consent and against the will of" were surplusage, and that the remaining allegations charged the offense sufficiently. Gibson *v.* State, 17 Tex. App. 574.

In Greenlee *v.* State, 4 Tex. App. 345, the indictment charged that "*Joseph Greenlee*, in the county of *Bell*, in said state of *Texas*, on the *sixth* day of *September*, anno Domini one thousand eight hundred and *seventy-three*, then and there, in and upon the body of *Eliza Gibson*, then and there being a woman, did make an assault, and her, the said *Eliza Gibson*, then and there did beat, wound, and ill-treat, with the intent then and there her, the said *Eliza Gibson*, against her will and without her consent, then and there feloniously to rape and carnally know, and other wrongs to her, the said *Eliza Gibson*, then and there did, contrary," etc. It was held that this indictment was sufficient in substance to charge an assault with intent to commit rape.

Insufficient. — An indictment charging that defendant "did feloniously attempt to commit a rape on one *Aramanda Clemmons*," etc., without other necessary technical words, is bad. Sullivant *v.* State, 8 Ark. 400.

Where the indictment charged that "the said *William O'Neil*, on the *9th* day of *April*, A. D. 1873, and previous to the time of finding this indictment, on the point west of *Crescent City*, did unlawfully and feloniously assault one *Hannah Dunlay*, with intent to outrage her person, by throwing her (the said *Hannah Dunlay*) on her back, and attempting to have sexual intercourse with her; all of which is contrary," etc., it failed to charge an assault with intent to commit rape, but at best only charged an assault. People *v.* O'Neil, 48 Cal. 257.

An indictment which alleges that defendant, "with force and arms, in and upon the body of one *C.*, in the peace of said commonwealth then and there being, violently and feloniously did make an assault, with intent then and there feloniously to ravish and carnally know, by force and against her will," charges a simple assault, but does not charge the aggravation of the offense with sufficient precision. Com. *v.* Kennedy, 131 Mass. 584.

In Williams *v.* State, 8 Humph. (Tenn.) 585, the indictment charged that defendant "in and upon the body of one *Martha Jane Williams*, in the peace of God and the said state then and there being, an assault did make, and her, the said *Martha Jane Williams*, then and there did beat, wound and ill-treat, with intent her, the said *Martha Jane Williams*, feloniously, violently, forcibly, and against her will, then and there feloniously to ravish and carnally to know," etc. It was held that the indictment was insufficient, as it did not show the intent with which the assault was committed.

Where the indictment charged an assault upon the injured party with an attempt to ravish and carnally know her, and charged that the accused obtained carnal knowledge of her without her consent and against her will, it was held that the indictment did not charge a rape by force, as it did not allege that the defendant obtained the carnal knowledge by force or that he ravished the female. Elschlep *v.* State, 11 Tex. App. 301.

1. See, generally, *supra*, note 1, p. 572.

This form is set out in Whart. Prec. Ind. and Pl. (1857), p. 188.

intent her, the said *Julia Roe*, then and there feloniously to ravish and carnally know, and other wrongs to her, the said *Julia Roe*, then and there did, in contempt of our said lady the queen and her laws, to the evil example of all others, and against the peace of our said lady the queen, her crown and dignity.

Form No. 17100.[1]

(1 Archb. Crim. Pr. and Pl. 308.)

Middlesex, to wit:

The jurors of our lady the queen upon their oath present, that *John Doe* on the *tenth* day of *June*, in the year of our Lord one thousand eight hundred and *forty*, unlawfully did make an assault upon one *Julia Roe*, and her the said *Julia Roe* did then beat and ill-treat, with intent her, the said *Julia Roe*, then violently and against her will, feloniously to ravish and carnally to know, against the form of the statute in such case made and provided, and against the peace of our lady the queen, her crown and dignity.

Form No. 17101.[2]

(Ala. Crim. Code (1896), § 4923, No. 13.)[3]

(*Commencing as in Form No. 10680, and continuing down to* *) *John Doe* did assault *Julia Roe*, a woman, with the intent forcibly to ravish her, against (*concluding as in Form No. 10680*).

Form No. 17102.[4]

(Precedent in Skaggs *v.* State, 108 Ind. 54.)[5]

[(*Commencing as in Form No. 10692, and continuing down to* *)][6] did then and there, unlawfully and feloniously, in a rude, insolent and angry manner, touch, push, strike and choke one *Flora May Ennis*, a woman, with intent then and there and thereby her, the said *Flora May Ennis*, feloniously, forcibly and against her will, to ravish and carnally know [(*concluding as in Form No. 10692*).][6]

Form No. 17103.[7]

(*Commencement as in Form No. 10699.*)

The jurors for the commonwealth of *Massachusetts*, on their oath present, that *John Doe*, late of *Boston*, in said county of *Suffolk*, on the *first* day of *June*, in the year of our Lord one thousand eight

1. See, generally, *supra*, note 1, p. 572.

2. *Alabama.* — Crim. Code (1896), § 4346.

See also, generally, *supra*, note 1, p. 572.

3. **Statutory Form Sufficient.** — An indictment for assault with intent to ravish which follows the form prescribed in the code is sufficient. Bradford *v.* State, 54 Ala. 230.

4. *Indiana.* — Horner's Stat. (1896), §§ 1909, 1917.

See also, generally, *supra*, note 1, p. 572.

5. This was the first count of the indictment and was held sufficient.

6. The matter to be supplied within [ ] will not be found in the reported case.

7. *Massachusetts.* — Stat. (1893), c. 466.

See also, generally, *supra*, note 1, p. 572.

This form is set out in Whart. Prec. Ind. and Pl. (1857), p. 188.

hundred and *ninety-nine*, with force and arms, at *Boston* aforesaid, in the county aforesaid, in and upon one *Julia Roe*, feloniously did make an assault, with intent the said *Julia Roe* then and there feloniously to ravish and carnally know, by force and against her will, against the peace of said commonwealth, and contrary (*concluding as in Form No. 10699*).

Form No. 17104.[1]

(*Commencement as in Form No. 10713*), that *John Doe*, late of the county aforesaid, on the *twenty-first* day of *August*, in the year of our Lord one thousand eight hundred and *ninety-eight*, in the county of *Montgomery* aforesaid, in and upon one *Julia Roe*, then and there being, did unlawfully make an assault, and her, the said *Julia Roe*, then and there did beat, wound and ill treat, with intent her, the said *Julia Roe*, violently, forcibly and against her will, then and there unlawfully and feloniously to ravish and carnally know, to the great damage of the said *Julia Roe*, contrary (*concluding as in Form No. 10713*).

Form No. 17105.[2]

(Precedent in Harmon *v.* Territory, 5 Okla. 369.)[3]

[(*Commencement as in Form No. 10714.*)

The Territory of Oklahoma against *Henry Harmon.* } Indictment for Assault with Intent to Commit Rape.

The grand jurors, duly summoned from the body of *Payne* county and territory of *Oklahoma*, chosen, examined, selected, empaneled, sworn and charged in and for the county and territory aforesaid to inquire into and true presentment make of the crimes and offenses committed in the county and territory aforesaid, on their oath do find and present:

That one *Henry Harmon*, late of the county and territory aforesaid, on the ——— day of ———, A. D. 1897, then and there being, with force and arms, in the county and territory aforesaid,][4] did then and there unlawfully and feloniously make an assault in and upon one *D. Y.*, a woman, with intent then and there, upon the part of him, the said *Henry Harmon*, to commit the offense of rape upon the said *D. Y.* by then and there, without the consent of the said *D. Y.*, attempting by force, threats and violence, to have carnal knowledge of her, the said *D. Y.*; the said *D. Y.* not then and there being the wife of him, the said *Henry Harmon*, contrary [(*concluding as in Form No. 10714*).][5]

1. *Ohio.* — Bates' Anno. Stat. (1897), § 6821.

See also, generally, *supra*, note 1, p. 572.

This indictment is set out in Whart. Prec. Ind. and Pl. (1857), p. 189.

2. *Oklahoma.* — Laws (1895), c. 20, art. 2; Stat. (1893), §§ 2561, 2563.

See also, generally, *supra*, note 1, p. 572.

3. It was held that this indictment was sufficient; that there was a sufficient allegation that the prosecutrix resisted, and that her resistance was overcome by force or violence, and that evidence of such resistance was admissible under the indictment.

4. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

5. The matter to be supplied within [ ] will not be found in the reported case.

Form No. 17106.[1]

(*Title of court and cause as in Form No. 10716.*)

The grand inquest of the commonwealth of *Pennsylvania*, inquiring for the county of *Dauphin*, on their oaths and solemn affirmations, respectively do present, that *John Doe*, of the county aforesaid, *yeoman*, on the *seventeenth* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-nine*, at the county aforesaid, and within the jurisdiction of this court, in and upon one *Jane Roe*, spinster, in the peace of God then and there being, with force and arms, an assault did make, with an intent then and there the said *Jane Roe* feloniously to ravish and carnally know, and then and there the said *Jane Roe* did beat, wound and evilly ill treat, so that her life was greatly despaired of, and other harms to her then and there did, to the great damage of the said *Jane Roe*, against the peace and dignity of the commonwealth of *Pennsylvania*.

(*Signature of attorney, and indorsements as in Form No. 10716.*)

Form No. 17107.[2]

(Precedent in Hairston *v.* Com., 97 Va. 754.)[3]

Virginia, *Henry* county, to wit:

In the *County* Court of said county, at the *October* term thereof, 1898.

The grand jurors of the Commonwealth of *Virginia*, in and for the county of *Henry*, and now attending the said court, upon their oaths present, that *George Hairston* within *twelve* months last, to wit, on the ——— day of *September*, 1898, in said county, did unlawfully and feloniously attempt to commit the crime of rape, and with force and arms, in and upon one *Mary E. Thomasson*, the said *Mary E. Thomasson* then being over the age of *fourteen* years, to wit, of the age of *forty-two* years, violently and feloniously did make an assault with intent her, the said *Mary E. Thomasson*, feloniously to ravish and carnally know against her will and by force, and he, the said *George Hairston*, then and there in his said attempt to commit the felony and rape aforesaid did ask and demand to have sexual intercourse with her, the said *Mary E. Thomasson*, and upon refusal of the said *Mary E. Thomasson* of said demand, he the said *George Hairston* did then and there advance violently and rapidly upon the said *Mary E. Thomasson*, and then and there thrust out his hand to violently lay hold of her person, but he the said *George Hairston* was repelled by force from the said *Mary E. Thomasson*, and the said *George Hairston* did not actually commit the felony and rape attempted as aforesaid, against the peace and dignity of the Commonwealth of *Virginia*.

1. *Pennsylvania*. — Bright. Pur. Dig. (1894), p. 535, § 370.

See also, generally, *supra*, note 1, p. 572.

2. *Virginia*. — Code (Supp. 1898), § 3888.

See also, generally, *supra*, note 1, p. 572.

3. This indictment was demurred to in the trial court and the demurrer overruled. No objection was made to the form of the indictment in the supreme court. A new trial, however, was granted, on the ground that the evidence did not support the verdict of guilty.

This indictment is found upon the evidence of *Mary E. Thomasson*, *Sallie A. Stone*, *Banks Valentine*, *Mary E. Valentine* and *Kiah Cahill*, witnesses sworn in open court to give evidence to the grand jury.

b. Where Female is Under Age of Consent.[1]

1. Requisites of Indictment or Information, Generally. — See *supra*, note 1, p. 572.

An information which charges the defendant with an attempt to carnally and unlawfully know a female child under the age of ten years is sufficient, although the word "rape" is not used. State *v.* Hart, 33 Kan. 218.

Assault. — Abuse of a female under the age of consent is necessarily attended with assault, and therefore the offense is accurately described by alleging that there was an assault. Farrell *v.* State, 54 N. J. L. 416.

Description of Injured Party — *Age.* — The age of female must be stated. State *v.* Wheat, 63 Vt 673. But see O'Meara *v.* State, 17 Ohio St. 515, holding that the age of the female need not be alleged.

Not Wife of Defendant. — That female was not the wife of the defendant must be alleged, where the indictment is for an assault with intent to commit rape on a female under the age of consent. Dudley *v.* State, 37 Tex. Crim. 543; Edwards *v.* State, 37 Tex. Crim. 242; Rice *v.* State, 37 Tex. Crim. 36; Bice *v.* State, 37 Tex. Crim. 38.

Force, Threats or Fraud. — An indictment for an assault with intent to commit rape on a female under the age of consent need not allege force, threats or fraud. Moore *v.* State, 20 Tex. App. 275.

"Ravish." — An indictment for an assault with intent to commit rape on a child under the age of consent need not contain the word "ravish." State *v.* Jaeger, 66 Mo. 173.

Consent of Female. — An indictment for assault with intent to commit rape upon a female under the age of consent need not allege that it was done without her consent: assault being charged, force is implied. Territory *v.* Keyes, 5 Dak. 244.

Where the indictment charged the assault as by force and against the will of the person assaulted, it was held that the objection that the injured party had no will, being under the age of consent, was not well taken. State *v.* Grossheim, 79 Iowa 75.

Precedents — *Sufficient.* — Where the indictment charges that "*Edwin H. Keyes* * * * in and upon one *Ruby Milliken*, then and there being, did make an assault, and her, the said *Ruby Milliken*, did then and there beat and ill-treat, with intent to commit the felony of rape upon her, the said *Ruby Milliken*, then being a female under the age of *ten* years," it is sufficient. Territory *v.* Keyes, 5 Dak. 244.

In Porter *v.* People, 158 Ill. 370, an indictment was held sufficient which alleged that defendant "on the *tenth* day of *October*, 1893, at and within the county of *Jackson*, State of *Illinois*, then and there being a male person of the age of *sixteen* years and upwards, unlawfully and feloniously did make an assault in and upon one *Nora Blackwood*, then and there being a female person under the age of *fourteen* years, to-wit, of the age of *eleven* years, and her, the said *Nora Blackwood*, then and there wickedly, unlawfully and feloniously, with intent then and there to ravish and carnally know, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois."

In State *v.* Newton, 44 Iowa 45, the following indictment was held sufficient: "That on, etc., at, etc., the defendant upon one *Jerusha A. L.*, a female child under the age of * * * years, to wit: *seven* years of age, did feloniously make an assault with intent the said *Jerusha A. L.* feloniously to ravish and carnally know by force and against her will."

In Proctor *v.* Com., (Ky. 1892) 20 S. W. Rep. 213, the indictment charged that the defendant "with force and arms, unlawfully, maliciously, and feloniously did make an assault upon *Laura Bell McDaniel*, a female under the age of *12* years, then and there unlawfully and feloniously, against her will and consent, did attempt to ravish and carnally know ——, contrary to the form of the statute," etc. The words "her" or "*Laura Bell McDaniel*" were omitted in the latter part of the averment. It was held

that the last averment applied to and was connected with the person upon whom the assault was made, and that the indictment was sufficient to charge an attempt to commit rape upon a child under twelve years of age.

In People *v.* McDonald, 9 Mich. 150, an indictment which charged that defendant did "in and upon one *Margaret Brown*, a female child under the age of *ten* years, to wit: of the age of *seven* years, unlawfully make an assault, and her, the said *Margaret Brown*, beat, wound, and ill-treat, with intent her, the said *Margaret Brown*, unlawfully, feloniously, and carnally to know and abuse," was sufficient.

In State *v.* Prather, 136 Mo. 20, the indictment charged as follows: "That *A. E. Prather*, on the *eleventh* day of *June*, A. D. 1895, at the county of *Vernon* and state of *Missouri*, in and upon one *Birdie Harpold*, a female child under the age of *fourteen* years, to wit, of the age of *six* years, unlawfully and feloniously did make an assault with intent her, the said *Birdie Harpold*, then and there feloniously to unlawfully rape and carnally know and abuse, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state." It was held that this indictment was drawn under sections 3489, 3490 of the Revised Statutes of 1889, and was in good form; that the word "rape," being unnecessary, might be rejected as surplusage.

An indictment for an assault upon a child under the age of ten years, "with intent feloniously to ravish and feloniously to carnally know," etc., is good. The words "to ravish" may be rejected as surplusage. McComas *v.* State, 11 Mo. 116.

In McAvoy *v.* State, (Tex. Crim. 1899) 51 S. W. Rep. 928, the first count in the indictment charged that "*L. N. McAvoy* on or about the *18th* day of *December*, A. D. 1897, and anterior to the presentment of this indictment, in the county and state aforesaid, in and upon *Carrie Race*, a woman then and there under the age of *fifteen* years, did make an assault, with the intent then and there to commit the offense of rape upon the said *Carrie Race*, by then and there, without the consent of the said *Carrie Race*, attempting by force, threats and fraud to have carnal knowledge of her, the said *Carrie Race*, the said *Carrie Race* not being then and there the wife of the said *L. N. McAvoy*; against the peace and dignity of the state." The second count charged "that heretofore, on or about the *18th* day of *December*, 1897, in *El Paso* county, in the state of *Texas*, *L. N. McAvoy* did then and there, in and upon *Carrie Race*, a female, then and there under the age of *fifteen* years, make an assault, with the intent upon the part of him, said *L. N. McAvoy*, then and there, by means of said assault, her, the said *Carrie Race*, to ravish and carnally know, she, the said *Carrie Race*, not being then and there the wife of him, said *McAvoy*; against the peace and dignity of the state."

This indictment was objected to on the ground that it charged two distinct offenses. It was held, however, that the charge contained in each count might properly be joined in the same indictment.

In Fizell *v.* State, 25 Wis. 364, the indictment charged that defendant "in and upon one *Ida J. Perry*, then and there being, unlawfully did make an assault with an intent her, the said *Ida J. Perry*, then and there unlawfully and feloniously to carnally know and ravish by force, and against her will, he, the said *Samuel Fizell, Jr.*, then and there being a male person of the age of *sixteen* years and upward, and the said *Ida J. Perry* being then and there a female child under the age of *ten* years." It was held that this indictment was good under the statute.

Insufficient. — Where the indictment charged "that *John Nugent*, late of said county, in and upon one *Hanna Smith* (she, the said *Hanna Smith*, then and there being a female child under the age of *ten* years) feloniously did make an assault, and her, the said *Hanna Smith*, then and there did feloniously abuse in the attempt to carnally know," it was held to be insufficient in not specifying with sufficient certainty and precision the person upon whom the attempt was committed. Nugent *v.* State, 19 Ala. 540.

An information which charged that "on the *14th* day of *April*, 1893, in the said county of *Saline*, and the state of *Kansas*, one *George W. Frazier*, then and there, in and upon one *Anna Yust*, a female under the age of *18* years, to wit, of the age of *13* years, then and there being, unlawfully and feloniously did commit a rape, by then and there carnally and unlawfully knowing her,

Form No. 17108.[1]

(Precedent in State *v.* Meinhart, 73 Mo. 562.)[2]

(*Venue and title of court as in Form No. 10703.*)

The grand jurors of the State of *Missouri*, summoned from the body of inhabitants of *Cole* county, now here in court, duly empaneled, sworn and charged, on their oaths, present that *Theodore H. Meinhart*, late of said *Cole* county, on the *20th* day of *October*, in the year of our Lord one thousand eight hundred and *eighty*, at the said county of *Cole*, in the State of *Missouri*, in and upon one *Amelia Thomas*, a female child under the age of *twelve* years, to-wit: Of the age of *nine* years, unlawfully and feloniously did make an assault, with intent her, the said *Amelia Thomas*, then and there feloniously to unlawfully and carnally know and abuse, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of *Missouri*.

Mack J. Leaming,
Prosecuting Attorney for *Cole* county, *Missouri*.

[(*Indorsements.*)][3]

Form No. 17109.[4]

(*Commencing as in Form No. 10721, and continuing down to* *) in and upon one *Julia Roe*, a female under the age of *fifteen* years then and there being, make an assault, with intent on the part of him, the said *John Doe*, of her, the said *Julia Roe*, to have carnal knowledge, she, the said *Julia Roe*, not then and there being the wife of him, the said *John Doe*, against (*concluding as in Form No. 10721*).

Form No. 17110.[5]

(*Commencing as in Form No. 10727, and continuing down to* *) in and upon one *Julia Roe*, a female child under the age of *fourteen* years then and there being, unlawfully and feloniously did make an assault, with intent her, the said *Julia Roe*, then and there to unlawfully and carnally know and abuse, against (*concluding as in Form No. 10727*).

IX. AIDING AND ABETTING.[6]

the said *Anna Yust*," and the second count of which charged that "on the *14th* day of *April*, 1893, in the said county of *Saline* and state of *Kansas*, one *George W. Frazier*, then and there, in and upon one *Anna Yust*, a female under the age of *18* years, to wit, of the age of *13* years, then and there being, unlawfully and feloniously did attempt to commit a rape, by then and there attempting to carnally and unlawfully know the said *Anna Yust*," etc., was held insufficient, on motion to quash, in failing to set forth any specific acts done toward the commission of the offense. State *v.* Frazier, 53 Kan. 87.

1. *Missouri.* — Rev. Stat. (1899), § 1848.

See also, generally, *supra*, note 1, p. 580.

2. It was held that this indictment was sufficient.

3. The matter to be supplied within [] will not be found in the reported case.

4. *Texas.* — Pen. Code (1895), arts. 608, 633.

See also, generally, *supra*, note 1, p. 580.

5. *Wisconsin.* — Stat. (1898), §§ 4382, 4383.

See also, generally, *supra*, note 1, p. 580.

6. **For forms relating to aiders and abetters, generally,** see the titles ACCESSORIES, AIDERS AND ABETTORS, vol. 1, p. 158.

1. In General.[1]

Form No. 17111.[2]

(*Commencing as in Form No. 10696, and continuing down to* *) with force and arms, in and upon one *Jane Roe*, feloniously and forcibly did make an assault, and her the said *Jane Roe*, then and there, at the said parish of *St. Landry*, state aforesaid, forcibly and against her will, feloniously did ravish and carnally know, contrary to the form of the statute of the state of *Louisiana* in such case made and provided, in contempt of the authority of said state, and against the peace and dignity of the same.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that *Samuel Short*, on the *first* day of *January* aforesaid, at the said parish of *St. Landry*, state aforesaid, feloniously was present aiding, abetting and assisting the said *John Doe* the felony aforesaid to do and commit, contrary to the form of the statute of the state of *Louisiana* in such case made and provided, in contempt of the authority of said state, and against the peace and dignity of the same.

(*Indorsements as in Form No. 10696.*)

2. Where Principal is Unknown.

Form No. 17112.[3]

State of *Louisiana*, }
Parish of *St. Landry*. }

In the name and by the authority of the state of *Louisiana*, the grand jurors of the state of *Louisiana*, duly impaneled, sworn and charged to inquire within and for the body of the parish of *St. Landry*, state aforesaid, upon their oath do present, that a certain person to the grand jurors unknown, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-nine*, at the said parish of *St. Landry*, state aforesaid, with force and arms, in and upon one *Jane Roe*, feloniously and forcibly did make an assault, and her, the said *Jane Roe*, then and there, at the said parish of *St. Landry*, state aforesaid, forcibly and against her will, feloniously did ravish and carnally know, contrary to the form of the statute of

1. **Precedent.** — In Sutton *v.* People, 145 Ill. 279, the indictment charged that defendant "on the *16th* day of *June*, at and in the county of *Champaign*, and State of *Illinois* (*naming the defendants*), feloniously and forcibly did make an assault in and upon one *Nellie Huhm*, then and there being a female, and the said *Frank Sutton*, then and there being a male person of the age of *fourteen* years and upwards, did then and there feloniously have carnal knowledge of the said *Nellie Huhm*, forcibly and against her will, and the said *Thomas Blakesly*, and *Clara Cunningham*, then and there being present, stood by and feloniously aided, and abetted, and assisted the said *Frank Sutton*, in having said carnal knowledge of the said *Nellie Huhm* forcibly, and against her will, as aforesaid."

It was held that the indictment was sufficient, and that the words "then and there being a male person of the age of *fourteen* years and upwards" might be rejected as surplusage.

2. See, generally, *supra*, note 1, this page.

3. This is substantially the indictment in State *v.* Williams, 32 La. Ann. 335. The indictment in that case was held sufficient, although the word "violently" was used in place of "forcibly" or "by force."

Louisiana in such case made and provided, in contempt of the authority of said state, and against the peace and dignity of the same.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that *Samuel Short*, on the *first* day of *January* aforesaid, at the said parish of *St. Landry*, state aforesaid, feloniously was present aiding, abetting and assisting the said person to the grand jurors aforesaid unknown the felony aforesaid to do and commit, contrary to the form of the statute of the state of *Louisiana* in such case made and provided, in contempt of the authority of said state, and against the peace and dignity of the same.

(*Indorsements as in Form No. 10696.*)

REAL ESTATE BROKERS.

See the title BROKERS, vol. 4, p. 90.

REAL PROPERTY.

See the titles ASSISTANCE, WRIT OF, vol. 2, p. 289; *ASSUMPSIT*, vol. 2, p. 294; *ATTACHMENT, GARNISHMENT, TRUSTEE PROCESS, FACTORIZING*, vol. 2, p. 303; *CREDITORS' SUITS*, vol. 5, p. 874; *DISTRESS*, vol. 6, p. 980; *DOWER*, vol. 7, p. 139; *EJECTMENT*, vol. 7, p. 279; *EMINENT DOMAIN*, vol. 7, p. 561; *ENTRY, WRIT OF*, vol. 7, p. 703; *ESCHEATS*, vol. 7, p. 804; *EXECUTIONS AGAINST PROPERTY*, vol. 8, p. 1; *FRAUDULENT CONVEYANCES*, vol. 8, p. 859; *HOMESTEADS AND EXEMPTIONS*, vol. 9, p. 303; *HUSBAND AND WIFE*, vol. 9, p. 538; *LANDLORD AND TENANT*, vol. 11, p. 8; *MINES AND MINING*, vol. 12, p. 319; *MORTGAGES*, vol. 12, p. 390; *PARTITION*, vol. 13, p. 393; *POSSESSION, WRIT OF*, vol. 14, p. 69; *PRIVATE WAYS*, vol. 14, p. 212; *PROBATE AND ADMINISTRATION*, vol. 14, p. 238; *PUBLIC LANDS*, *ante*, p. 76; *QUIETING TITLE AND REMOVING CLOUD*, *ante*, p. 154; *RESCISSION, REFORMATION AND CANCELLATION; SPECIFIC PERFORMANCE; TRESPASS; TRESPASS TO TRY TITLE; TRUSTS AND TRUSTEES; UNLAWFUL DETAINER; VENDOR AND PURCHASER.*

REARGUMENT.

See the title REHEARING; REARGUMENT.

REASONABLE DOUBT.

See the title APPEALS, vol. 1, p. 890.

REBUTTER.

See the title REJOINDERS AND SUBSEQUENT PLEADINGS.

RECEIPT.

See the title RELEASE.

RECEIVERS.

By Harold N. Eldridge.

CROSS-REFERENCES.

For Form of Decree Appointing Receiver in a Proceeding for a Partnership Accounting, see the title ACCOUNTS AND ACCOUNTING, vol. 1, *Form No. 522.*

For Forms relating to Receivers in Case of Chattel Mortgage, see the title CHATTEL MORTGAGES, vol. 4, p. 777.

For other Forms Against Receivers for Contempt, see the title CONTEMPT, vol. 5, p. 226.

For other Forms relating to Receivers of Corporations, see the title CORPORATIONS, vol. 5, p. 523.

For other Forms relating to Receivers in Creditors' Suits, see the title CREDITORS' SUITS, vol. 5, p. 874.

For Forms relating to Receivers in the Case of Elevated Railroads, see the title ELEVATED RAILROADS, vol. 7, p. 442.

For Forms relating to Receivers in Injunction Proceedings, see the title INJUNCTIONS, vol. 9, p. 822.

For other Forms relating to Receivers in Mortgage Foreclosure Proceedings, see the title MORTGAGES, vol. 12, p. 390.

For Form of Indictment Against Person Resisting a Receiver, see the title OBSTRUCTING JUSTICE, vol. 13, *Form No. 14660.*

For other Forms relating to Receivers in Partnership Proceedings, see the title PARTNERSHIP, vol. 13, p. 613.

See also the GENERAL INDEX to this work.

I. APPOINTMENT OF RECEIVER.[1]

1. **Statutes** relating to receivers exist as follows:
Alabama. — Civ. Code (1896), §§ 429, 438, 445, 799 *et seq.*, 821, 1294 *et seq.*, 2580, 3942, 3964; Ch. Ct. Rules Nos. 112, 113, 115.

Arizona. — Rev. Stat. (1901), § 1532 *et seq.*

Arkansas. — Laws (1897), c. 48; Sand. & H. Dig. (1894), §§ 351, 5964 *et seq.*

California. — Code Civ. Proc. (Supp. 1902), p. 32, § 566 *et seq.*; p. 82, § 1270; Civ. Code (1901), §§ 140, 653*j*; Code Civ. Proc. (1897), § 564 *et seq.*

Colorado. — Mills' Anno. Code (1896), § 163 *et seq.*; Laws (1893), c. 67; Mills' Anno. Stat. (1891), § 3298.

Connecticut. — Laws (1901), c. 157, § 46; Laws (1899), c. 151; Laws (1897), cc. 40, 62, 237; Laws (1895), cc. 57, 96, 108, 224, 316; Laws (1893), c. 112; Gen. Stat. (1888), §§ 1113, 1172 *et seq.*, 1313 *et seq.*, 1318 *et seq.*, 1830 *et seq.*, 1942, 2760 *et seq.*, 2822 *et seq.*, 2869 *et seq.*, 3585.

Delaware. — Laws (1895), c. 68.

Florida. — Laws (1901), c. 4986, p. 139; Rev. Stat. (1892), §§ 1211, 2107, 2154 *et seq.*, 2171, 2182, 2185, 2188, 2189, 2192.

Georgia. — 2 Code (1895), §§ 1970, 2324, 2333, 2716, 4321, 4900 *et seq.*

Idaho. — Rev. Stat. (1887), § 4329 *et seq.*

Illinois. — Starr & C. Anno. Stat. (1896), c. 16*a*, par. 1; c. 32, pars. 25, 90; c. 62, par. 24; c. 82, par. 12; c. 110, pars. 94, 107; c. 120, par. 6.

Indiana. — Laws (1899), c. 168; Horner's Stat. (1896), §§ 1222 *et seq.*, 1270, 1358, 1404, 1943, 3012, 3736, 4025, 5134, 6049, 6050, 6279, 6436.

Iowa. — Laws (1900), c. 69, § 9; Code (1897), §§ 1640, 1731, 1777, 1795, 1877, 3822 *et seq.*, 3904, 3978, 3988, 4078, 4084.

Kansas. — Gen. Stat. (1897), c. 18, § 46; c. 95, §§ 264 *et seq.*, 510 *et seq.*

Kentucky. — Stat. (1894), §§ 389 *et seq.*, 629, 677, 1740, 1761, 1776, 2116, 2336, 3925; Bullitt's Civ. Code (1895), §§ 21, 218, 219, 298 *et seq.*

Maine. — Stat. (Supp. 1895), p. 318, c. 49, § 6; Rev. Stat. (1883), c. 47, §§ 68, 121; c. 49, §§ 76, 83; c. 51, § 47 *et seq.*

Maryland. — Pub. Gen. Laws (1888), art. 5, § 25; art. 17, § 24; art. 23, § 268 *et seq.*

Massachusetts. — Stat. (1900), c. 381; Stat. (1897), c. 400; Stat. (1895), cc. 173, 340; Stat. (1894), cc. 203, 317, §§ 6, 51; c. 522, §§ 7, 13, 95; Stat. (1887), c. 214, §§ 7, 13, 49, 95; Stat. (1886), c. 299, § 1; Stat. (1883), c. 258, § 1; Stat. (1882), c. 77, § 1; Pub. Stat. (1882), c. 105, § 42 *et seq.*; c. 116, § 6; c. 118, §§ 81, 110, 118; c. 151, § 2, cl. 7.

Michigan. — Comp. Laws (1897), §§ 446, 5202, 6095, 6114, 6130, 6135, 6144, 6175, 7091, 7249, 7282, 7301, 7316, 7331, 7396, 7518, 7600, 8640, 9542, 9552, 9760, 9765, 9938, 9963, 10606, 10723, 10841, 11099.

Minnesota. — Laws (1895), c. 66, §§ 2, 3, 6; c. 175, §§ 13, 93; c. 222; Stat. (1894), §§ 2512, 3182, 3432 *et seq.*, 4241, 4246, 4253, 4810, 5174, 5175, 5176, 5351 *et seq.*, 5492, 5895, 5902, 5906, 5948, 5972, 6238.

Mississippi. — Anno. Code (1892), §§ 119, 574 *et seq.*, 1063.

Missouri. — Rev. Stat. (1899), §§ 395 *et seq.*, 753 *et seq.*, 993, 1006, 1016, 1029, 1067, 1113, 1141, 1142, 1150, 1303, 1305, 1339, 1407, 1469, 1539, 3175, 3176, 3648, 3890, 4150, 7381, 7382, 8037 *et seq.*

Montana. — Code Civ. Proc. (1895), § 950 *et seq.*; Civ. Code (1895), §§ 604, 728, 830, 832.

Nebraska. — Laws (1901), c. 9, § 1; Comp. Stat. (1899), §§ 649 *et seq.*, 723, 5777, 5837 *et seq.*, 6134.

Nevada. — Comp. Laws (1900), § 3241.

New Jersey. — Gen. Stat. (1895), p. 4, § 12; p. 5, § 2; p. 353, § 18; p. 390, § 93; p. 582, § 618; p. 918, § 60 *et seq.*; p. 947, § 191; p. 974, § 310; p. 977, § 325; p. 982, §§ 338, 340; p. 1419, § 26; p. 1755, §§ 67, 68; p. 2682, § 188; p. 2688, §§ 216, 219; p. 3011, § 64.

New York. — Code Civ. Proc., §§ 713 *et seq.*, 1791, subs. 8, 812, 827, 1263, 1766, 1772, 1788, 1789, 1801, 1810, 1869, 1877, 1890, 1947, 2153, 2160, 2429, 2441, 2464 *et seq.*, 2469, 3271, 3320, 3347.

North Carolina. — Clark's Code Civ. Proc. (1900), § 379 *et seq.*

North Dakota. — Rev. Codes (1895), §§ 5302, 5403 *et seq.*, 5568, 5765, 5770, 5779, 5780.

Ohio. — Bates' Anno. Stat. (1897), §§ 3415 *et seq.*, 5484 *et seq.*, 5539 *et seq.*, 5587 *et seq.*, 5656 *et seq.*; Laws (1898), p. 413, No. 663.

Oklahoma. — Stat. (1893), §§ 4101 *et seq.*, 4144 *et seq.*, 4385 *et seq.*, 5601.

Oregon. — Laws (1899), p. 92, No. 164; Hill's Anno. Laws (1892), § 1060 *et seq.*

Pennsylvania. — Bright. Pur. Dig. (1894), p. 427, § 118; p. 1776, § 23.

Rhode Island. — Gen. Laws (1896), c. 177, § 2; c. 202, § 15; c. 233, § 13; c. 267, § 1 *et seq.*

South Carolina. — Laws (1898), No. 481, § 4; Laws (1897), No. 325; Code Civ. Proc. (1893), §§ 265, 318.

South Dakota. — Dak. Comp. Laws (1887), §§ 4943, 5180, 5182, 5359.

Tennessee. — Code (1896), §§ 1097, 3526, 4730, 4765, 5182, 5433, 5547 5549, 5752, 6269, 6270.

1. Application for.[1]

a. Affidavit, Bill, Complaint or Petition.

(1) In General.[2]

Texas. — Rev. Stat. (1895), arts. 480, 682, 1194, 1465 *et seq.*, 2594, 3017.

Utah. — Rev. Stat. (1898), §§ 377, 378, 390, 399, 400, 415, 424, 430, 2543, 3114 *et seq.*, 3281.

Vermont. — Stat. (1894), §§ 962 *et seq.*, 3700 *et seq.*, 3974, 4056 *et seq.*, 4124, 4208 *et seq.*

Virginia. — Code (1887), § 3405 *et seq.*

Washington. — Ballinger's Anno. Codes & Stat. (1897), §§ 1055 *et seq.*, 1060 *et seq.*, 1534, 1535, 5339, 5364, 5455 *et seq.*, 5923, 5941, 5856.

West Virginia. — Code (1899), c. 133, § 15 *et seq.*

Wisconsin. — Laws (1901), c. 175; Stat. (1898), §§ 1044, 1584*d*, 1648, 1694*b*, 1769, 1791*b*, 1861, 1921, 1945*b*, 2014, 2347*a*, 2583, 2787 *et seq.*, 2802, 3216, 3219, 3246.

Wyoming. — Laws (1895), c. 12; Laws (1888), c. 88, § 17; Rev. Stat. (1887), §§ 2832, 2833, 2887 *et seq.*, 2935 *et seq.*

1. Necessity of Application. — There must be some application filed on behalf of the party seeking the appointment of a receiver and invoking the powers of the court to be exercised in that behalf. The applicant must map out some form of pleading stating a case for the appointment of a receiver, that the opposite parties may know on what ground the right to a receiver is claimed, and that they may know what they have to meet and defend against to prevent the appointment, and the pleadings in this behalf will bound and limit the inquiry. Supreme Sitting, etc., *v.* Baker, 134 Ind. 293 (*citing* Steele *v.* Aspy, 128 Ind. 367).

2. Manner of Application — Affidavit. — It is the usual practice, in applying for the appointment of a receiver, for the moving party to file an affidavit in support of his application. Irwin *v.* Everson, 95 Ala. 64; Micou *v.* Moses, 72 Ala. 439; Tumlin *v.* Vanhorn, 77 Ga. 315; Sioux City First Nat. Bank *v.* Gage, 79 Ill. 207; Leeds *v.* Townsend, 74 Ill. App. 444; Sullivan Electric Light, etc., Co. *v.* Blue, 142 Ind. 407; Supreme Sitting, etc., *v* Baker, 134 Ind. 293; Naylor *v.* Sidener, 106 Ind. 179; Pressley *v.* Harrison, 102 Ind. 14; Pouder *v.* Tate, 96 Ind. 330; Bitting *v.* Ten Eyck, 85 Ind. 357; Clark *v.* Raymond, 84 Iowa 251; Elwood *v.* Greenleaf First Nat. Bank, 41 Kan. 475; Hottenstein *v.* Conrad, 9 Kan. 435; Rankin *v.* Rothschild, 78 Mich. 10; Connor *v.* Allen, Harr. (Mich.) 371; State *v.* New England Bank, 55 Minn. 139; Prouty *v.* Hallowell, 53 Minn. 488; Ladd *v.* Harvey, 21 N. H. 514; Waterbury *v.* Merchant's Union Express Co., 50 Barb. (N. Y.) 157; McCarty *v.* Stanwix, (Supreme Ct. Spec. T.) 16 Misc. (N. Y.) 132; Quincy *v.* Cheeseman, 4 Sandf. Ch. (N. Y.) 405; Whitehead *v.* Hale, 118 N. Car. 601; Pearce *v.* Elwell, 116 N. Car. 595; City Nat. Bank *v.* Bridgers, 114 N. Car. 381; Forsaith Mach. Co. *v.* Hope Mills Lumber Co., 109 N. Car. 576; Bryan *v.* Moring, 94 N. Car. 694; Jones *v.* Thorne, 80 N. Car. 72; Schlecht's Appeal, 60 Pa. St. 172; Davis *v.* Reaves, 2 Lea (Tenn.) 649; Cameron *v.* Groveland Imp. Co., 20 Wash. 169; Brundage *v.* Home Sav., etc., Assoc., 11 Wash. 277; Schreiber *v.* Carey, 48 Wis. 208; Finch *v.* Houghton, 19 Wis. 149; Hungerford *v.* Cushing, 8 Wis. 320; Shainwald *v.* Lewis, 7 Sawy. (U. S.) 148; Commercial, etc., Bank *v.* Corbett, 5 Sawy. (U. S.) 172.

Bill, Complaint or Petition. — The application for the appointment of a receiver may, however, be included in the bill, complaint or petition. Hendrix *v.* American Freehold Land Mortg. Co., 95 Ala. 313; Jones *v.* Leadville Bank, 10 Colo. 464; State *v.* Union Nat. Bank, 145 Ind. 537; Sellers *v.* Stoffel, 139 Ind. 468; Bufkin *v.* Boyce, 104 Ind. 53; Brinkman *v.* Ritzinger, 82 Ind. 358; Newell *v.* Schnull, 73 Ind. 241; Clark *v.* Raymond, 84 Iowa 251. In such cases the pleading must lay the foundation for the appointment by dislosing that the action is one in which a receiver is authorized. Sullivan Electric Light, etc., Co. *v.* Blue, 142 Ind. 407; Elwood *v.* Greenleaf First Nat. Bank, 41 Kan. 475; Hottenstein *v.* Conrad, 9 Kan. 435; Commercial, etc., Bank *v.* Corbett, 5 Sawy. (U. S.) 172. And must show the necessity or propriety of the appointment of the receiver. Tomlinson *v.* Ward, 2 Conn. 396; Vause *v.* Woods, 46 Miss. 120; Wilson *v.* Maddox, 46 W. Va. 641. And must be sufficient in itself, and must contain all allegations necessary to show why the

application should be granted. Sellers *v.* Stoffel, 139 Ind. 468.

Requisites of Affidavit, Bill, etc., Generally.— Facts relied on to show necessity for appointment of receiver should be distinctly and specifically set forth, and a mere allegation that such appointment is necessary is not sufficient. Dozier *v.* Logan, 101 Ga. 173; Bufkin *v.* Boyce, 104 Ind. 53; Peatman *v.* Centerville Light, etc., Co., 100 Iowa 245; Clark *v.* Ridgely, 1 Md. Ch. 70; National F. Ins. Co. *v.* Broadbent, 77 Minn. 175; Blair *v.* Green, 45 N. J. Eq. 671; Wilson *v.* Maddox, 46 W. Va. 641.

Interest of Applicant — *Generally.* — The interest of the applicant in the property over which a receivership is asked must be shown. Ashurst *v.* Lehman, 86 Ala. 370; Weis *v.* Goetter, 72 Ala. 259; Briarfield Iron Works Co. *v.* Foster, 54 Ala. 622; Jones *v.* Leadville Bank, 10 Colo. 464; State *v.* Jacksonville, etc., R. Co., 15 Fla. 201; Davis *v.* Niswonger, 145 Ind. 426; State *v.* Union Nat. Bank, 145 Ind. 537; Steele *v.* Aspy, 128 Ind. 367; American Invest. Co. *v.* Farrar, 87 Iowa 437; Kelley *v.* Black, (Ky. 1897), 42 S. W. Rep. 738; Anderson *v.* Cecil, 86 Md. 490; Baltimore, etc., R. Co. *v.* Cannon, 72 Md. 493; Frostburg Bldg. Assoc. *v.* Stark, 47 Md. 338; Voshell *v.* Hynson, 26 Md. 83; Blondheim *v.* Moore, 11 Md. 365; Chase's Case, 1 Bland (Md.) 206; Payne *v.* Atterbury, Harr. (Mich.) 414; Vause *v.* Woods, 46 Miss. 120; Mays *v.* Rose, Freem. (Miss.) 703; Flagler *v.* Blunt, 32 N. J. Eq. 518; Holland Trust Co. *v.* Consolidated Gas, etc., Co., 85 Hun (N. Y.) 454; Buffalo Chemical Works *v.* Bank of Commerce, 79 Hun (N. Y.) 93; O'Mahoney *v.* Belmont, 62 N. Y. 133; Simmons *v.* Wood, (Supreme Ct. Spec. T.) 45 How. Pr. (N. Y.) 262; Smith *v.* Wells, (Supreme Ct. Spec. T.) 20 How. Pr. (N. Y.) 158; Goodyear *v.* Betts, (Supreme Ct. Spec. T.) 7 How. Pr. (N. Y.) 187; Bloodgood *v.* Clark, 4 Paige (N. Y.) 574; NcNair *v.* Pope, 96 N. Car. 502; Bryan *v.* Moring, 94 N. Car. 694; Levenson *v.* Elson, 88 N. Car. 182; Twitty *v.* Logan, 80 N. Car. 69; Rollins *v.* Henry, 77 N. Car. 467; Pottsville Lumber, etc., Co. *v.* Kopitzsch Soap Co., 13 Pa. Co. Ct. 139; Pelzer *v.* Hughes, 27 S. Car. 408; Spokane *v.* Amsterdamsch Trustees Kantoor, 18 Wash. 81; Kanawha Coal Co. *v.* Ballard, etc., Coal Co., 43 W. Va. 721; Wilson *v.* Maddox, 46 W. Va. 641; Hinckley *v.* Pfister, 83 Wis. 64; Ryder *v.* Bateman, 93 Fed. Rep. 16; Leary *v.* Columbia River, etc., Nav. Co , 82 Fed. Rep. 775.

Must be Shown by Complaint. — The applicant's title must be set forth in his bill or complaint and not by separate affidavit, and this title must be set forth with such particularity of statement and description and averment as would compel defendant by sworn answer to admit or enable the court to see a prima facie or apparent title in the plaintiff. Pasco *v.* Gamble, 15 Fla. 562; Rollins *v.* Henry, 77 N. Car. 467.

Insolvency of Debtor — *Generally.* — The application should allege the insolvency of the person against whom a receiver is sought. Adams *v.* Woods, 8 Cal. 152; Dickerson *v.* Cass County Bank, 95 Iowa 392; O'Bryan *v.* Gibbons, 2 Md. Ch. 9; Williamson *v.* Wilson, 1 Bland (Md.) 418; Chase's Case, 1 Bland (Md.) 206; Brown *v.* Ring, 77 Mich. 159; Buckley *v.* Baldwin, 69 Miss. 804; Coddington *v.* Tappan, 26 N. J. Eq. 141; O'Mahoney *v.* Belmont, 62 N. Y. 133; Hayes *v.* Heyer, 4 Sandf. Ch. (N. Y.) 485; Attrill *v.* Rockaway Beach Imp. Co., 25 Hun (N. Y.) 509; Darcin *v.* Wells, (Supreme Ct. Gen. T.) 61 How. Pr. (N. Y.) 259; Willis *v.* Corlies, 2 Edw. (N. Y.) 281; West *v.* Swan, 3 Edw. (N. Y.) 420; McNair *v.* Pope, 96 N. Car. 502; Bryan *v.* Moring, 94 N. Car. 694; Levenson *v.* Elson, 88 N. Car. 182; Twitty *v.* Logan, 80 N. Car. 69; Jay *v.* Squire, 5 Ohio Dec. 318; Rollins *v.* Henry, 77 N. Car. 467; Banner *v.* Dingus, (Va. 1899) 33 S. E. Rep. 530; Spokane *v.* Amsterdamsch Trustees Kantoor, 18 Wash. 81; Clay *v.* Selah Valley Irrigation Co., 14 Wash. 543; Brundage *v.* Home Sav., etc., Assoc., 11 Wash. 277; Clark *v.* Johnston, 15 W. Va. 804; Hunt *v.* American Grocery Co., 80 Fed. Rep. 70; Beecher *v.* Bininger, 7 Blatchf. (U. S.) 170; Haines *v.* Carpenter, 1 Woods (U. S.) 262. Insolvency need not be directly charged: if it is fairly shown by the statements made, it is sufficient. Dickerson *v.* Cass County Bank, 95 Iowa 392.

In Hottenstein *v.* Conrad, 9 Kan. 435, it was held that the matter of solvency may or may not become material, and that it does not necessarily follow that because the person is solvent no receiver will be appointed.

Ex Parte Application. — Where the appointment is sought *ex parte*, the application should allege that the party

against whom a receiver is sought is insolvent. Gilreath *v.* Union Bank, etc., Co., 121 Ala. 204; Word *v.* Word, 90 Ala. 81; Moritz *v.* Miller, 87 Ala. 331; Thompson *v.* Tower Mfg. Co., 87 Ala. 733; Ashurst *v.* Lehman, 86 Ala. 370; Sims *v.* Adams, 78 Ala. 395; *Ex p.* Walker, 25 Ala. 81; Turgeau *v.* Brady, 24 La. Ann. 348.

Insolvency Alone Insufficient.—A mere charge of insolvency is not sufficient: that the property is in danger must also be alleged. Cofer *v.* Echerson, 6 Iowa 502; Williamson *v.* Wilson, 1 Bland. (Md.) 418; Chase's Case, 1 Bland (Md.) 206; Turnbull *v.* Prentiss Lumber Co., 55 Mich. 387; Vause *v.* Woods, 46 Miss. 120; Cox *v.* Peters, 13 N. J. Eq. 39; Bird *v.* Lanphear, 92 Hun (N. Y.) 567; Gregory *v.* Gregory, 33 N. Y. Super. Ct. 1; West *v.* Swan, 3 Edw. (N. Y.) 420; Fairbairn *v.* Fisher, 4 Jones Eq. (57 N. Car.) 390; McNair *v.* Pope, 96 N. Car. 502; Bryan *v.* Moring, 94 N. Car. 694; Levenson *v.* Elson, 88 N. Car. 182; Twitty *v.* Logan, 80 N. Car. 69; Stairley *v.* Rabe, McMull. Eq. (S. Car.) 22; Rollins *v.* Henry, 77 N. Car. 467; Bowling *v.* Scales, 2 Tenn. Ch. 63; Clay *v.* Selah Valley Irrigation Co., 14 Wash. 543; Ryder *v.* Bateman, 93 Fed. Rep. 16; Hunt *v.* American Grocery Co., 80 Fed. Rep. 70; McGeorge *v.* Big Stone Gap Imp. Co., 57 Fed. Rep. 262; Lawrence Iron-Works Co. *v.* Rockbridge Co., 47 Fed. Rep. 755.

Property Endangered. — That property or its rents and profits are in danger of being lost or materially injured or impaired should be shown. Heard *v.* Murray, 93 Ala. 127; Ashurst *v.* Lehman, 86 Ala. 370; Weis *v.* Goetter, 72 Ala. 259; Briarfield Iron Works Co. *v.* Foster, 54 Ala. 622; Jones *v.* Leadville Bank, 10 Colo. 464; State *v.* Jacksonville, etc., R. Co., 15 Fla. 201; West *v.* Chasten, 12 Fla. 315; Tumlin *v.* Vanhorn, 77 Ga. 315; Poythress *v.* Poythress, 16 Ga. 406; Soux City First Nat. Bank *v.* Gage, 79 Ill. 207; McCaslin *v.* State, 44 Ind. 151; Hirsch *v.* Israel, 106 Iowa 493; Dickerson *v.* Cass County Bank, 95 Iowa 392; American Invest. Co. *v.* Farrar, 87 Iowa 437; Cofer *v.* Echerson, 6 Iowa 502; Anderson *v.* Cecil, 86 Md. 490; Baltimore, etc., R. Co. *v.* Cannon, 72 Md. 493; Frostburg Bldg. Assoc. *v.* Stark, 47 Md. 338; Vosheii *v.* Hynson, 26 Md. 83; Knighton *v.* Young, 22 Md. 359; Blondheim *v.* Moore, 11 Md. 365; Clark *v.* Ridgely, 1 Md. Ch. 70; Chase's Case, 1 Bland (Md.) 206; Falmouth Nat. Bank *v.* Cape Cod Ship Canal Co., 166 Mass. 550; Turnbull *v.* Prentiss Lumber Co., 55 Mich. 387; Vause *v.* Woods, 46 Miss. 120; Mays *v.* Rose, Freem. (Miss.) 703; Ladd *v.* Harvey, 21 N. H. 514; Flagler *v.* Blunt, 32 N. J. Eq. 518; Hamburgh Mfg. Co. *v.* Edsall, 8 N. J. Eq. 141; Kean *v.* Colt, 5 N. J. Eq. 365; O'Mahoney *v.* Belmont, 62 N. Y. 133; Simmons *v.* Wood, (Supreme Ct. Spec. T.) 45 How. Pr. (N. Y.) 262; Goodyear *v.* Betts, (Supreme Ct. Spec. T.) 7 How. Pr. (N. Y.) 187; Gregory *v.* Gregory, 33 N. Y. Super. Ct. 1; Bloodgood *v.* Clark, 4 Paige (N. Y.) 574; Rogers *v.* Marshall, (Supreme Ct. Gen. T.) 6 Abb. Pr. N. S. (N. Y.) 457; West *v.* Swan, 3 Edw. (N. Y.) 420; Willis *v.* Corlies, 2 Edw. (N. Y.) 281; Orphan Asylum Soc. *v.* McCartee, Hopk. (N. Y.) 429; Bryan *v.* Moring, 94 N. Car. 694; Levenson *v.* Elson, 88 N. Car. 182; Twitty *v.* Logan, 80 N. Car. 69; Rollins *v.* Henry, 77 N. Car. 467; Pelzer *v.* Hughes, 27 S. Car. 408; Stairley *v.* Rabe, McMull. Eq. (S. Car.) 22; Bowling *v.* Scales, 2 Tenn. Ch. 63; City Nat. Bank *v.* Dunham, 18 Tex. Civ. App. 184; U. S. *v.* Church of Jesus Christ, 5 Utah 361; Norris *v.* Lake, 89 Va. 513; Banner *v.* Dingus, (Va. 1899) 33 S. E. Rep. 530; Spokane *v.* Amsterdamsch Trustees Kantoor, 18 Wash. 81; Clay *v.* Selah Valley Irrigation Co., 14 Wash. 543; Brundage *v.* Home Sav., etc., Assoc., 11 Wash. 277; Kanawha Coal Co. *v.* Ballard, etc., Coal Co., 43 W. Va. 721; Ogden *v.* Chalfant, 32 W. Va. 559; Wilson *v.* Maddox, 46 W. Va. 641; Ryder *v.* Bateman, 93 Fed. Rep. 16; Hunt *v.* American Grocery Co., 80 Fed. Rep. 70; Lawrence Iron-Works Co. *v.* Rockbridge Co., 47 Fed. Rep. 755; Beecher *v.* Bininger, 7 Blatchf. (U. S.) 170.

No Adequate Remedy at Law. — It should appear from the allegations of the bill, complaint or petition that the plaintiff has no full and adequate remedy at law. Hendrix *v.* American Freehold Land Mortg. Co., 95 Ala. 313; American Freehold Land Mortg. Co. *v.* Turner, 95 Ala. 272; West *v.* Chasten, 12 Fla. 315; Empire Hotel Co. *v.* Main, 98 Ga. 176; Tumlin *v.* Vanhorn, 77 Ga. 315; May *v.* Greenhill, 80 Ind. 124; American Invest. Co. *v.* Farrar, 87 Iowa 437; Harmon *v.* Kentucky Coal, etc., Co., (Ky. 1893) 21 S. W. Rep. 1054; Knighton *v.* Young, 22 Md. 359; Falmouth Nat. Bank *v.* Cape Cod Ship Canal

Co., 166 Mass. 550; Canandaigua First Nat. Bank *v.* Martin, 49 Hun (N. Y.) 571; Bunn *v.* Daly, 24 Hun N. Y.) 526; Starr *v.* Rathbone, 1 Barb. (N. Y.) 70; Albany City Nat. Bank *v.* Gaynor, (Supreme Ct. Spec. T.) 67 How. Pr. (N. Y.) 421; Congden *v.* Lee, 3 Edw. (N. Y.) 304; Kanawha Coal Co. *v.* Ballard, etc., Coal Co., 43 W. Va. 721.

Exhibits. — On a bill praying for an injunction and a receiver, the written documents on which the relief is prayed should be attached to the bill or proper excuse be made for their absence. Morton *v.* Grafflin, 68 Md. 545.

Prayer for Appointment — *Generally.* — In some jurisdictions it has been held that a receiver may be appointed although there is no prayer for such appointment in the bill. Ladd *v.* Harvey, 21 N. H. 514; Clyburn *v.* Reynolds, 31 S. Car. 91; Henshaw *v.* Wells, 9 Humph. (Tenn.) 568; Merrill *v.* Elam, 2 Tenn. Ch. 513; Commercial, etc., Bank *v.* Corbett, 5 Sawy. (U. S.) 172. If the facts stated in the bill authorize the appointment. Henshaw *v.* Wells, 9 Humph. (Tenn.) 568; Merrill *v.* Elam, 2 Tenn. Ch. 513. In other jurisdictions it has been held that a receiver will not be appointed before a decree, unless the bill contains a specific prayer for such appointment. Brinkman *v.* Ritzinger, 82 Ind. 358; Shannon *v.* Hanks, 88 Va. 338; Wilson *v.* Maddox, 46 W. Va. 641.

After Decree Entered.—In other jurisdictions the courts have distinguished between an appointment made before decree and one made after, holding that an appointment may be made after decree entered, even though the bill does not pray for the appointment of a receiver. Chicago, etc., R. Co. *v.* St. Clair, 144 Ind. 371; Brinkman *v.* Ritzinger, 82 Ind. 358; Connelly *v.* Dickson, 76 Ind. 440.

Verification — *Generally.* — The bill, complaint or petition should be verified. Pollard *v.* Southern Fertilizer Co., 122 Ala. 409; Burgess *v.* Martin, 111 Ala. 656; Hendrix *v.* American Freehold Land Mortg. Co., 95 Ala. 313; Smith-Dimmick Lumber Co. *v.* Teague, 119 Ala. 385; New South Bldg., etc., Assoc. *v.* Willingham, 93 Ga. 218; Bass *v.* Wolf, 88 Ga. 427; Siegmund *v.* Ascher, 37 Ill. App 122.

See list of statutes cited *supra*, note 1, p. 591.

Information and Belief.— In Holland Trust Co. *v.* Consolidated Gas, etc., Co., 85 Hun (N. Y.) 454, it was held "that a verified complaint, even on information and belief, as to some of its allegations particularly within the knowledge of the defendant, when not met or denied either by answer or affidavit, fully establishes the facts therein alleged and the rights of the parties accruing from such facts," and justifies an order appointing a receiver. But an affidavit on information and belief, unless accompanied by a disclosure of the affiant's means of information, is insufficient. Davis *v.* Reaves, 2 Lea (Tenn.) 649.

Ex Parte Application — *In General.* — A receiver may be appointed without notice where the pleadings on which application for receiver are founded set out facts and circumstances showing a good reason for such a course. Moritz *v.* Miller, 87 Ala. 331; Sims *v.* Adams, 78 Ala. 395; Bostwick *v.* Isbell, 41 Conn. 305; Jacksonville Ferry Co. *v.* Stockton, 40 Fla. 141; Stockton *v.* Harmon, 32 Fla. 312; Fricker *v.* Peters, etc., Co., 21 Fla. 254; State *v.* Jacksonville, etc., R. Co., 15 Fla. 201; English *v.* People, 90 Ill. App. 54; Winchester Electric Light Co. *v.* Gordon, 143 Ind. 681; Sullivan Electric Light, etc., Co. *v.* Blue, 142 Ind. 407; Wabash R. Co. *v.* Dykeman, 133 Ind. 56; Bisson *v.* Curry, 35 Iowa 72; French *v.* Gifford, 30 Iowa 148; Blondheim *v.* Moore, 11 Md. 365; People *v.* Albany, etc., R. Co., (Supreme Ct. Spec. T.) 7 Abb. Pr. N. S. (N. Y.) 265; Verplanck *v.* Mercantile Ins. Co., 2 Paige (N. Y.) 438; Ladd *v.* Harvey, 21 N. H. 514; Grandin *v.* La Bar, 2 N. Dak. 206.

Sufficient Allegations. — In Maxwell *v.* Peters Shoe Co., 109 Ala. 371, the material averments of the bill were that the complainants were creditors of J. K. Maxwell and J. E. Maxwell, composing the firm of J. K. Maxwell & Company; that the defendants were insolvent; that they had sold a large part of their goods to their mother, M. A. Maxwell, who had taken possession of the goods and disposed of them by her agent, W. T. Maxwell; that the debt claimed by Mrs. Maxwell for which these goods were received in payment was simulated; that the debtors had made an assignment of the remainder of their stock of goods for their creditors, and that W. T. Maxwell was assignee in said deed; that he had taken possession of the remainder of the goods and was dis-

Form No. 17113.[1]

Supreme Court, *Suffolk* County.
John Doe, plaintiff,
against
Richard Roe, defendant.

posing of them; that the assignee was insolvent and acting without bond. The bill further averred that said insolvent assignee had preferred a large claim, amounting to over twelve hundred dollars, which was simulated. The bill further averred that since the pretended sale to M. A. Maxwell new goods had been received, which were consigned to the firm before said sale and not included in the sale, and were turned over to W. T. Maxwell as the agent of M. A. Maxwell, and were now in his possession as such agent. The bill further averred that both W. T. Maxwell, the assignee, and Mary A. Maxwell, the purchaser, had notice of the insolvent condition of the debtors at the time of the sale and the execution of the assignment, and that the entire transaction was a scheme to injure, delay and defraud complainants and other creditors. The court said that they could not anticipate the evidence, but looking at the case made by the bill they were not prepared to hold that the appointment of a receiver was not authorized, notwithstanding no notice of such appointment was given to the adverse party.

Where it is shown by affidavit that defendants are disposing of the property in which complainant claims an equal interest with them, collecting and appropriating the proceeds of sale, and that they are insolvent, whereby the object of the suit will probably be defeated by notice, it is sufficient to warrant the appointment of a receiver without notice. Sims *v.* Adams, 78 Ala. 395.

Sufficient cause is shown where it appears that irreparable or other damage will result if notice be given. Jacksonville Ferry Co. *v.* Stockton, 40 Fla. 141; Sullivan Electric Light, etc., Co. *v* Blue, 142 Ind. 407.

In Dwelle *v.* Hinde, 8 Ohio Cir. Dec. 177, it was alleged in the petition as ground for proceeding to appoint a receiver without notice as follows: "Plaintiff further says that good grounds exist in this action for the appointment of a receiver without notice to the defendant, *Benjamin F. Dwelle*, for the reason that if such notice be required or given that the said *Dwelle* will sell, dispose of, remove, or incumber said property and assets whereby the said object and purpose of this action and the plaintiff's rights herein will be wholly lost and defeated." It was held that this constituted a sufficient ground to justify the judge in proceeding to the appointment of a receiver without notice.

Insufficient Allegations. — An allegation that complainant "greatly fears if the defendants are permitted to remain in possession of said property after the commencement of the suit that the same will be disposed of so as to be placed beyond the reach of your orators, and their debt will be wholly lost to them," is insufficient. Fears of the complainant are not sufficient, without stating the facts and circumstances from which such fears might be inferred. Fricker *v.* Peters, etc., Co., 21 Fla. 254.

A statement in a verified complaint that there is an emergency for the immediate appointment of a receiver without notice is not a sufficient showing. This is a mere statement of an opinion. Wabash R. Co. *v.* Dykeman, 133 Ind. 56.

An allegation that plaintiffs verily believe that if notice of this application be given, the books, records and papers of said bank will be so falsified or spirited away that they cannot ascertain the said fraud, does not conform to the rule as recognized that where a receiver is appointed without notice the particular facts and circumstances which render such a proceeding proper should be set forth in the bill or petition. French *v.* Gifford, 30 Iowa 148.

Allegations that the complainants are informed of certain matters, without stating when or whence the information was obtained, do not make such a case of fraud and imminent danger as to justify the granting of an injunction and the appointment of a receiver without notice to defendant. Blondheim *v.* Moore, 11 Md. 365.

1. See, generally, *supra*, note 2, p. 593.

Suffolk County, ss.

John Doe, being duly sworn, says:

I. That he is the plaintiff in the above entitled cause.

II. (*Here state all facts in support of the application not stated in the complaint or admitted in the answer.*)

III. That the (*specifying the property*) mentioned in the pleadings in this action, and of which a receiver is sought to be appointed, are now, exclusive of taxes and of other deductions and expenses, at the clear yearly rent of *one thousand* dollars.

IV. That the summons and complaint were on the *tenth* day of *February*, 1899, served upon the defendant, *Richard Roe*, and on the *twenty-fifth* day of *February*, 1899, the answer of the said defendant, *Richard Roe*, was duly served; that the cause has not yet been put upon the calendar, and the next circuit is appointed for the *first* day of *March*, 1899.

V. That an order to show cause is asked for, because (*Here state reason*).

VI. That no previous application has been made in this action for an order to show cause herein.

(*Signature and jurat as in Form No. 8805.*)

(2) In Foreclosure Proceedings.[1]

1. In Foreclosure Proceedings — *In General.*—Courts of equity had jurisdiction to appoint a receiver in foreclosure proceedings where, by reason of the insufficieney of the security or other reason, it became necessary to impound the rents and profits of the mortgaged property during the litigation, in order that they might, after the decree and sale, be applied upon the debt for the security of the mortgage. Warren *v.* Pitts, 114 Ala. 65; Merritt *v.* Gibson, 129 Ind. 155; Main *v.* Ginthert, 92 Ind. 180; Decker *v.* Gardner, 124 N. Y. 334; U. S. Trust Co. *v.* New York, etc., R. Co., 101 N. Y. 478; Hollenbeck *v.* Donnell, 94 N. Y. 342; Sales *v.* Lusk, 60 Wis. 490.

Under Statute. — For statutory provisions relating to appointment of receivers in proceedings to foreclose mortgages or deeds of trust see list of statutes cited *supra*, note 1, p. 591.

Where Mortgage Stipulates for Appointment. — Where it is shown that there is a stipulation in the mortgage for the appointment of a receiver, one will, as a general rule, be appointed. Stetson *v.* Northern Invest. Co., 101 Iowa 435; Hubbell *v.* Avenue Invest. Co., 97 Iowa 135. But that there is no absolute right to the appointment see Clark *v.* John A. Logan Mut. Loan, etc., Assoc., 58 Ill. App. 311; Couper *v.* Shirley, 75 Fed. Rep. 168. See also Eidlitz *v.* Lancaster, 40 N. Y. App. Div. 446, where the court held that the existence of a receiver's clause did not give mortgagee an absolute right to the appointment of a receiver, but that such a clause should be considered among the other features of the case in determining the propriety of the appointment.

Requisites of Affidavit, Bill, etc., Generally. — See *supra*, note 2, p. 593.

Facts Upon Which Application is Based — *Generally.* — The rule that the facts upon which the application for receivership are based should be clearly stated is especially true in mortgage foreclosure cases, where there is imminent danger of waste, removal or destruction of the property. National F. Ins. Co. *v.* Broadbent, 77 Minn. 175. And the facts stated must establish a case which clearly invokes the exercise of the equitable power of the court to appoint. Schreiber *v.* Carey, 48 Wis. 208.

That mortgage debt is due must be stated. Douglass *v.* Cline, 12 Bush (Ky.) 608; Farmers' Nat. Bank *v.* Backus, 64 Minn. 43; Quincy *v.* Cheeseman, 4 Sandf. Ch. (N. Y.) 405; Oldham *v.* Wilmington First Nat. Bank, 84 N. Car. 304; Finch *v.* Houghton, 19 Wis. 149.

That mortgagor is in possession of the mortgaged premises is, in *Alabama*, an essential allegation. Warren *v.* Pitts, 114 Ala. 65.

Insolvency of mortgagor and other persons liable must be stated. Warren *v.* Pitts, 114 Ala. 65; Jackson *v.* Hooper, 107 Ala. 634; Ashurst *v.* Lehman, 86 Ala. 370; Scott *v.* Ware, 65 Ala. 174; Montgomery *v.* Merrill, 65 Cal. 432; Pasco *v.* Gamble, 15 Fla. 562; Joliet First Nat. Bank *v.* Illinois Steel Co., 174 Ill. 140; Haas *v.* Chicago Bldg. Soc., 89 Ill. 498; Fountain *v.* Walther, 66 Ill. App. 529; Clark *v.* John A. Logan Mut. Loan, etc., Assoc., 58 Ill. App. 311; Glos *v.* Roach, 80 Ill. App. 283; Harris *v.* U. S. Sav. Fund, etc., Co., 146 Ind. 265; Reynolds *v.* Quick, 128 Ind. 316; Main *v.* Ginthert, 92 Ind. 180; Brinkman *v.* Ritzinger, 82 Ind. 358; Connelly *v.* Dickson, 76 Ind. 440; Stetson *v.* Northern Invest. Co., 101 Iowa 435; Swan *v.* Mitchell, 82 Iowa 307; Paine *v.* McElroy, 73 Iowa 81; Collins *v.* Richart, 14 Bush (Ky.) 621; Hazeltine *v.* Granger, 44 Mich. 503; Brown *v.* Chase, Walk. (Mich.) 43; Farmers' Nat. Bank *v.* Backus, 64 Minn. 43; Phillips *v.* Eiland, 52 Miss. 721, Hyman *v.* Kelly, 1 Nev. 179; Matter of Busch Brewing Co., 41 N. Y. App. Div. 204; Hollenbeck *v.* Donell, 29 Hun (N. Y.) 94; Smith *v.* Tiffany, 13 Hun (N. Y.) 671; Burlingame *v.* Parce, 12 Hun (N. Y.) 144; Syracuse City Bank *v.* Tallman, 31 Barb. (N. Y.) 201; Warner *v.* Gouverneur, 1 Barb. (N. Y.) 36; Wall St. F. Ins. Co. *v.* Loud, (Supreme Ct. Spec. T.) 20 How. Pr. (N. Y.) 95; Astor *v.* Turner, 11 Paige (N. Y.) 436; Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.) 565; Quincy *v.* Cheeseman, 4 Sandf. Ch. (N. Y.) 405; Oldham *v.* Wilmington First Nat. Bank, 84 N. Car. 304; Clay *v.* Selah Valley Irrigation Co., 14 Wash. 543; Brundage *v.* Home Sav., etc., Assoc., 11 Wash. 277; Morris *v.* Branchaud, 52 Wis. 187; Finch *v.* Houghton, 19 Wis. 149; Central Trust Co. *v.* Chattanooga, etc., R. Co., 94 Fed. Rep, 275; American Nat. Bank *v.* Northwestern Mut. L. Ins. Co., 89 Fed. Rep. 610; Stillwell-Bierce, etc., Co. *v.* Williamston Oil, etc., Co., 80 Fed. Rep. 68; Putnam *v.* Jacksonville, etc., R. Co., 61 Fed. Rep. 440; Mercantile Trust Co. *v.* Chicago, etc., R. Co., 61 Fed. Rep. 372; Kountze *v.* Omaha Hotel Co., 107 U. S. 378; American Nat. Bank *v.* Northwestern Mut. L. Ins. Co., 89 Fed. Rep. 610; Commercial, etc., Bank *v.* Corbett, 5 Sawy. (U. S.) 172; Allen *v.* Dallas, etc., R. Co., 3 Woods (U. S.) 316. An allegation of insolvency alone is not sufficient to warrant the appointment of a receiver. It must further appear that the appointment is necessary to prevent waste and preserve the premises. National F. Ins. Co. *v.* Broadbent, 77 Minn. 175; Marshall, etc., Bank *v.* Cady, 76 Minn. 112; Whitehead *v.* Hale, 118 N. Car. 601; Sales *v.* Lusk, 60 Wis. 490.

In *Indiana*, insolvency need not be shown, it being sufficient if it be shown that the property is inadequate to secure the mortgage debt. Hursh *v.* Hursh, 99 Ind. 500; Pouder *v.* Tate, 96 Ind. 330.

That property is inadequate to secure mortgage debt must be alleged. Warren *v.* Pitts, 114 Ala. 65; Lindsay *v.* American Mortg. Co., 97 Ala. 411; Ashurst *v.* Lehman, 86 Ala. 370; Scott *v.* Ware, 65 Ala. 174; Scott *v.* Hotchkiss, 115 Cal. 89; Montgomery *v.* Merrill, 65 Cal. 432; Pasco *v.* Gamble, 15 Fla. 562; Joliet First Nat. Bank *v.* Illinois Steel Co., 174 Ill. 140; Haas *v.* Chicago Bldg. Soc., 89 Ill. 498; Clark *v.* John A. Logan Mut. Loan, etc., Assoc., 58 Ill. App. 311; Glos *v.* Roach, 80 Ill. App. 283; Harris *v.* U. S. Sav. Fund, etc., Co., 146 Ind. 265; Reynolds *v.* Quick, 128 Ind. 316; Hursh *v.* Hursh, 99 Ind. 500; Pouder *v.* Tate, 96 Ind. 330; Main *v.* Ginthert, 92 Ind. 180; Brinkman *v.* Ritzinger, 82 Ind. 358; Sweet, etc., Co. *v.* Union Nat. Bank, 149 Ind. 305; Paine *v.* McElroy, 73 Iowa 81; Beverly *v.* Barnitz, 55 Kan. 451; Seckler *v.* Delfs, 25 Kan. 159; Louisville, etc., R. Co. *v.* Eakins, 100 Ky. 745; Woolley *v.* Holt, 14 Bush (Ky.) 788; Douglass *v.* Cline, 12 Bush (Ky.) 608; Collins *v.* Richart, 14 Bush (Ky.) 621; Hazeltine *v.* Granger, 44 Mich. 503; Brown *v.* Chase, Walk. (Mich.) 43; Farmers' Nat. Bank *v.* Backus, 64 Minn. 43; Phillips *v.* Eiland, 52 Miss. 721; Vause *v.* Woods, 46 Miss. 120; Philadelphia Mort., etc., Co. *v.* Goos, 47 Neb. 804; Ecklund *v.* Willis, 42 Neb. 737; Jacobs *v.* Gibson, 9 Neb. 380; Hyman *v.* Kelly, 1 Nev. 179; Matter of Busch Brewing Co., 41 N. Y. App. Div. 204; Hollenbeck *v.* Donell, 29 Hun (N. Y.) 94; Smith *v.* Tiffany, 13 Hun (N. Y.) 671; Burlingame *v.* Parce, 12 Hun (N. Y.) 144; Syracuse City Bank *v.* Tallman, 31 Barb. (N. Y.) 201; Warner *v.* Gouverneur, 1 Barb. (N. Y.) 36; Decker *v.* Gardner, 124 N. Y. 334;

Astor *v.* Turner, 11 Paige (N. Y.) 436; Sea Ins. Co. *v.* Stebbins, 8 Paige (N.Y.) 565; Quincy *v.* Cheeseman, 4 Sandf. Ch. (N. Y.) 405; Oldham *v.* Wilmington First Nat. Bank, 84 N. Car. 304; Morris *v.* Branchaud, 52 Wis. 187; Finch *v.* Houghton, 19 Wis. 149; Central Trust Co. *v.* Chattanooga, etc., R. Co., 94 Fed. Rep. 275; American Nat. Bank *v.* Northwestern Mut. L. Ins. Co., 89 Fed. Rep. 610; Kountze *v.* Omaha Hotel Co., 107 U. S. 378; Commercial, etc., Bank *v.* Corbett, 5 Sawy. (U. S.) 172; Pullan *v.* Cincinnati, etc., Air-Line R. Co., 4 Biss. (U. S.) 35; Allen *v.* Dallas, etc., R. Co., 3 Woods (U. S.) 316. And it must be shown to be inadequate at the time application is made for the appointment of receiver. It is not sufficient to show that at some future time the property will be inadequate. Laune *v.* Hauser, 58 Neb. 663.

That property is not debtor's homestead must, in *Nebraska*, be shown. Laune *v.* Hauser, 58 Neb. 663; Chadron Loan, etc., Assoc. *v.* Smith, 58 Neb. 469.

To Prevent Waste and Preserve Premises. — It has been held that to justify the appointment of a receiver it must appear that a receiver is necessary to prevent waste and preserve the property. The fact that the premises are inadequate security or that the mortgagor is insolvent, or both combined, is of itself no ground for the appointment. National F. Ins. Co. *v.* Broadbent, 77 Minn. 175; Marshall, etc., Bank *v.* Cady, 76 Minn. 112; Cortleyeu *v.* Hathaway, 11 N. J. Eq. 39.

In *Washington*, it is held that the fact that mortgagor is committing waste is not alone sufficient to authorize the appointment of a receiver. Brundage *v.* Home Sav., etc., Assoc., 11 Wash. 277.

Rents and Profits Pledged. — That rents and profits of mortgaged premises have been pledged to the mortgagee must be alleged. Loughridge *v.* Haugan, 79 Ill. App. 644; Clark *v.* John A. Logan Mut. Loan, etc., Assoc., 58 Ill. App. 311; Oakford *v.* Robinson, 48 Ill. App. 270; American Invest. Co. *v.* Farrer, 87 Iowa 437; Myton *v.* Davenport, 51 Iowa 583; Des Moines Gas Co. *v.* West, 44 Iowa 23; Collins *v.* Richart, 14 Bush (Ky.) 621.

Failure to Pay Taxes, etc. — Failure on the part of the mortgagor to pay taxes, interest or to secure insurance must be alleged. Harris *v.* U. S. Sav. Fund, etc., Co., 146 Ind. 265; Brinkman *v.* Ritzinger, 82 Ind. 358; Wall St. F. Ins. Co. *v.* Loud, (Supreme Ct. Spec. T.) 20 How. Pr. (N. Y.) 95; Finch *v.* Houghton, 19 Wis. 149; American Nat. Bank *v.* Northwestern Mut. L. Ins. Co., 89 Fed. Rep. 610.

Precedents. — In Veerhoff *v.* Miller, 30 N. Y. App. Div. 355, the affidavit, copied from the records, was as follows:

"*Supreme* Court,
County of *Kings*.

Mary E. Veerhoff, as Executrix of the Last Will and Testament of *Ernst H. Veerhoff*, deceased, plaintiff,
against
Mary E. Miller and *George M. Miller*, her husband; *Marion Thompson*, *Henry J. Platt*, *Thomas O'Mahony*, *Ernest Tieman*, *Joseph E. McGivern*, *Joseph Butcher* and *Frederick Cordes*, defendants.

Affidavit of *Mary E. Veerhoff*, Read on behalf of moving party.

City and County of *New York*, } ss.:
Borough of *Manhattan*, }

Mary E. Veerhoff, the plaintiff above named, being duly sworn, says:

I. — That this action is brought to foreclose a mortgage covering premises known as street number *479 Fourth Avenue*, in the Borough of *Brooklyn*, *New York*.

II. — That there is due and unpaid on said mortgage the sum of *$8,500*, and interest thereon from *August 24*, 1897, at the rate of *five* per cent. per annum.

III. — That said mortgage contains the usual receivers' clause, to the effect that the plaintiff shall be entitled as a matter of right, and without regard to the value of the premises or the solvency or insolvency of the obligors, to the appointment by the court of a receiver of the rents, issues and profits of said mortgaged premises, to be applied to the payment of said mortgage.

IV. — That the obligors and only persons personally liable for the payment of said mortgage are the defendants *Mary E. Miller* and *George M. Miller*, who are each totally pecuniarily irresponsible, and, as deponent is informed and believes, a judgment of deficiency against them or either of them would be entirely worthless.

V. — That, as deponent is informed and believes, the value of said premises is inadequate to pay the amount due

plaintiff, and this deponent verily believes she will be obliged to buy in said property at foreclosure sale for less than the amount due her.

VI. — That the defendant *Marion Thompson* is the owner of the equity of redemption of said premises, and, as late as *February 23*, 1898, offered, through her husband, by letter to this plaintiff, for $500 to deed to plaintiff her equity in this house, as well as the adjoining house of the same kind, which is also mortgaged to plaintiff for the same amount, and an action is now pending to foreclose this mortgage also, which offer would therefore amount to $250 for each house.

VII. — That said defendant has put in an answer, *March 23*, 1898, in which she claims that the payment of the mortgage debt was duly extended, in *September*, 1895, by agreement, which is not true, and this deponent verily believes that such answer was only served for the purpose of delay, so that defendant could have an opportunity to continue to collect the rents of the premises. That no other defendant has appeared or answered herein.

VIII. — That even if the summons and complaint were not served on defendant *Marion Thompson*, this deponent received a letter dated *March 7*, 1898, from her husband, in which he stated that no defense will be made to the action, and which letter is hereto annexed and marked '*A*.'

IX. That this deponent notified the husband of the defendant *Marion Thompson* at least *thirty* days before *February 24*, 1898, when said mortgage was due, that she would expect payment of the mortgage *February 24*, 1898, when the same was due, and in reply this deponent received a letter which is hereto annexed marked '*B*' from said *Thompson*, dated *January 22*, 1898, inquiring how long deponent would extend her mortgages if a payment of $2,000 was made on account of the principal. This deponent refers to this letter for the purpose of showing that the defense that the said mortgages were extended in *September*, 1897, is entirely without merit.

X. That deponent is informed and believes that the rents for both of said houses which said defendant *Thompson* is collecting amount now to about $100 per month.

XI. That this deponent most respectfully asks for the appointment of a receiver of the rents of said premises during the pendency of this action.

Mary E. Veerhoff.

Sworn to before me this *25th* day of *March*, 1898.

Robert A. M. Dayton,
Notary Public, *N. Y.* Co."

The court decided that the letters which passed been deponent and defendant Marion Thompson did constitute an extension of time, but that the motion for a receiver should be granted, on the ground that such agreement did not provide for an extension of payment of the interest.

Where the petition shows the insolvency of the debtor, that the mortgaged property is not sufficient in value to secure the debt, and that there is danger of its removal beyond the jurisdiction of the court, it is sufficient. Reynolds *v.* Quick, 128 Ind. 316.

In Skiddy *v.* Atlantic, etc., R. Co., 3 Hughes (U. S.) 320, the bill, which sought for the foreclosure of a deed of trust and the appointment of a receiver, was in substance as follows:

To the Judges of the Circuit Court of the United States for the Eastern District of Virginia, Fourth Judicial Circuit:

Your orators, Francis Skiddy, William Butler Duncan, and Samuel L. M. Barlow, of the city, county, and state of New York, and citizens respectively of the said state of New York, trustees as hereinafter more particularly set forth, bring this their amended bill against the Atlantic, Mississippi and Ohio Railroad Company, a corporation created, organized and established under and by virtue of the laws of the state of Virginia, and a citizen of the state of Virginia, George Blow, Jr., Richard H. Chamberlain, George W. Camp, John S. Tucker; the city of Petersburg, John Mann, executor, etc.; Martha Wallace, W. H. F. Lee, and W. N. Bolling, executrix and executors, etc.; Richard G. Pegram, Odin G. Clay, Thomas S. Bocock, Abram S. Hewitt, C. L. Mosby, C. W. Purcell, F. Johnson, R. J. Davis, R. H. Maury, D. H. Miller, trustees, etc.; the Board of Public Works of the state of Virginia, and also specially the state of Virginia, in so far as said state can be made a party, as hereinafter mentioned, or shall elect to come in as a party; and thereupon your orators complain and say:

That, on the ninth day of September, A. D. 1871, the defendant, the Atlantic,

Mississippi and Ohio Railroad Company, was, and now is, a corporation duly created, organized and established, as aforesaid, under and by virtue of the laws of the state of Virginia, and owning and operating a continuous line of railway from the seaport of Norfolk, in the said state of Virginia, to Bristol, in the state of Tennessee, and having due authority of law to extend the said line to Cumberland Gap, in the state of Kentucky, and did possess due authority of law to execute a mortgage upon its said line of railroad property and franchises, for the sum of fifteen million dollars, to secure the bonds of the said company, to be issued, negotiated and sold for the purpose of raising money for the use and benefit of said company. That on the said ninth day of September, A. D. 1871, the said company did execute and deliver to your orators its certain indenture and deed of trust and mortgage, wherein and whereby the said company did convey to your orators, for the consideration and upon the trusts therein fully and at large set forth, all the right, title and interest of the said company which the said company then possessed, or might thereafter acquire, in and to all and singular its franchises and entire line of railway, constructed or to be constructed, extending from Norfolk, aforesaid, to Cumberland Gap, aforesaid, together with all branches thereof, constructed or to be constructed, together with the tolls, incomes, rents, issues and profits thereof, and all real estate, rights of way, easements, fixtures, rolling-stock, machinery, tools and equipments, and all other personal property thereunto belonging; but in and by the said indenture, among other things, it was and is provided and declared that the premises aforesaid were conveyed to your orators to secure the bonds of the said company to the amount, in the aggregate, of fifteen million dollars; that is to say, fifteen thousand bonds of one thousand dollars each, bearing date even with the said indenture, payable in gold coin of the United States, thirty-three years from the said date, with interest coupons thereto attached for the payment of interest thereon semi-annually, at the rate of seven per cent. per annum, in gold coin of the United States, or in British sterling, at the option of the owner.

And for the equal benefit and security of all persons or corporations who might become holders of any of the said bonds, without preference, it was further provided that if default should be made in the payment of any of the interest coupons upon any of said bonds then outstanding on the demand of the bona fide holders of said coupons, representing at least one-fifth of the bonds secured by said indenture, and within ninety days after the said demand, your orators, trustees as aforesaid, should enter upon the mortgaged premises and take possession thereof, receive the rents, tolls and income thereof, and apply the same as herein provided; and might proceed to sell, upon and after certain notice therein provided for, the mortgaged premises, or so much thereof as might be necessary to raise and produce the amount of money then due by the said company, and in arrear in respect of the said mortgage bonds; and it was further provided, in case of default in the payment of such bonds at maturity and the continuance thereof for the period of ninety days, and upon the demand of the holders of one-fifth in amount of said bonds remaining due at the time, then, if required by the bona fide holders of one-fifth of the said amount of bonds, your orators, the survivors of them, or their successors, should enter upon the premises and take possession of the entire property, lines of railroad and franchises of the said company, and proceed by their duly appointed agents to conduct the business of the same and control its various receipts and disbursements until the amount of any past due and unpaid principal and interest shall have been duly discharged; or, in their discretion, proceed to sell the premises, or so much thereof as might be necessary, at public auction on certain notice therein provided for, and execute good and sufficient conveyance thereof to the purchasers. That after the execution and delivery of the said indenture to your orators the said company issued, negotiated, and sold in the open market, bonds of the said issue, to the amount, in the aggregate, of five millions four hundred and seventy thousand dollars, all of which are now outstanding in the hands of bona fide holders.

Five millions five hundred thousand dollars additional of the said bonds were deposited by the said company,

to be exchanged, under the supervision and direction of your orators, for certain prior mortgage bonds of the said company, then outstanding. Four hundred and seventy four thousand dollars of such bonds have been issued and so exchanged; and the remainder of the said bonds have not yet been issued by the said company, are under your orator's control, and constitute no lien upon the mortgaged premises.

Four thousand additional bonds of the fifteen thousand were authorized to be created for the purpose of extending the line from Bristol to Cumberland Gap, but they were never issued, and the company was released by the legislature from the duty of constructing such extension of road.

The said company continued to pay interest according to the tenor of the said bonds, as it became due and payable, to and inclusive of the first day of October, 1873, on the said five thousand four hundred and seventy bonds so issued, negotiated and sold, as hereinbefore stated.

The said company made default in the payment of the interest which became due upon the said bonds on the first day of April, 1874; subsequently the said company paid the interest which became due on the first day of April, 1874, as aforesaid, one half of the interest which became due on the first day of October, 1874, and one half of the interest on the said bonds which became due on the first day of April, 1875. It has paid no interest on the said bonds since the date last aforesaid, and all of the interest accruing on the said bonds since the date last aforesaid, as well as one half of the interest thereon due on the first day of October, 1874, and one half of the interest due on the first day of April, 1875, now remains due and unpaid.

Your orators are informed and believe that when and as the interest aforesaid became due and payable, according to the tenor of the said bonds, payment thereof was duly demanded by the holders, respectively, of interest warrants or coupons; and that if in case formal demand was omitted, and such omission was in pursuance of notice on the part of said company, such interest would not be paid. That payment was refused by the said company and its agents; that public notice was given of the inability of the said company to make such payment, and that various negotiations have, from time to time, been had between the said company, its agents and the holders of such bonds and coupons, to the end of inducing such holders to forbear proceeding to enforce the mortgage security therefor, and to grant time and indulgence to the said company for the payment thereof, all of which negotiations have failed.

Your orators further say that the said Atlantic, Mississippi and Ohio Railroad Company was, in pursuance of the said act of the general assembly of the state of Virginia, approved June 17th, 1870, created by the consolidation of the following railroad companies theretofore created and then existing as separate and independent companies, that is to say:

The Norfolk and Petersburg Railroad Company, owning and operating a railroad extending from Norfolk to Petersburg;

The Southside Railroad Company, owning and operating a railroad extending from said Petersburg to Lynchburg;

The Virginia and Tennessee Railroad Company, owning and operating a railroad extending from Lynchburg to Bristol aforesaid.

Your orators are informed and believe that prior to the seventeenth day of June, 1870, and prior to the execution and delivery to your orators of the indenture aforesaid, the property and franchises of the several railroad companies so consolidating, and whose railroads respectively became the property of the said defendant company, and were mortgaged as aforesaid by the defendant company to your orators, had been incumbered by sundry mortgages to sundry persons as security for certain debts of the said companies respectively, and that the said incumbrances, to the extent that they are valid and subsisting liens, are prior in point of time to the lien of the mortgage or deed of trust to your orators.

Your orators are informed and believe that the said mortgage debts, in the aggregate, now amount to the sum of about five million four hundred and ninety-three thousand eight dollars and eleven cents, the interest on which is payable semi-annually, and that half-yearly interest thereon, amounting to about the sum of one hundred and seventy-six thousand two hundred and thirty-nine dollars and eighteen cents,

will become due on the first day of July next; and your orators are informed and believe that the said defendant company does not expect or intend to pay such interest at maturity, and that default in the payment thereof will expose the rights and interests of your orators to great jeopardy.

Your orators pray that it may be ascertained what amount is due, and to whom, in respect of the said several prior liens; and that, when ascertained, such order and direction may be given that the foreclosure and sale hereafter prayed for may be made, subject to the lien thereof, upon such terms as may seem to be just and equitable.

Your orators say, as they have before said, that they are ignorant of the names of the person or persons to whom the said several prior mortgages or deeds of trust were executed and delivered.

And your orators pray that, when discovered, they may have leave to make such person or persons, respectively, parties defendant hereto, if they shall be advised that it is proper or necessary to make them such parties.

Your orators are informed and believe that, prior to the execution of the deed of trust aforesaid to your orators, the following deeds of trust or mortgage were executed, delivered, and recorded by the several corporations hereinafter mentioned, owning and operating respectively at the respective dates hereinafter mentioned, part of the premises conveyed to your orators, all of which deeds of trust or mortgage remain of record uncanceled, that is to say: (*Here follows a list of the divisional mortgages*).

Your orators are informed and believe that the state of Virginia has, or claims to have, some interest in the mortgaged premises, by way of lien thereon, subsequent, however, and subordinate to the lien created by the aforesaid mortgage or trust deed to your orators. Your orators are informed and believe that this claim is made on behalf of the state of Virginia, under and by virtue of a certain act of the general assembly of the said state, approved June 17th, 1870, entitled 'An act to authorize the formation of the Atlantic, Mississippi and Ohio Railroad Company," and under and by virtue of a certain covenant to stand seised, in the nature of a mortgage made to the defendants, the Board of Public Works of the state of Virginia, for the benefit of the state of Virginia, by the said defendant, the Atlantic, Mississippi and Ohio Railroad Company, dated on the twenty-second day of December, 1870, a copy whereof is annexed hereto in schedule (A), to which said act of the general assembly, and the said covenant to stand seised, your orators crave leave to refer, from time to time, as they may be advised, and as occasion may require, and with like effect in respect of such act of the general assembly as though the same were herein set out at length.

Your orators further say, on information and belief, that the said company is indebted to various persons, whose debts are unsecured by any lien upon the mortgaged premises, to an amount exceeding one million dollars, including a large debt for labor to its servants, agents, and operatives employed in the management of its said road, and the conduct of its general business, in an amount, as your orators are informed and believe, exceeding the sum of one hundred and ninety-five thousand dollars, the wages of such persons being unpaid and in arrear, as your orators are informed and believe, for a period of more than six months, and that by reason of such nonpayment of wages, if the same shall be continued for any considerable length of time, the mortgaged premises will be in imminent danger of irreparable injury and liable to waste and destruction.

Your orators are further informed and believe that there are sundry judgments against said company outstanding and unsatisfied; but your orators have no information or belief as to the amount thereof, or as to whether such judgments, if any, do or do not constitute a lien upon the mortgaged premises, or any part thereof; and they pray that the facts in this behalf may be ascertained.

And your orators, upon their information and belief, further say, that five million four hundred and thirty thousand dollars in amount of the bonds issued under the said mortgage to your orators, commonly called the consolidated mortgage, and which are now outstanding in the hands of bona fide holders, as aforesaid, were issued, negotiated, and sold by the said railroad company, under and upon the faith of the representation of the said railroad company, made through its

president to the purchasers and takers of said consolidated bonds; that of the whole issue of fifteen million dollars of such consolidated bonds five million five hundred thousand dollars were to be specially appropriated to and reserved for taking up the prior mortgage bonds of that aggregate amount upon separate portions of the said railroad line, and which are commonly called the divisional bonds; four million dollars were appropriated to and specially reserved for the projected extension of said railroad from Bristol to Cumberland Gap, no part of which has ever been constructed; and the proceeds of the remaining five million five hundred thousand dollars of such consolidated bonds were to be applied to paying off the entire floating debt of said railroad company then existing, and to repairing, completing, equipping, and putting in full, complete and suitable condition the entire line of said railroad in the state of Virginia, extending from Norfolk via Petersburg and Lynchburg to Bristol, on or near the state line between Virginia and Tennessee, and that the proceeds of said five million five hundred thousand dollars of bonds would be amply sufficient for the fulfilment of all those objects and purposes; and it was then represented by said company to the purchasers of said bonds that the amount of its then floating debt was only about seven hundred and seventy-one thousand dollars, exclusive of such as was being temporarily contracted for the purposes of the reparation of said line between Norfolk and Bristol, by way of anticipating the proceeds of such five million five hundred thousand dollars of bonds while the arrangements for the negotiation thereof were in progress, and to be provided for out of such proceeds when received. And it was then further represented by the said company to the parties to whom the said consolidated bonds were negotiated, that the net income of the said railroad would unquestionably be much more than sufficient to meet all the current interest on the consolidated bonds which were issued, and upon the prior divisional bonds. (*Here follows a financial statement.*)

Yet the said company is in default for interest on said consolidated bonds during said period to the extent of some six hundred thousand dollars, besides having made no provision for the large amount of interest falling due on the first day of July, 1876, upon the divisional bonds; and in place of having paid off and extinguished their floating debt out of the proceeds of such consolidated bonds, in accordance with their representations and promises, they have, as well as can be judged from their published reports and statements, actually increased the amount of such floating debt. (*Here follows a financial statement.*)

And it is notorious and is given out by the said company itself, that the funds for the payment of the interest on divisional bonds, falling due on the first day of July, 1876, are not and will not be on hand, and that such interest cannot be paid by the company, and that in the management of the company and the application of its revenues, since the first day of July last, there has been a misapplication and diversion to the extent of more than three hundred thousand dollars of the net income of the road from the purposes to which it is pledged by the mortgage deed and to which it ought to have been devoted; and if the road be left in the hands and control of the company, there is imminent danger, and, in fact, substantial certainty, that the like course will be pursued by them in the future.

And your orators further show that it is absolutely essential to the protection of the rights and interests of the consolidated mortgage bondholders, as well as for the interest of the public interested in the travel and traffic of said railroad, that the whole line from Norfolk to Bristol should be held together and maintained as one entire property.

That by reason of the aforesaid misapplication and diversion of income and the failure of the company to make provision for the interest falling due on the first day of July next, on the divisional bonds, there is imminent danger of foreclosures taking place on the divisional mortgages, and a consequent breaking up of the consolidated line, and great sacrifice of the property, rights and interests of the consolidated bondholders, unless the said railroad be at once taken out of the hands of the company and placed in the hands of a receiver or receivers, so that a proper application of its revenues for the future may be secured, and due order may be taken for the avoidance

of foreclosure of the divisional mortgages, either by raising means for the payment of the divisional mortgage interest upon the credit of the property or otherwise.

And your orators further show that the whole of said mortgaged property in its present condition is an insufficient security for the payment of the consolidated mortgage bonds which are outstanding in the hands of bona fide holders as aforesaid, and cannot be expected to produce upon the sale thereof, subject to the divisional mortgages, a sum sufficient to satisfy said consolidated mortgage bonds now outstanding in the hands of bona fide holders, or to result otherwise than in a large deficiency remaining due thereon.

That a sale of a parcel or parcels of the mortgaged property to satisfy only the interest due would be substantially impracticable, because of the existence of the prior mortgage liens thereon; and if the same were practicable, it could not result otherwise than in enormous sacrifice and loss.

That a sale in parcels for such purpose of property other than the roadway, stations, and other fixed property, could only be of rolling stock and materials and supplies, thus rendering the future operation of the road and the obtaining of income therefrom impracticable; that a sale for such purpose of a parcel or parcels of the road itself, if at all practicable, would be an immense sacrifice and loss in respect of the value of the property as a whole; and that if a sale is to be made at all, it must necessarily be of the whole property as an entirety, in order to avoid great loss and injury, and, in fact, enormous sacrifice to the parties interested in the sale and its proceeds.

Your orators further say that the said company is insolvent, possessing no property of any considerable value, other than the mortgaged premises; that the mortgaged premises are an entirely inadequate security for the several mortgage liens thereon; and that the current revenues and income of the said road are being diverted and appropriated by the said company to other purposes, and to the payment of other debts than those secured by the indenture to your orators, and by several prior mortgages hereinbefore mentioned; whereas, in fact, the net revenues of the said road are entirely inadequate, as the said company concedes and admits, to the satisfaction of the payment of such current interest as it matures, and the interest on the aforesaid indebtedness secured by mortgage of the premises and the principal thereof as the same becomes payable.

Your orators further say that they bring this their bill as trustees aforesaid, in pursuance of the request and demand, as they are informed and believe, of all the holders of bonds secured by the aforesaid mortgage to your orators, now outstanding.

Your orators, therefore, pray that a receiver may be appointed of all and singular the mortgaged premises, including all books, papers and accounts of the said company, relating to the business of the said company, in and about the mortgaged premises, and all choses in action, bills receivable, moneys on hand or in the hands of agents, with the usual authority of receivers, in like cases, to take possession of all the mortgaged premises, books, papers, records, choses in action, bills receivable, moneys on hand or in the possession of agents, with authority to maintain and operate the said road in the usual course of business, and to do all things usual, needful and proper in that behalf; to receive the tolls, rents, income and earnings of the mortgaged premises, safely to keep the same, and make such disposition thereof, as he may from time to time be ordered and directed by this court.

Your orators further pray that the said company, its officers, agents, attorneys, laborers and servants, and all persons whomsoever, may be strictly commanded and enjoined forthwith, on demand, to surrender to the receiver so appointed all and singular the premises whereof he is appointed receiver.

Your orators further pray that the said company, its officers, attorneys, servants and agents, may be restrained and enjoined from issuing, negotiating or parting with any of the bonds created under the aforesaid indenture to your orators remaining unissued.

And that they may also be enjoined and restrained from in the meantime parting with, disposing of or surrendering to any person any part of the mortgaged premises, and from applying any money or property, the pro-

Form No. 17114.[1]

(*Title of court and cause as in Form No. 5932.*)

The complaint of the above named plaintiff respectfully shows to this court,

That on or about the *first* day of *June*, 1899, the defendant, *Richard Roe*, made his bond to the plaintiff under seal and dated on that day, conditioned to pay to the plaintiff *five thousand* dollars on (*Here state condition of bond*), and that thereupon he, the said defendant, *Richard Roe*, duly made and acknowledged his mortgage to the plaintiff, of even date therewith, as collateral to secure the payment of the aforesaid bond, a copy of which mortgage is annexed to this complaint and made a part thereof (or *and that by the aforesaid mortgage he, the said defendant, Richard Roe, granted, bargained and sold to this plaintiff, his heirs and assigns, the following described premises, to wit*, — describing

ceeds or income of the mortgaged premises. to the payment of any antecedent debt, or to any purpose other than the payment of the ordinary current expenses of operating the railroad and managing the business of the company.

Your orators further pray that an account may be had and taken of all and singular the liens of every kind upon the mortgaged premises, stating the order and propriety thereof, the amount due in respect of each lien, and to whom; and that upon your orators complying with such terms as may be just and equitable, all and singular the mortgaged premises may be adjudged and decreed to be sold, and sold under the aforesaid indenture of mortgage to your orators, subject to all liens that may be prior thereto, and that the same may be sold at such time and in such manner as may be most beneficial to your orators, due regard being had to the rights and interests of all parties having liens upon the premises, and that the several defendants and the state of Virginia may, by such sale, be barred and foreclosed of and from all equity of redemption, and all other estate, right, interest, lien, or claim of, in, to or in respect of the said mortgaged premises.

And that your orators may have such further and other relief in the premises as the nature of their case shall require, and as to the court may seem meet.

(*Concluding with prayer for process.*)

The prayer of the bill in this case was granted and a decree was entered awarding an injunction and appointing receivers.

The following allegations have been held sufficient to authorize the appointment of a receiver:

That the value of the property was inadequate to pay the mortgage debt; that the respondents were insolvent and refuse to deliver possession of the property; that they were collecting the rents and applying them to their own use instead of the mortgage debt; that respondents agreed in their mortgage to keep the property insured for the benefit of the mortgagee in case of loss, which they have failed and refused to do; and that the mortgagors failed to pay the taxes assessed against the property. Jackson *v.* Hooper, 107 Ala. 634.

That the property was inadequate to secure the debt; that the debtor was insolvent; that the mortgagors did not occupy the property; that the security was imperiled from the lapse of insurance and the maturity of taxes. Harris *v.* U. S. Sav. Fund, etc., Co., 146 Ind. 265.

In American Nat. Bank *v.* Northwestern Mut. L. Ins. Co., 89 Fed. Rep. 610, the petition asking the appointment of receiver averred the inadequacy of the security, the insolvency of the mortgagors, the failure to pay the taxes, the failure to pay the water-rents, which would result in a loss of tenants, the failure to keep the property insured, the failure to keep the premises in good repair, and the fact that the appellant was collecting the rents, but was not applying the same to the protection of the property, as it was required to do by contract. It was held that a receiver was properly appointed.

1. See, generally, *supra*, note 1, p. 598.

the premises, — *which conveyance was nevertheless upon the following conditions, to wit,* — setting out condition of the mortgage and interest and insurance clauses).

II. That on the said *first* day of *June*, 1899, said mortgage was duly acknowledged by the said defendant, *Richard Roe*, and on said *first* day of *June* was duly recorded in the office of the register of mesne conveyances in said county of *Spartanburg*, in book *K* of mortgages, page *210*.

III. That the interest on said bond and mortgage which became payable on the *first* day of *June*, 1900, is still due and unpaid; that more than *sixty* days have elapsed since said interest became due and payable, and this plaintiff elects to deem the whole principal sum upon said bond and mortgage to be immediately due and payable, and that there is now justly due to this plaintiff on said bond and mortgage the sum of *five thousand* dollars, with interest from the *first* day of *June*, 1899, at *seven* per cent. per annum.

IV. That the said defendant, *Richard Roe*, did not keep the premises insured, but wholly neglected so to do (or *but on the contrary defendant, Richard Roe, suffered the insurance on said premises to expire on the first day of January, 1900*), in consequence whereof this plaintiff caused said premises to be insured in the *National Fire Insurance Company of America* for the term of *three* years from the *first* day of *February*, 1900, and has paid for said insurance the premium of *forty-five* dollars.

V. That no proceedings have been had at law or otherwise for the recovery of the aforesaid sums of money or any part thereof.

VI. That the defendants *Francis Fern* and *Samuel Short* have or claim to have some interest in or lien on the aforesaid mortgaged premises, which said interest or lien has accrued since the lien of said mortgage.

VII. That the aforesaid described mortgaged premises consist of (*Here give a brief description of the situation of the premises, showing wherein they are inadequate security*); that said premises are a scanty and insufficient security for the plaintiff's mortgage debt, and the said defendant, *Richard Roe*, who is personally liable for said debt, is insolvent.

Wherefore the plaintiff demands judgment,

1. That each of the aforesaid defendants, and all persons claiming under them or either of them, subsequent to the commencement of this action, may be foreclosed of all equity of redemption or other interest in said mortgaged premises.

2. That the said premises may be sold and the proceeds applied to the payment of the costs and expenses of this action and the amount due on said bond and mortgage and the amount of said premium of insurance, with interest on said moneys to the time of such payment.

3. That a receiver of the rents and profits be appointed by the order of the court to apply the same to the plaintiff's demand.

4. That the defendant, *Richard Roe*, may be adjudged to pay any deficiency that may remain after applying all of said moneys so applicable thereto.

5. For costs of this action, together with such other and further relief as to the court shall seem just and equitable.

(*Signature and verification as in Form No. 5932.*)

Form No. 17115.[1]

(*Title of court and cause, and venue as in Form No. 8805.*)

John Doe, being duly sworn, says:

I. That he is the plaintiff in the above entitled action.

II. That the above action is brought for the foreclosure of a mortgage executed by the said defendant, *Richard Roe*, dated the *tenth* day of *June*, 1897, and duly recorded in the office of the county clerk of said county of *Suffolk* on said *tenth* day of *June*, 1897, and covering the following premises, to wit: (*describing premises*); that said mortgage was given to secure a bond bearing date the said *tenth* day of *June*, 1897, and made by the said defendant, *Richard Roe*, conditioned to pay to this plaintiff the sum of *five thousand* dollars.

III. That the said principal sum of *five thousand* dollars, with interest thereon from the *tenth* day of *June*, 1897, amounting to the sum of *nine hundred* dollars, is overdue and unpaid to the plaintiff, and that the taxes on the aforesaid premises for the years 1897, 1898 and 1899, amounting to the sum of *four hundred* dollars, are unpaid.

IV. That the aforesaid mortgaged premises are insufficient security for said mortgage debt, and that upon a sale thereof at public auction would not bring sufficient to satisfy the said mortgage debt, with interest, costs and arrears of taxes as aforesaid, as will appear by the affidavits of *Samuel Short* and *William West* hereto annexed and made a part hereof.

V. The said defendant, *Richard Roe*, the mortgagor in said mortgage, and the person primarily liable for the debt secured by the aforesaid mortgage, is insolvent and pecuniarily irresponsible and unable to pay any deficiency there might be on a sale of the aforesaid premises, as will appear by the affidavit of *William West* attached hereto and made a part hereof.

VI. That the aforesaid mortgaged premises at the commencement of this action were and now are in the possession of the said defendant, *Richard Roe*; that all persons in possession of said premises as tenants or otherwise, at the commencement of this action, are made defendants therein.

VII. That the aforesaid described mortgaged premises are occupied for the following purposes: (*stating purposes*), and that, as your petitioner is informed and believes, the rentals and other incomes from said property amount in the whole to the sum of *one thousand* dollars per year and no more.

(*Signature and jurat as in Form No. 8805.*)

(3) In Partnership Proceedings.[2]

1. See, generally, *supra*, note 1, p. 598.

2. **Partnership Proceedings, Generally.**— In partnership proceedings, whether for a dissolution or for an accounting after dissolution, a receiver will be appointed where it is shown by the pleadings that necessity therefor

exists. Word *v.* Word, 90 Ala. 81; Adams *v.* Woods, 8 Cal. 306; Painter *v.* Painter, (Cal. 1894) 36 Pac. Rep. 865; Adams *v.* Hannah, 97 Ga. 515; Terrell *v.* Goddard, 18 Ga. 664; Loomis *v.* McKenzie, 31 Iowa 425; Heflebower *v.* Buck, 64 Md. 15; Hamill *v.* Hamill, 27 Md. 679; Haight *v.* Burr, 19 Md. 130; Walker *v.* House, 4 Md. Ch. 39; O'Bryan *v.* Gibbons, 2 Md. Ch. 9; Williamson *v.* Wilson, 1 Bland (Md.) 418; Perrin *v.* Lepper, 56 Mich. 351; Barry *v.* Briggs, 22 Mich. 201; New *v.* Wright, 44 Miss. 202; Cox *v.* Volkert, 86 Mo. 505; Randall *v.* Morrell, 17 N. J. Eq. 343; Cox *v.* Peters, 13 N. J. Eq. 39; Wilson *v.* Fitchter, 11 N. J. Eq. 71; Birdsall *v.* Colie, 10 N. J. Eq. 63; Renton *v.* Chaplain, 9 N. J. Eq. 62; Heathcot *v.* Ravenscroft, 6 N. J. Eq. 113; Wright *v.* Bowne, 79 Hun (N. Y.) 385; Wilcox *v.* Pratt, 52 Hun (N. Y.) 340; Geortner *v.* Canajoharie, 2 Barb. (N. Y.) 625; Dawson *v.* Parsons, (Supreme Ct. Spec. T.) 20 N. Y. Supp. 65; Jacquin *v.* Buisson, (N. Y. Super. Ct.) 11 How. Pr. (N. Y.) 385; Evans *v.* Evans, 9 Paige (N. Y.) 178; Marten *v.* Van Schaick, 4 Paige (N. Y.) 479; Law *v.* Ford, 2 Paige (N. Y.) 310; Walker *v.* Trott, 4 Edw. (N. Y.) 38; Henn *v.* Walsh, 2 Edw. (N. Y.) 129; Anonymous, 2 Daly (N. Y.) 533; Durkheimer *v.* Heilner, 24 Oregon 270; Sloan *v.* Moore, 37 Pa. St. 217; Allen *v.* Cooley, 53 S. Car. 414; Webb *v.* Allen, 15 Tex. Civ. App. 605; Shulte *v.* Hoffman, 18 Tex. 678; Jordan *v.* Miller, 75 Va. 442; McMahon *v.* McClernan, 10 W. Va. 419.

Statutory provisions relating to appointment of receivers in partnership proceedings are set out *supra*, note 1, p. 591.

During Continuance of Partnership. — In the case of a subsisting partnership, the court will never interfere by the appointment of a receiver unless for such gross abuse and misconduct on the part of one partner that a dissolution ought to be decreed and the affairs of the concern wound up. Walker *v.* House, 4 Md. Ch. 39; O'Bryan *v.* Gibbons, 2 Md. Ch. 9; Gowan *v.* Jeffries, 2 Ashm. (Pa.) 296; McMahon *v.* McClernan, 10 W. Va. 419.

Upon Dissolution—*In General.* — Upon the dissolution of the partnership, a receiver will be appointed where misconduct, breach of duty or insolvency is shown. Terrell *v.* Goddard, 18 Ga. 664; Loomis *v.* McKenzie, 31 Iowa 425; O'Bryan *v.* Gibbons, 2 Md. Ch. 9; New *v.* Wright, 44 Miss. 202; Randall *v.* Morrell, 17 N. J. Eq. 343; Wilson *v.* Fitchter, 11 N. J. Eq. 71; Birdsall *v.* Colie, 10 N. J. Eq. 63; Waterbury *v.* Merchants Union Express Co., 50 Barb. (N. Y.) 157; Geortner *v.* Canajoharie, 2 Barb. (N. Y.) 625; Walker *v.* Trott, 4 Edw. (N. Y.) 38; Henn *v.* Walsh, 2 Edw. (N. Y.) 129; Anonymous, 2 Daly (N. Y.) 533; Watson *v.* McKinnon, 73 Tex. 210; Webb *v.* Allen, 15 Tex. Civ. App. 605; McMahon *v.* McClernan, 10 W. Va. 419.

As Matter of Right.— It has been held that where either party has a right to dissolve the partnership, and the agreement between the parties makes no provision for closing up the concern, it is a matter of course to appoint a receiver upon a bill filed for that purpose if it be shown that the parties cannot arrange matters between themselves. Walker *v.* House, 4 Md. Ch. 39; Marten *v.* Van Schaick, 4 Paige (N. Y.) 479; Law *v.* Ford, 2 Paige (N. Y.) 310. But see *contra* that in such cases a receiver will not be appointed as a matter of course, but only where it appears necessary to protect the interests of the parties. Randall *v.* Morrell, 17 N. J. Eq. 343; Cox *v.* Peters, 13 N. J. Eq. 39. Birdsall *v.* Colie, 10 N. J. Eq. 63; Renton *v.* Chaplain, 9 N. J. Eq. 62.

All Partners Deceased. — Where it appears that all the partners are deceased, the court will appoint a receiver as a matter of course. Walker *v.* House, 4 Md. Ch. 39.

In Action Against Survivor. — A surviving partner cannot be interfered with by the appointment of a receiver except on the ground of insolvency, mismanagement or improper conduct. Painter *v.* Painter, (Cal. 1894) 36 Pac. Rep. 865; Walker *v.* House, 4 Md. Ch. 39; Connor *v.* Allen, Harr. (Mich.) 371; Barry *v.* Briggs. 22 Mich. 201; Dawson *v.* Parsons, (Supreme Ct. Spec. T.) 20 N. Y. Supp. 65; Jacquin *v.* Buisson, (N. Y. Super. Ct.) 11 How. Pr (N. Y.) 385; Evans *v.* Evans, 9 Paige (N. Y.) 178.

Requisites of Affidavit, Bill, etc., Generally. — See *supra*, note 2, p. 593.

Exhibiting Articles of Copartnership. — It is proper to exhibit by complainant's bill the articles of copartnership, so that their terms and the respective rights of the copartners may clearly appear to the court; and if it appears from the bill that the articles are in the possession of the complainant, the failure to produce them may be urged with much force as

(*a*) *For Dissolution on Account of Defendant's Misappropriation of Funds.*[1]

a ground for refusing to grant an injunction or to appoint a receiver before answer. Haight *v.* Burr, 19 Md. 130.

Precedent. — In Pressley *v.* Lamb, 105 Ind. 171, is set out the following complaint:

"The plaintiff complains of the defendant and says, that plaintiff and defendant are partners doing business as bankers, at *Indianapolis*, *Indiana*, under the firm name of '*A. & J. C. S. Harrison*,' and have been, as such partners, doing such business for *twenty* years last past; that 'a run' has been going on, by their depositors, against their said bank for several days last past, whereby their cash resources have been so much reduced that they are unable longer to continue said banking business, and said firm is therefore insolvent; that, in order to prevent a multiplicity of suits and thereby cause great expense in litigation, and in order to save said estate for their creditors, it is important that a receiver be now appointed for said firm to take possession and control of the assets of such firm, and administer the same under the order of the court; that a dissolution of such partnership be had, and an accounting between the partners. Wherefore," etc.

A receiver was appointed as prayed for.

1. In Katz *v.* Brewington, 71 Md. 79, the bill of complaint charged in substance that complainant and defendant, in May, 1887, entered into a copartnership under the name of L. Katz & Company, and that the business had been carried on under the firm name until the time of the filing of the bill; that the books of the firm were in the possession and control of the defendant, who refused to permit complainant to have access to the same; that defendant had sole control and possession of the goods of the firm, and was disposing of the same in fraud of the complainant; that complainant no longer felt safe with the books and papers and assets of said firm in the possession of defendant, and desired that the partnership should be wound up under the order and direction of the court; that defendant absolutely excluded complainant from all control of the business, and refused to give him any information in regard to the business of the firm, having carried the books of the firm away from the place of business of said firm, and refused to disclose the place where said books were deposited. An order appointing a receiver was affirmed.

In Gowan *v.* Jeffries, 2 Ashm. (Pa.) 296, is set out the following special affidavit, which was annexed to a bill in equity brought for the purpose of dissolving a partnership:

"*Thomas H. Jacobs*, being duly sworn, according to law, doth depose and say that the said complainants and defendant entered into the articles of copartnership annexed to the bill of complaint, dated the *20th February*, 1838; and that the complainants loaned their notes to the defendant in the amount of *eight thousand* dollars, which were discounted at the *Bank of the United States*, and the money applied by said *Jeffries* in the purchase of furniture; and that your orators have since supplied him with wines and liquors to the amount of *eight thousand three hundred and twenty-nine* dollars and *fifty-seven* cents; the greater part of which he has converted into money, and had in his hands, applicable to the purchase of furniture; that said *Jeffries* has, until recently, acquiesced in this as a full compliance with the second article in the said agreement of copartnership. And this deponent further says, that said complainants, having heard that said *Jeffries* was getting behind hand, repeatedly applied to him for an account of his situation, and were never able to get any satisfaction or intelligible statement from him. And deponent believes, that he has never complied with the stipulations in the articles, to keep proper books of account; and that he has only kept such as afford no information of the state of the partnership affairs: that, as far as deponent can learn, and he firmly believes, said establishment is now entirely insolvent; that the goods are under distress, and are advertised for sale for arrears of rent to the amount of *four thousand two hundred and fifty* dollars, and that another quarter's rent, of *fifteen hundred* dollars, will be due on the *first* of *June*, 1840; that the establishment is also largely indebted to the servants and others; and that the said *Jeffries* insists upon carrying

Form No. 17116.[1]

(*Title of court and cause as in Form No. 5926.*)

The complaint of the above named plaintiff respectfully shows to this court:

I. That on the *first* day of *January*, 1897, the plaintiff and the defendant formed a partnership for the purpose of (*specifying nature of the business*) under articles of copartnership, a copy of which articles is hereto annexed and made a part of this complaint, marked Exhibit "*A*" (*or, if agreement was not in writing, state the substance thereof*).

II. That under and in pursuance of the aforesaid agreement, plaintiff and defendant entered upon and have ever since continued to carry on the business of the said copartnership, and no other articles or instrument have ever been executed between them.

III. That the defendant, since the commencement of said partnership, has from time to time applied from the receipts and profits of the said business, to his own use, large sums of money, greatly in excess of the proportion thereof to which he was entitled; that defendant has always had the management of the books of said copartnership and in order to conceal such misappropriation of funds has never balanced said books.

IV. That the plaintiff, on or about the *first* day of *January*, 1899, discovered that the defendant was, by reason of his applying the

the same on, notwithstanding its hopeless condition: that he has advertised his connection with the complainants in the newspapers; and that he informs the creditors of the establishment, that the complainants will be obliged to pay the debts which he incurs; that the rent is *six thousand* dollars per annum; and that the furniture has diminished by embezzlements, and other deterioration, to a value not exceeding *eight thousand five hundred* dollars; and that it is the only fund from which complainants can be indemnified for their liabilities; but, that the same is in the possession of the said *Jeffries*, who forbids the clerk of the establishment to communicate with the complainants; and assumes, and in fact has, the exclusive control of the property: that an account which the said *Jeffries* furnished to the complainants, and which he rendered very reluctantly and after repeated demands, gives no other account of the disposition made of the receipts of the establishment to the amount of *$26,155.98*, but, that he has deposited it in the *Bank of the United States*: and this deponent declares, that he has no such balance in said bank. And this deponent declares, that complainants have offered said *Jeffries*, repeatedly, terms of compromise; all of which have been rejected. They have also offered to pay the arrears of rent, provided he would agree that the moneys should hereafter be received and disbursed by a clerk named by these complainants, and approved by him; which reasonable proposition he utterly rejected. And this deponent further states, that a copy of said accounts, so furnished, are annexed to said bill of complaint. And this deponent further states, that in saying that said establishment is insolvent, he means, that it is so upon the accounts of the said *Jeffries*, treating said deposits in bank as disbursements: and this deponent further says, that if, of the sum of which said *Jeffries* represents to be in bank were really there, there would be funds to pay said arrears of rent, and a large balance besides. And this deponent further says, that the other facts stated in said bill of complaint, and not herein specially repeated are, so far as they are of defendant's own knowledge, true; and so far as they are derived from the information of others, he believes them to be true."

A motion for a receiver, which motion was founded on the bill and affidavit, was allowed.

1. See, generally, *supra*, note 2, p. 609.

copartnership moneys to his own use as aforesaid, greatly indebted to said copartnership; that plaintiff then requested defendant to pay all copartnership moneys that he, the defendant, had received, into the *National Bank of Redemption*, in which said bank said copartnership was accustomed to keep its accounts, and to draw therefrom only such sums as said copartnership had occasion for; that defendant wholly disregarded this request of plaintiff, and continued to apply to his own use the copartnership moneys received by him, without depositing the same in said bank or in any other bank to the credit of the said firm; that defendant has also taken to his own use the moneys received by the clerks and employees of said firm, and has by said means greatly increased his debts to the said firm, without affording any adequate means to this plaintiff of ascertaining the true state of his accounts.

V. That the said defendant has received, over and above his due proportion of the copartnership profits, the sum of *ten thousand* dollars; that defendant continues to collect the debts due said copartnership and to appropriate the moneys collected to his own use.

Wherefore plaintiff demands judgment:

1. That the said copartnership may be dissolved and an account be taken of all the dealings and transactions of the said copartnership from the commencement thereof, and of all the moneys received and paid by plaintiff and defendant respectively in relation thereto.

2. That the property of said firm, both real and personal, be sold; that the debts and liabilities of said copartnership be paid off, and that the surplus, if any there be, be divided between plaintiff and defendant according to their respective interests.

3. That in the meantime the defendant be enjoined from collecting or receiving or in any manner interfering or intermeddling with or disposing of the debts, moneys or other property or effects of said copartnership.

4. That a receiver of the said partnership moneys, property and effects may be appointed, with the usual powers and duties.

5. That plaintiff may have such other and further relief as may be just, with the costs of this action.

(*Signature and office address of attorney, and address as in Form No. 11457.*)

(*b*) *To Set Aside Sale of Goods as Fraudulent and to Wind Up Affairs of Partnership.*[1]

1. Precedent.— In Heathcot *v.* Ravenscroft, 6 N. J. Eq. 113, the bill for the dissolution of a partnership and injunction and receiver stated in substance, that on the sixteenth day of November, 1845, the complainant and defendant agreed, by parol, to enter into partnership in the business of manufacturing cotton, and agreed to contribute equally, in money or necessary articles of machinery, towards forming a partnership stock for carrying on said business, and that the profits and losses should be shared by or fall equally on them. That in pursuance of said agreement, and for the purpose of providing themselves with a mill and water-power to carry on their said business, the complainant and defendant entered into a written contract with one John Cooper for the purchase of certain real estate in the county of Bergen, with a water-power and cotton-mill thereon, for one thousand dollars, to be paid at a future

day; and, on the same day, entered into possession of said premises, under said contract.

That the complainant contributed, in fulfilment of his part of said agreement, and toward forming a copartnership stock, in necessary articles of machinery or in money, five hundred and sixty-two dollars and seventy-seven cents, and the said Ravenscroft contributed one hundred and twenty-two dollars and eighty-five cents, leaving a deficiency in the contribution of the said Ravenscroft of four hundred and thirty-nine dollars and ninety-two cents, which deficiency the said Ravenscroft represented to the complainant that he had means of making up, under his control, and agreed to make up the same in a short time thereafter. That notwithstanding the said deficiency, the complainant, relying on the said representations and promise of said Ravenscroft to make up the same in a short time thereafter, entered with him upon the business of manufacturing cotton yarn under the copartnership agreement above stated.

That the said Ravenscroft and the complainant continued to carry on the said partnership business until the fourth day of September, 1846, at which time they stopped business, though no dissolution of said copartnership took place; and that during all that time the said Ravenscroft neglected to make any further contribution to the said copartnership stock, notwithstanding his said promise and undertaking and the frequent urgent requests of the complainant for him to do so.

That on or about the fourth day of November, 1846, the said Ravenscroft, without the knowledge or consent of the complainant, and in violation of his said copartnership agreement, and without any further contribution to the said copartnership stock, sold and transferred to Joel M. Johnson, all his interest in the lot of land, mill and water privilege herein before mentioned, together with all his interest in all the machinery, gearing and fixtures in said mill, consisting of the following goods and chattels in said writing enumerated, to wit, etc.; and did covenant and agree to and with the said Joel M. Johnson, that he was the true and lawful owner of one full undivided half of the said goods, chattels and privileges.

That about the time of the said sale, the said Johnson entered into the said mill, and has ever since that time continued in possession of the same and of all the gearing, machinery, stock and appurtenances herein before mentioned; claiming a right so to do as the owner of one-half thereof by virtue of the said article of sale.

That there are in said mill divers articles besides those enumerated in the said article of sale, appertaining to the machinery in said mill, and necessary and useful in and about the business of manufacturing, amounting in the whole to the value of one hundred and seventy-five dollars, as nearly as the complainant can estimate the same; to which the said Johnson also claims an equal right and title with the complainant, and which he also holds in possession as one-half owner thereof.

That there were copartnership debts contracted by the complainant and the said Ravenscroft before the fourth day of September last past, and now remaining due and unpaid, to the amount of seven hundred and ten dollars and forty-nine cents.

That the said Ravenscroft, since his said sale to the said Johnson, hath refused to pay any portion of the said copartnership debts, although applied to and particularly requested so to do; and that the said Ravenscroft hath no visible or tangible property or effects out of which the proportion of said debts which ought to be paid by him could be levied and made; and that the said Ravenscroft is in insolvent circumstances.

That the said Joel M. Johnson, although claiming to be an equal joint owner with the complainant in the said copartnership property, refuses to pay or discharge any of the said copartnership debts, or to make good to the complainant the excess of his contribution to the said copartnership stock over the contribution of the said Ravenscroft; and claims to hold the undivided half of the said property free and discharged from such debts and liabilities.

That neither the said Ravenscroft nor the said Johnson, at or before the time of the said sale and transfer between them, made known to the complainant the intention of the said Ravenscroft to sell, nor the said Johnson to purchase the interest so sold and purchased, nor did they or either of them apply to the complainant or ob-

Form No. 17117.[1]

(Precedent in Allen *v.* Cooley, 60 S. Car. 353.)[2]

[(*Commencement as in Form No. 5932.*)][3]

1. That the plaintiff and the defendant *D. K. Cooley*, up to *September 30, 1897*, and for several years previous thereto, were partners in a general merchandise business, at *Lowndesville*, in the county of *Abbe-*

tain his assent to such sale; but that said sale and transfer were made without the complainant's knowledge and consent.

That complainant hath been informed and believes, and therefore charges it to be true, that the said Johnson, before or at the time of his said purchase, and before the payment by him of any money on account thereof, knew or had good cause to believe that the said Ravenscroft had not an equal interest with the complainant in the said partnership property, and that he knew or had good cause to believe that the said copartners had debts at that time due and owing, for the payment of which the said copartnership property and assets ought in law and in equity to be applied. And the bill charged that the said Ravenscroft, at the time of his agreement to make up the deficiency in his contribution as above stated, had not the means so to do under his control, and that his representations to the complainant on that subject were fraudulent and intended to mislead the complainant; and that the said sale by the said Ravenscroft to the said Johnson was fraudulent, and that the same was made with the intent to defraud the complainant in the premises.

That by reason of the premises the copartnership business of the complainant and the said Ravenscroft is wholly broken up, and that the copartnership property is suffering great damage and loss; and that the said Johnson hath set up in said mill a machine for cutting shingles, which the complainant is informed and believes he has put in operation, thereby exposing the said mill and machinery to great hazard of loss by fire; and, as the complainant is advised and believes, by increasing the risk, vitiated and avoided the insurance effected on the said mill and machinery in the name of the said Ravenscroft and the complainant as copartners as aforesaid.

That the said Johnson threatens to take exclusive possession and control of the said mill and machinery and appurtenances, and to put the same in operation on his own account and for his individual benefit, and thereby wholly exclude the complainant from the same.

That the said Johnson, though not to the knowledge or belief of the complainant insolvent, yet is possessed of slender means, and is not of sufficient responsibility to render it safe to leave the said machinery and premises in his charge and under his control; and that in case of any serious loss or damage to said property, or in case of the fraudulent removal or conversion of the same, he would, as the complainant verily believes, be unable to respond in damages to the complainant.

The bill prayed that the said sale by Ravenscroft to Johnson may be set aside, that the partnership may be dissolved, and that a receiver may be appointed to take charge of the partnership property, and collect and sell the same; and that the proceeds thereof may be applied, under the direction of the court, to payment of the partnership debts; and that so much of the surplus, if any remain, as may be necessary for that purpose, be paid to the complainant, to make good the deficiency of said Ravenscroft in his contribution to the partnership stock; and that the residue, if any, may be paid into court, to be disposed of as may be deemed equitable; and that said Ravenscroft and Johnson may be restrained from doing or suffering any damage or waste, etc.

1. *South Carolina.* — Code Civ. Proc. (1893), § 265.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 2, p. 609.

2. A motion to strike out certain matter in the complaint as irrelevant and redundant and a demurrer to the complaint for failure to state a cause of action, were held by the supreme court properly overruled.

3. The matter to be supplied within [ ] will not be found in the reported case.

ville, in the State of *South Carolina*, under the firm name of "*Allen & Cooley.*" That the plaintiff is a farmer, and was an inactive partner in said business, and knew nothing of the same — the entire management and control of said business having been in the hands of the defendant *D. K. Cooley.* That the defendant *Thomas D. Cooley* is a brother of the said *D. K. Cooley*, and has since *June*, 1891, been the bookkeeper of the said firm of "*Allen & Cooley.*" That up to a short time preceding the *30th* day of *September*, 1897, the plaintiff had all confidence in his partner, the said *D. K. Cooley*, and paid no attention whatever to the said business; but that now and since the *30th September*, 1897, all confidence is gone, and there exists bitter and hostile antagonism between himself and both of the defendants.

2. That on the said *30th September*, 1897, a mutual dissolution of the firm of *Allen & Cooley* was agreed upon, at which time the said *D. K. Cooley* made and delivered to the plaintiff a paper of which the following is a copy: "State of *South Carolina*, *Abbeville.* Know all men by this paper that by reason of a mutual dissolution of the firm of *Allen & Cooley*, that I, *D. K. Cooley*, have bought the entire stock of goods and chattels belonging to the firm of *Allen & Cooley*, together with all notes, mortgages, accounts, liens, and deposits; and I do hereby assume all the indebtedness of the old firm, and do hereby release *B. Berry Allen* from all obligation in the payment of the same. (Signed) *D. K. Cooley. H. C. Fennell*, witness. *September 30th*, 1897. Receiver of *B. Berry Allen* in full of all demands up to date. *October first*, 1897. *D. K. Cooley.*"

3. That in said dissolution and settlement the real estate of the firm was divided between the partners, and the following statement as to the other assets and liabilities was at that time presented by the said *D. K. Cooley*, and by which the settlement was made — the same being in the handwriting of the said *Thomas D. Cooley*, and who was present and participated in the settlement: Statement. *Allen & Cooley*, Sept. *1st*, 1897.

Accounts '*91*, '*92*, '*93*, '*94*, '*95* and '*96*	$ *3,907 82*
Accounts 1897	*15,582 58*
Notes	*1,548 30*
Mortgages, old	*2,535 43*
Mortgages, new	*6,439 59*
Stock on hand	*5,229 12*
One buggy, *Jink Parnell*	*65 00*
Rent cotton due	*564 00*
	$*38,871 84*
Liabilities	*11,536 72*
	$*27,335 12*
Notes, mortgages and accounts, no good	*8,737 10*
	$*18,598 02*

That the whole of this amount of $*18,598.02* came into the hands of the said *D. K. Cooley*, and that by his own statement as to good and bad assets.

4. That the said *D. K. Cooley* has not paid the debts of *Allen & Cooley*, as agreed. That plaintiff has never been over the books and does not know who are the creditors or the amount of indebtedness, except from the condensed statement above referred to, but to the best of his information and belief, derived from judgments already obtained against *Allen & Cooley*, from suits now pending against *Allen & Cooley* (being *five* in number), and from claims now in the hands of attorneys for suit, viz. *Tribble & Prince*, *F. B. Gary*, *W. P. Greene*, *De Bruhl & Lyon*, *Perrin & Cothram*, and others, there remains now unpaid of the debts of *Allen & Cooley* between *seven and eight thousand* dollars, and for all of which this plaintiff, as the former partner of the said *D. K. Cooley*, may be held responsible.

5. That the said *D. K. Cooley* has made no payments on the debts of *Allen & Cooley* since *December*, 1897, when he paid $100 to *Powers, Gibbs & Co.*, who had then begun suit against *Allen & Cooley*, although he has had ample assets from the firm of *Allen & Cooley* with which to pay all of the debts of the said firm as he agreed to do, and has actually collected, as this plaintiff is informed and believes, sufficient of the assets so to do. That this information is derived from Mr. *W. C. Tennant* and Mr. *E. R. Horton*, cotton buyers at *Lowndesville*, *S. C.*, and from his own observation as to the amount of business done by the said *D. K. Cooley* after the dissolution, and the collections he must have made.

6. That the only real estate owned by the said *D. K. Cooley* is the store in the town of *Lowndesville* and a house and lot there. This plaintiff does not think the store would bring on the market more than $1,000, and the house more than $700. That on the *9th* day of *December*, 1897, the said *D. K. Cooley* executed to his brother — the said *Thomas D. Cooley* — a mortgage on the said storehouse for $714, the consideration for the said alleged mortgage, as expressed therein, being for "services due by *Allen & Cooley*." That with this alleged mortgage and the homestead of the said *D. K. Cooley* (who is a married man) there is nothing in his real estate for creditors. That in the schedule of assets and liabilities presented at the dissolution this amount for services does not appear, nor was anything said about it.

7. That on the ——— day of ———, but after the dissolution and agreement of *D. K. Cooley* to pay the debts of *Allen & Cooley*, the said *D. K. Cooley*, for an alleged consideration of $3,580, sold his entire stock of merchandise, fixtures, and business to his brother — the said *Thomas D. Cooley*. That said paper was probated *December 21st*, 1897, and recorded, although not dated, and the said *Thomas D. Cooley* now claims the entire business of the late firm of *Allen & Cooley*. That the defendant *D. K. Cooley* has stated, under oath, that previous to the above pretended sale, shortly after the claim of Mrs. *K. W. Allen* was presented to him for payment and which he refused to pay, being early in the month of *October*, 1897, he bargained his stock and business to his brother — the same *Thomas D. Cooley* — and did have the insurance policy on the stock of goods transferred back, giving as the reason therefor that the said *Thomas D. Cooley* could not raise the money or borrow it.

8. That two judgments have lately been recovered on the debts of *Allen & Cooley*, one in favor of *Powers, Gibbs & Co.* for $798.15, and one in favor of Mrs. *K. W. Allen* for over $3,000. That executions have been issued in both of these cases, and that as to the defendant, *D. K. Cooley*, there has been in both cases a return of "nulla bona" by the sheriff of *Abbeville* county, *S. C.*

9. That *Thomas D. Cooley*, the brother and bookkeeper of *D. K. Cooley*, and the pretended purchaser of the said business, is a young married man, who has been working on a salary such as is usually paid in country stores, which this plaintiff alleges was little more, if any, than was necessary for the support of his family, and that he did support his family from his salary; plaintiff is further informed and believes that the home of the said *Thomas D. Cooley* is not yet paid for, and if so that payment was completed at a very recent date. That this information is derived from *Thomas D. Cooley* himself, and plaintiff knows of his own knowledge that he was paying for his home in a building and loan association by monthly installments, which also came from his salary.

(*There was no paragraph 10 in the complaint.*)

11. That the said *Thomas D. Cooley* has stated, under oath, that he paid for said stock and business the sum of $3,580; that he paid cash to the Bank of *Anderson* the sum of $2,000 on a note due there by *Allen & Cooley*, and that he has now in cash for the plaintiff $1,580, the same being the amount of two notes due the plaintiff by *D. K. Cooley*, and which was a part of the settlement of *September 30*, 1897, and which are not due until *November* and *December*, 1898. That to secure the balance of $2,000 in the *Anderson* Bank there had been deposited some $6,000 of good assets and collaterals of *Allen & Cooley*. That the said *Thomas D. Cooley* also stated, under oath, that he made the money with which he purchased the business; that he got all of the collateral out of the *Anderson* Bank, and that some of it, he declining to say how much, had been assigned to him by *D. K. Cooley*.

12. That the said *Thomas D. Cooley* also stated, under oath, that he did not intend to pay one cent of the debts of *Allen & Cooley*; that he now claims everything in sight connected with the late business of *Allen & Cooley*, and the sheriff of *Abbeville* could find nothing whatever to levy upon as the property of *D. K. Cooley*.

13. That the said *Thomas D. Cooley* also stated, under oath, that in 1891 he had lent to his brother, *D. K. Cooley*, $1,750 with which to pay his expenses while a fugitive from justice, and that he now holds his note for the same and interest, when, as matter of fact, in the alleged trade for the business involving a layout of $3,580, no mention was made of the note as set-off or otherwise. He stated that he paid in cash $2,000 to the bank and was ready to pay the $1,580 when the notes became due.

14. This plaintiff alleges that it is an impossibility for the said *Thomas D. Cooley* to have had the $3,580, and that he never paid same to his brother, *D. K. Cooley*. That he may have and probably did hand over to the *Anderson* Bank $2,000, but if so, that it was the money of *D. K. Cooley*, collected from the assets of *Allen & Cooley*;

and that the pretended sale is a fraudulent scheme between the two brothers to defeat the creditors of *Allen & Cooley* and *D. K. Cooley.*

15. This plaintiff alleges that he made the settlement and dissolution in good faith, believing at the time that *Cooley* was getting the best of it, but willing to do it if he would honestly carry out his agreement and pay the debts, and at that time this plaintiff believed that he would. That no confidence now exists between himself and the *Cooleys*, and no relation of any kind except hard and bitter feeling. That the assets of the firm of *Allen & Cooley* are being diverted and dissipated, and that the *Cooleys*, instead of paying the debts of the old firm, are making every effort to defeat them. That it was the understanding when the old firm was dissolved, that *D. K. Cooley* should continue the business and pay the debts, and this plaintiff declined to take a mortgage to secure the notes for $1,580, above referred to, because, as he said at the time, it might injure the credit of *D. K. Cooley*, and he wanted him to go on in the business and pay the debts. That irreparable loss is imminent to this plaintiff, as he may have the debts of *Allen & Cooley* to pay, if not paid by *D. K. Cooley* as promised; and as the retiring partner. who has done all that he can, and for the benefit of all concerned and in all equity and good conscience, he prays:

1. That the alleged sale of the stock of goods and business of the late firm of *Allen & Cooley* to *Thomas D. Cooley* by *D. K. Cooley* be declared fraudulent and void, and made to hinder, delay and defeat the creditors of *Allen & Cooley* and *D. K. Cooley.*

2. That the alleged mortgage given to *Thomas D. Cooley* by *D. K. Cooley*, on the brick store in *Lowndesville* for $714 for alleged services due by *Allen & Cooley*, be declared fraudulent and void, and made to hinder, delay and defeat the creditors of *Allen & Cooley* and *D. K. Cooley*; and if not fraudulent, that it is a virtual assignment and the same is a preference, and is void.

3. That a receiver be immediately appointed by this honorable court, to take charge of the entire business of *Allen & Cooley*, together with all the books, accounts, liens, mortgages, notes and chattels of every description connected with said business. That said receiver do wind up the said business as soon as possible, subject to the direction of this Court, and that he hold all proceeds subject to the future order of this Court.

4. For such other and further relief as to this honorable Court may seem just and proper.

[(*Signature and verification as in Form No. 5932.*)][1]

(4) In Proceedings Against Corporation.[2]

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **Requisites of Bill, Complaint or Petition, Generally.** — See *supra*, note 2. p. 593.

To justify the appointment of a receiver of a corporation, creditor should show that he has a valid claim against the corporation and that there are assets applicable to its payment; that he has exhausted his legal remedies, or that to deny the application would lead to wasting and loss of property which otherwise might be made available for the payment of the debts of the corporation, and which could not be availed of

(*a*) *To Administer Assets.*

Form No. 17118.[1]

(Precedent in State *v.* Scarritt, 128 Mo. 332.)[2]

In the *Circuit* Court of *Jackson* County, *Missouri*, *January* term, 1894.

John Walruff, Plaintiff,
vs.
The Weston Brewing Company, Defendant. } Petition for Appointment of Receiver.

Petitioner states that the defendant, *The Weston Brewing Company*, is a corporation duly organized under the laws of the state of *Missouri*, doing business at, and having its chief office in, the city of *Kansas City*, *Jackson* county, *Missouri*; that the plaintiff is a stockholder in said corporation, owning *two hundred and forty-eight and one-half* shares in said corporation of the *five hundred* shares therein; that said corporation is insolvent, and unable to pay its debts; that numerous small creditors of said corporation are threatening, and are about, to sue; that the assets of said corporation consist partly of beer on hand, and materials for making the same, and that said beer is at present unsalable; that the debts due said corporation can not be readily collected at present, to apply on the debts of the corporation; and that the assets of said corporation are liable to be wasted and frittered away to the great injury and detriment of the stockholders and creditors. Petitioner prays the court to appoint a receiver for said corporation, to take charge of the assets of said corporation.

John Walruff, Petitioner.

John Walruff, petitioner herein, being duly sworn, on oath states that the matters and facts set forth above are true and correct.

John Walruff.

[(*Jurat as in Form No. 851.*)][3]

(*b*) *To Continue Business of Corporation.*

Form No. 17119.[4]

(*Venue and title of court and cause as in Form No. 5915.*)

The plaintiffs, *James G. Douglass*, *John Dunlap* and *Isaac N. Pattison*, complain of the defendant, the *United States Encaustic Tile Company*, and say that the plaintiff *Douglass* is the owner of *four hun-*

in any other manner so satisfactorily. Falmouth Nat. Bank *v.* Cape Cod Ship Canal Co., 166 Mass. 550.

1. *Missouri.* — Rev. Stat. (1899), §§ 753, 1339.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 2, p. 619.

2. The circuit court appointed a receiver as prayed for in the petition set out in this case. On application to the supreme court for a writ of prohibition, on the ground inter alia that such petition was fatally deficient, the court held that in such a proceeding the question of sufficiency could not arise, but added that the action of the circuit court upon the petition implied a ruling that it was sufficient.

3. The matter to be supplied within [] will not be found in the reported case.

4. *Indiana.* — Horner's Stat. (1896), § 1222.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 2, p. 619.

This complaint is set out in one of the pleadings in Mauch Chunk First

dred and seventy-four shares of the capital stock of the defendant; that plaintiff *Dunlap* is the owner of *twenty-five* shares of the stock of such defendant; that the plaintiff *Pattison* is the owner and holder of *three* promissory notes, of $5,000 each, made and issued by the defendant; that the defendant is a corporation, created under the laws of the state of *Indiana*, and having its place of business at the city of *Indianapolis*, in such state, where it is engaged in the manufacture of tile; that the defendant is indebted in a large sum of money, to wit, $200,000, to divers persons; that more than $100,000 of such indebtedness is in the form of commercial paper, some of which has matured and is unpaid; that the defendant is unable to pay its matured paper and will be unable to meet, in the due course of business as it matures, its other outstanding notes, and is in imminent danger of insolvency; that such corporation is now employing a large number of hands in the manufacture of tile; that it has many valuable contracts outstanding, and has on hand a large stock of manufactured tiles; that it would be very disastrous to the business of such corporation and to its creditors and stockholders, if the operations of its factory should be stopped; that, if a receiver is not appointed to take charge of its assets, the same will be wasted and dissipated by sales upon execution and large amounts of unnecessary costs, and the interests of the creditors sacrificed.

Wherefore the plaintiffs pray that a receiver may be appointed to take charge of the books, property and assets of every kind of the defendant, and apply the same under the direction of the court to the liquidation of the debts of the company, and that he may be authorized, until the further order of the court, to continue the business of the company

R. O. Hawkins, Attorney for Plaintiffs.

(*Verification.*)

(*c*) *To Sequester Property.*

Form No. 17120.[1]

Supreme Court — *Cayuga* County.

The National Bank of Auburn
against
The Rheubottom & Teall Manufacturing Company.

The above named plaintiff complains of the defendant, and shows to the court that the plaintiff is a banking association duly created

Nat. Bank *v.* U. S. Encaustic Tile Co., 105 Ind. 227. The object of that suit was to vacate the order appointing the receiver asked for in this complaint, on the ground that it was made in vacation. This the court refused to do.

1. *New York.* — Code Civ. Proc., §§ 713, 1788.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 2, p. 619.

This form of complaint is one of the pleadings in the case of Jones *v.* Blun, 145 N. Y. 333, introduced in evidence for the purpose of showing that the plaintiff in that case was duly appointed receiver and entitled to sue. It was held in Hunting *v.* Blun, 143 N. Y. 511, that this complaint fairly alleged all that was needed to authorize the judgment of the court sequestrating the property of the Rheubottom & Teall Manufacturing Company and appointing the plaintiff receiver of the property. The form is copied from the records.

under the laws of the United States in reference to banking, and is doing business under the name and style of *The National Bank of Auburn*, at *Auburn, N. Y.*

That the defendant is a domestic corporation incorporated on or about *January 16th*, 1889, under chapter 40 of the laws of the state of New York, passed in 1848.

That on or about *February 9th*, 1891, a judgment was rendered in the City Court of the city of *Auburn, N. Y.*, in favor of the above-named plaintiff and against the defendant for the sum of *nine hundred and thirty-four* dollars and *twelve* cents ($934.12), and that a transcript thereof was filed and said judgment duly docketed in the county clerk's office of *Cayuga* county on the *9th* day of *February*, 1891.

That on said *February 9th*, 1891, an execution upon said judgment against the property of said defendant was issued to the sheriff of *Cayuga* county, in which county the said defendant at the time said execution was issued had its principal office and transacted its general business, and that said execution has been returned wholly unsatisfied.

Wherefore, the plaintiff demands judgment that the property of the defendant may be sequestrated and that a fair and just distribution thereof, and of the proceeds thereof may be made among the fair and honest creditors of said defendant, according to law, and that a receiver of said property may be appointed with the powers and authority conferred, and subject to the duties and responsibilities and liabilities imposed by law upon such receivers, and that the plaintiff may have such other and further relief as may be equitable in the premises, together with the costs of this action.

Charles I. Avery, Attorney for Plaintiff,
120 Genesee street, *Auburn, N. Y.*

Cayuga County, ss.:

George B. Longstreet, being duly sworn, says that he is *Assistant Cashier* of the *National Bank of Auburn*, the plaintiff in the above-entitled action; that he has read the foregoing complaint and that the same is true to the knowledge of deponent, except as to those matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

G. B. Longstreet.

Sworn to before me this *12th* day of *February*, 1891.

H. T. Keeler, Notary Public.

(*d*) *To Wind Up Affairs.*[1]

1. **Precedents.** — In Dickerson *v.* Cass County Bank, 95 Iowa 392, the petition, which stated in substance that the defendant bank was incorporated under the laws of the state for the purpose of transacting a banking business, and had been so engaged for a number of years, and that plaintiff was a stockholder therein; that said bank was heavily indebted and so involved that it was impossible for it to meet the claims due and to become due upon it; that its assets were scattered, and of a kind that it was impossible to realize on at once without great sacrifice; that the bank was running its business at a large daily expense and constantly losing money; that it had not more than

aa. For Misconduct or Mismanagement.[1]

two hundred dollars in cash, which was not sufficient to meet its daily checks, and that its business was decreasing; that its creditors were pressing payment, which it would be impossible for the bank to make, and that there was danger that some creditor would commence suit by attachment or otherwise, and involve the bank in disastrous and costly litigation, and compel the assets to be sacrificed by creating a run on the bank, was held sufficient to authorize the appointment of a receiver.

1. Precedent. — The complaint in People *v.* Empire Loan, etc., Co., 15 N. Y. App. Div. 69, which is copied from the records, is as follows:

"*Supreme* Court, County of *Kings*.

The People of the State of New York, plaintiffs, against *Empire Loan and Investment Company*, defendant. } Complaint.

The plaintiffs herein, by *T. E. Hancock*, attorney general, complain of the defendant herein, and upon information and belief, allege the following facts:

First. At the several times herein referred to, the defendant in this action, *Empire Loan and Investment Company*, was and still is a domestic corporation organized under a general act of the legislature of the state of *New York*, being Chapter *689* of the Laws of 18*92*, and the several acts amendatory thereof and supplemental thereto, carrying on business as a savings, loan and building association, having its principal office in the city of *New York*, county of *New York*, *N. Y.*

Second. From an examination made by and under the direction of the Superintendent of Banks of the state of *New York* of the defendant and its books and business on or about *September 23d*, 18*96*, the fact appeared that the liabilities of said defendant exceeded its assets, and that said defendant was insolvent and unable to pay its debts, charges and obligations; and that such defendant had violated various provisions of its by-laws and charter and of the laws of the state of *New York* binding upon it, and was conducting its business in an unsafe and unauthorized manner, and that it is unsafe and inexpedient for the defendant to longer continue to transact business, and the interests of the creditors, shareholders of said defendant, and of the public require that its assets should be taken from the control and management of said defendant and preserved for the benefit of the persons entitled thereto.

That there is now due from the company defendant the sum of about $30,000 of mortgage indebtedness assumed by it, said amount being past due, and the said defendant has not ready, quick or available assets with which to meet said demands, and the Superintendent of Banks of the state of *New York* has communicated such facts to the attorney general of the state of *New York*, by Exhibits *A* and *B* hereto annexed and made part hereof, for the institution by the latter named official of such action or proceeding as the nature of the case may require and will best protect the interests of the creditors and shareholders of said defendant, and the Attorney General is of opinion from such facts that the defendant should not longer be permitted to transact business but that its corporate rights and franchises should be terminated.

Wherefore the plaintiffs demand judgment dissolving the defendant corporation and forfeiting its corporate rights, privileges and franchises, and perpetually enjoining and restraining the defendant, its trustees, officers and agents from exercising any corporate powers, privileges and franchises, and from transferring, disposing of, and in any manner interfering with, its property and assets, and the plaintiffs pray that during the pendency of the action an order may be granted restraining the defendant, its officers and agents from transferring any corporate business, or in any manner transferring, disposing of or interfering with any of its property or assets, and that a temporary receiver of such property and assets be appointed with all the powers and duties of temporary receivers in such cases, and that an injunction order, restraining creditors and all persons from commencing any suit or proceeding against the defendant, or taking any proceedings in any action already commenced, may be granted, and that upon the dissolution of the defendant a permanent receiver of its property and assets be appointed, with

Form No. 17121.[1]

(Precedent in State *v.* Commercial State Bank, 28 Neb. 677.)[2]

[(*Title of Court and cause as in Form No. 6435.*)
To the Honorable the said *Supreme* Court:][3]

The attorney general respectfully represents to the court:

First — That the defendant the *Commercial State Bank* is a corporation, duly organized under and by virtue of the laws of this state.

Second — That the defendant *John F. McConaughy* is the president of the defendant bank.

Third — That the defendant *George W. Shreck* is the sheriff of *York* county.

Fourth — That the following named persons are creditors of said bank, and have money deposited therein in the sums set opposite their respective names:

N. M. Ferguson	$2,000 00
T. J. Maguire	650 00
J. H. Bell	110 00
E. J. Petty	377 35
Fairman & Harrington	300 00
Mabel Fairman	100 00
Grace Fairman	50 00
E. E. Watts	235 00

all the rights, powers, duties and liabilities of permanent receivers in such cases; that there be a just and fair distribution of the property of the corporation and of the proceeds thereof among its creditors in the order and in the proportion described by law, and that the plaintiffs may have such other and further relief as to the court may seem just and proper to grant, with the costs of this action.

T. E. Hancock,
Attorney General, Plaintiff's
Attorney, Capitol, *Albany, N. Y.*"

An order was entered appointing a temporary receiver as prayed for and on appeal such order was affirmed. But in People *v.* Republic Sav., etc., Assoc., 53 N. Y. App. Div. 384, the court said of the complaint in that case that it was not substantially different from the complaint upheld in People *v.* Empire Loan, etc., Co., 15 N. Y. App. Div. 69, and that it was justly subject to criticism. "Instead of alleging directly that the liabilities of the defendant exceed its assets, and that the defendant is insolvent and is violating the various provisions of its by-laws and charter, and conducting its business in an unsafe and unauthorized manner, it avers that, 'from examination made, by and under the direction of the Superintendent of Banks of the State of *New York*, of the books and papers of the said defendant corporation in and about the month of *July*, 1899, to *March*, 1900, inclusive, the fact appeared that the liabilities of said defendant exceeded its assets, and that said defendant was insolvent and unable to pay its debts, charges and obligations, and that said defendant had violated various provisions of its by-laws and charter and of the laws of the State of *New York*, binding upon it, and was conducting its business in an unsafe and unauthorized manner,' etc. If the question were a new one, I should hesitate to hold that an allegation in this form was a sufficient statement of the facts to constitute a cause of action."

1. *Nebraska.* — Comp. Stat. (1899), § 649.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 2, p. 619.

2. It was held that the petition in this case "contains all the facts required by the banking law and is sufficient to authorize the appointment of a receiver to take charge of and wind up the affairs of the defendant bank."

3. The matter enclosed by [ ] will not be found in the reported case.

Daniel Dorenbarger	$300 00
W. C. Conkle	394 13
W. S. Jeffrey	300 00

That the following named persons have sums of money deposited in said bank which in the aggregate amount to $2,583.58, to wit: *John W. Atkinson, Ancient Order of United Workmen, A. R. Bennett, R. L. Baugh, C. W. Beanblossom, E. B. Fox, S. M. French, Gobe Brothers, T. B. Kohn, S. A. Myers, R. E. McConaughy & Co., George F. Holmes, Scott & Stoddard, W. R. Vandevere, J. A. Greer & Co., G. M. Snyer, L. W. Troutman, John Bingham, S. J. Laird, William Bartlett, Thomas Barber, J. A. Vandyke, John Bittinger, C. A. Pyle, W. C. Harris, J. M. Stoddard.*

Fifth — That the defendant *McConaughy*, on the *25th* day of *November*, 1889, being, as he alleges, insolvent, made an assignment for the benefit of his creditors, and the defendant *Shreck*, as sheriff of *York* county, has taken possession of all the estate of the defendant *McConaughy*, and by the direction of the officers of the defendant bank, who claim that the defendant *McConaughy* is the sole owner thereof, the sheriff has closed the doors of said bank, taken possession of all its assets, and claims to hold the same by virtue of his office as assignee of said alleged insolvent.

Sixth — That at all times since the commencement of business by defendant bank, it has been conducted as a corporation, its articles of incorporation having been duly filed in the office of the county clerk of *York* county, and a copy thereof in the office of secretary of state.

Seventh — That it has been made to appear to the auditor of public accounts and the attorney general that the manner in which the defendant is conducting its business is unsafe and unauthorized, and is jeopardizing the interest of its depositors, and that it is unsafe and inexpedient for such corporation to continue to further transact business. Reference is hereby made to the affidavits hereto attached as Exhibits "*G*" and "*H*," and the report of said bank made *November 8*, 1889, marked Exhibit "*A*."

Eighth — That the defendant *McConaughy* is indebted in much larger amounts than he can pay in full, and has been insolvent for a long period of time, but the assets of said bank are not large enough, together with the individual assets of the defendant *McConaughy*, to pay more than *50* per cent. of the liabilities of the defendant bank and the defendant *McConaughy*; and the interests of depositors will be without protection unless this court appoint a receiver to wind up the business of the defendant bank.

Ninth — That if the affairs of said bank are properly managed, and its business wound up in accordance with the law under which it has been conducting a banking business, its depositors and all of its creditors may be paid in full, as its assets are in excess of its liabilities.

Tenth — That all of the persons whose names are mentioned in the body of this petition as depositors in said bank have made demand upon the officers of said bank for the payment of the amounts

severally due them, and payment thereof has been by them refused; that the officers of said bank declare that no more payments will be made by the defendant bank; that the sheriff, who now holds possession of its assets, intends to distribute the same among all the creditors of the defendant *McConaughy* pro rata only; and the sheriff now holds possession of said assets, and will so administer said assets unless he be ordered to turn the same over to a receiver to be appointed by this court.

Eleventh — That on *Saturday*, the *23d* day of *November* last, the president of the defendant bank, at the time when he was contemplating insolvency, and knowing that he was insolvent, received from *S. J. Laird*, one of the depositors above mentioned, a deposit of money amounting to the sum of *$300*, knowing that he, the said president, was insolvent and contemplated making an assignment for the benefit of his creditors, and on said day the said defendant issued his check on said bank, which was paid after banking hours on said day, all of which was done in contemplation of insolvency, and with intent to defraud creditors of said bank.

Twelfth — The plaintiff therefore prays that the sheriff of said county be ordered to list the assets of the defendant bank, to report the same to this court, and to turn the same over to such person as this court may direct; that this court will appoint a receiver, who may be by the court ordered and directed to take charge of the assets of the defendant bank, with directions to wind up the affairs of said bank in accordance with law, and for such relief as may be just and equitable; that the defendant *McConaughy* may be ordered to show cause, if he has any, why the court may not appoint a receiver as herein prayed for.

[*George H. Hastings*, Attorney General.][1]

bb. INSURANCE COMPANY TRANSFERRING RISKS TO ANOTHER COMPANY.

Form No. 17122.[2]

Commonwealth of *Massachusetts.*
Superior Court.

Suffolk, ss. In Equity.

The Petition of the *New England Mutual Accident Association* for the Appointment of a Receiver, etc.

To the Honorable the Justices of the *Superior* Court, holden at *Boston*, in and for the County of *Suffolk*, Sitting in Equity.

The *New England Mutual Accident Association* respectfully petitions and represents:

1. That as a corporation it was duly organized and created in *February*, 1884, and under and in accordance with the provisions of Chapter 115 of the Public Statutes of Massachusetts and Acts amenda-

1. The matter enclosed by [ ] will not be found in the reported case.

2. *Massachusetts.* — Pub. Stat. (1882), c. 105, § 42.
See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 2, p. 619.
This form is copied from the records of the case.

tory thereof and thereto, and from the date of its said organization, continuously until about *April 1*, 1899, it transacted the business of accident or casualty insurance upon the assessment plan under and in accordance with the various provisions of the laws of this Commonwealth as they were respectively enacted and continued in force; and during all said time did transact no other business.

2. That from the time of its organization the business of this Association gradually increased in volume so that on said *April 1*, 1899, it was conducting a large and active accident insurance business upon the assessment plan in *twenty* different States, and had many thousands of policy holders, whose policies were then in force.

3. That on said *April 1*, 1899, this Association entered into a written contract of that date with *The General Accident Assurance Corporation, Limited*, of *Perth, Scotland*, transacting business in the United States, for the transfer to or reinsurance by said *The General Accident Assurance Corporation, Limited*, all its outstanding policies and contracts on which no claim had on that date accrued or arisen; that under and in accordance with the provisions of the laws of this Commonwealth, particularly relating to such proceedings, the said contract was submitted to and approved by a *two-thirds* vote of the meeting of all policy holders insured by this Association, which said meeting was held at the office of this Association, in *Boston, Massachusetts*, on *May 25*, 1899, and was specially called to consider the same, and notice of which had been duly given according to law; and no policy holder within *five* days thereafter, or in fact ever thereafter filed with this Association any notice of preference to be transferred to some corporation other than the said *The General Accident Assurance Corporation, Limited.*

4. That under and by the provisions of Section *12* of Chapter *421* of the Acts of this Commonwealth for the year 1890, said vote of approval acted as a dissolution of this corporation, and all liabilities upon all its policies ceased at the expiration of *five* days thereafter, to wit: on *June 1*, 1899; and this Association thereupon ceased and wholly discontinued its business of casualty or accident insurance, and has carried on no business since that date other than that occasioned by adjusting and finally winding up its affairs.

5. That in and by said contract of reinsurance or transfer said corporation, *The General Accident Assurance Corporation, Limited*, did not assume or in any way obligate itself to pay any liability for any injury received or any death occurring as the result of an accident happening prior to noon of the date of said contract, i. e., *April 1*, 1899. That the liabilities of this Association upon its policies not assumed by the said *The General Accident Assurance Corporation, Limited*, as above set forth, have been liquidated as rapidly as the same could be adjusted, but there still remain certain liabilities, which when properly adjusted or ascertained, will amount to the sum of $25,000 or more.

6. That the principal assets of this Association now left, out of which the liabilities set forth in paragraph *five* of this petition can be satisfied and discharged, is the so-called Emergency Fund of this Association by it deposited with, and now in the hands of the Treasurer

of the Commonwealth, and under and in accordance with the requirements of the assessment laws of this State, which Emergency Fund now amounts to about the sum of $\$26,840$; that under the provisions of said Section *14* of said Chapter *421*, of the Acts of 1890, the Directors of this Association for purposes of paying certain of its death and disability claims, not assumed as above set forth by *The General Accident Assurance Corporation, Limited*, have duly made a written requisition for drawing a portion of said Emergency Fund and presented same to the Insurance Commissioner of this Commonwealth for his indorsement as required by law.

7. That said Insurance Commissioner declines and refuses to endorse the said requisition so made, and declines and refuses to endorse any requisition that may be hereafter drawn upon the said Emergency Fund, and said Commissioner and the State Treasurer each decline and refuse and in any way to allow said Emergency Fund, or any part thereof, to be withdrawn or used by this Association or its Directors or any of its officers for the reason as stated by them that this Association has within the meaning of said Section *14* wholly discontinued business, and now has no authority or right by law to control the disposition of said Emergency Fund or any part thereof, but that said fund can only be withdrawn from the State Treasury by a Receiver duly appointed by some Court of competent jurisdiction.

Wherefore your petitioner prays:—

1. That a Receiver may be appointed to collect and receive from the State Treasurer all said Emergency Fund and take possession of the property and effects of this Association and distribute its assets and fully settle, wind up and close its affairs subject to such orders and directions as this Honorable Court may from time to time prescribe.

2. That this Association may be dissolved and for such other and further relief in the premises as to this Honorable Court may seem meet.

New England Mutual Accident Association. By *Benjamin H. Ticknor.*
(SEAL) *Franklin J. Moore.*

Suffolk, ss. *Boston, October 7*, 1899.

Then personally appeared *Franklin J. Moore* and made oath that he is the Secretary duly elected by the *New England Mutual Accident Association*, that he has read the foregoing petition and understands the same, that the matters and things therein alleged are true of his own knowledge, save those therein stated upon information and belief and as to those he believes them to be true. Before me,

I. R. Clark, Justice of the Peace.

At a meeting of the Board of Managers of the New England Mutual Accident Association duly held on *October 7*, 1899, a quorum being present, the following vote was duly cast, viz:—

Voted:—That this Association forthwith take such action in a Court or elsewhere as may be proper or required for the appointment of a Receiver to take possession of the property and effects of this Association, and to settle and finally wind up and close its affairs; and that *Benjamin H. Ticknor* and *Franklin J. Moore* be appointed a committee in the name and behalf or under the seal of this Associa-

tion to sign all such petitions and papers and take all such steps as may be necessary or required to fully carry out the purposes of this vote; and that the Secretary of this Association be authorized to request the Insurance Commissioner, if the same shall prove necessary, to take any action requisite to carry out the purposes of this vote.

(SEAL) Attest: *Franklin J. Moore*, Secretary.

cc. WHERE CORPORATION IS INSOLVENT.

Form No. 17123.[1]

(Precedent in Darragh *v.* H. Wetter Mfg. Co., 78 Fed. Rep. 8.)[2]

United States Circuit Court, *Eastern* District of *Arkansas*, *Western* Division.

H. Wetter Mfg. Co. v. *Dickinson Hardware Co.*

Original Bill.

To the Judge of said court, in Chancery Sitting: Your orator states that it is a corporation created and doing business under the laws of the state of *Tennessee*, while the defendant is a corporation created and doing business under the laws of the state of *Arkansas*, and an inhabitant of this district. Said defendant is indebted to your orator, for goods sold and delivered, in the sum of *twenty-eight hundred forty-two and 90-100* dollars, and is insolvent, but that the distributive share going to your orator upon a distribution of its assets will exceed the sum of *two thousand* dollars. Your orator therefore prays for process of subpœna against the defendant; that it be required to answer this bill; that a receiver be appointed to take possession of its assets, and to administer the same; that they be reduced to money and distributed among the creditors entitled thereto; and for all other proper relief.

Rose, Hemingway and Rose.

(5) IN CREDITORS' SUITS.[3]

1. *Arkansas.* — Sand. & H. Dig. (1894), §§ 1426, 5964 *et seq.*

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 2, p. 619.

2. The court said of the bill in this case: "It is a model of clearness and brevity, worthy of imitation. It states without a useless word the facts conferring jurisdiction upon the federal court and the existence of every condition required by the statute of Arkansas to entitle the complainant to the relief prayed." An objection that the bill could not be sustained in a federal court, because it did not allege that the claim of the complainant had been reduced to judgment and that an execution upon it had been returned nulla bona, was not sustained.

3. **Affidavit Verifying Bill.** — In Gerson *v.* De Turck, 82 Ill. App. 125, the affidavit verifying the bill was as follows:

"State of *Illinois*, } ss.
County of *Cook*. }

Robert C. Robinson makes oath and says that he is the agent for the complainants in the foregoing bill mentioned; that he has read the foregoing bill of complaint, and knows the contents thereof, and that all the averments in said bill, charging the recovery of judgments in favor of the complainants, *Jacob De Turck* and *John F. Brown*, together with *Willard S. Brown*,

(*a*) *In General.*

Form No. 17124.[1]

(Precedent in McCadden *v.* Pender, 115 N. Car. 64.)[2]

[(*Commencement as in Form No. 5927.*)][3]

1. That on the *17th* day of *November*, 1891, judgments were rendered before *R. A. Watson*, a Justice of the Peace in and for the State and county aforesaid, against the defendant *D. Pender*, trading as *D. Pender & Co.*, for goods, wares and merchandise sold and delivered, and in favor of the plaintiffs, as follows: In favor of the plaintiffs *McCadden & McElwee* for the sum of $*42.90*, and $*1.15* costs; *J. W. Old & Co.* for $*77.05*, and $*1.15* costs; *M. L. Strauss & Sons* for $*50.70*, and $*1.15* costs; *Foster, Knight & Co.*, *two* judgments, *one* for $*138.65* and for $*83*, and $*1.15* costs in each case; that each of said judgments were thereafter duly docketed in the *Superior* Court of said county, and executions issued thereon to the Sheriff of said county, by whom the same were returned wholly unsatisfied.

2. That the plaintiffs *E. Austen Jenkins* and *Robert H. Jenkins*, partners, trading as *Edward Jenkins & Son*, sold and delivered to

since deceased, partners as *Brown, De Turck & Company*. and *Albert Hammacher, William Schiemmer* and *Charles F. Goepel*, partners as *Hammacher, Schlemmer & Company*, and the issuing of executions thereon and placing the same in the hands of the sheriff of *Cook* county, *Illinois*, and the sheriff's returns thereon, are true, as in the said bill alleged, in substance and in fact.

That affiant has taken pains to inform himself as to the principal defendants, *Rudolph Deimel, Joseph Deimel, Simon Deimel, John Gerson, Ignatz Deimel* and *Rosa Deimel*, and upon such information believes that said *Rudolph Deimel, Joseph Deimel, Simon Deimel, John Gerson, Ignatz Deimel* and *Rosa Deimel*, have property, real, personal and mixed, choses in action, which are held by other persons for them, or some of them, in fraud of the rights of complainants and the other creditors of said principal defendants, *Rudolph Deimel, Joseph Deimel, Simon Deimel, John Gerson, Ignatz Deimel* and *Rosa Deimel*, as alleged in complainant's bill of complaint, and which cannot be reached by execution; and believes from such information that there are moneys due the said principal defendants, *Rudolph Deimel, Joseph Deimel, Simon Deimel, John Gerson, Ignatz Deimel* and *Rosa Deimel*, which can be reached and collected in this proceeding, if a receiver is appointed, which cannot be reached by execution or garnishment proceedings, or any action at law, as in said bill is alleged.

Robert C. Robinson.

Subscribed and sworn to before me this *24th* day of *October*, A. D. 1898.

(SEAL) *R. M. Ashcraft*,
Notary Public."

The bill in this case alleged that certain property therein described had been fraudulently disposed of by some of the judgment debtors and was then equitably subject to the payment of the judgment indebtedness. On appeal from an interlocutory order appointing a receiver, it was held that, taking the affidavit together with the allegations of the bill of complaint, specifying as they did particular property of the judgment debtors, the chancellor was justified in ordering the appointment of a receiver.

1. *North Carolina.* — Code Civ. Proc. (1900), § 329.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 2, p. 593

2. A demurrer to the complaint in in this case, on the ground that there was a misjoinder in that plaintiffs had separate and distinct interests and that the complaint did not state facts sufficient to constitute a cause of action, was overruled.

3. The matter to be supplied within [ ] will not be found in the reported case.

the defendant *D. Pender*, trading as *D. Pender & Co.*, goods, wares and merchandise, during the fall of 1891, of the value of $119.36, for which he promised to pay.

3. That on the *21st* day of *September*, 1891, the defendant *D. Pender*, trading as *D. Pender & Co.*, made conditional sale of his stock of goods, wares and merchandise at *Old Sparta*, *N. C.*, and in the purchase of which the above debts were contracted, to one *W. R. Ricks* in consideration of $2,300 due the said *Ricks* by the firm of *Pender & Cotten*, to go as a cash payment on said purchase, and *three* notes for $500 each, and *one* note for $200 to be accepted for the balance of said purchase-price, the title to the said stock of goods to be retained to the said *D. Pender & Co.* until said notes were fully paid.

4. That thereafter the said *three* notes for $500 each were assigned to the defendants *Ida L. Bryan*, *Zilphia Killebrew* and *Henry Pender*, and the note for $200 to *Henry Pender*, in each instance as collateral security for debts claimed to be due said parties by the firm of *Pender & Cotten*. That the sum of $250 has been paid by the said *Ricks* upon the note held by the said *Ida L. Bryan*, but the balance due upon the note aforesaid, and the whole of the other of said notes, as plaintiffs are informed, remain unpaid.

5. That, as plaintiffs are informed and believe, and so allege, the defendant *D. Pender*, trading as *D. Pender & Co.*, during the year 1891, removed several thousand dollars worth of his stock of goods from his store at *Old Sparta* to the town of *Tarboro* and into the store then occupied by *Pender*, *Hargrove & Cotten*, and during the year sold the same and applied the proceeds of said sales to the payments of debts due by *Pender & Cotton*.

6. That *A. J. Cotten*, who with the defendant *D. Pender* composed the firm of *Pender & Cotten*, died in *July*, 1890, and the defendant *M. E. Cotten* was duly qualified as the administratrix of his estate; that the defendant *D. Pender* has since then continued as surviving partner of said firm in the management and closing up of its affairs.

7. That on the ——— day of *November*, 1891, the defendant *D. Pender*, as surviving partner of *Pender & Cotten*, and as a member of the firm of *Pender*, *Hargrove & Cotten*, executed an assignment to the defendants *J. L. Bridgers* and *Fred Philips*, conveying his interest in both firms to secure certain debts therein mentioned, among them being the debts due *Henry Pender*, *Zilphia Killebrew* and *Ida L. Bryan*, as aforesaid. That said trustees have taken possession of the property so conveyed and have paid off certain of the debts mentioned in said trusts, but whether they have paid off the particular debts referred to above, or whether the trust property will be sufficient for that purpose, the plaintiffs are unable to say, but ask that the said trustees be required to answer fully in respect thereto.

8. That the said *W. R. Ricks* is rapidly disposing of the stock of goods sold him as aforesaid; he has failed to pay off the notes due by him as aforesaid, although the same are due and payment thereof has been demanded. That he is insolvent, and the said stock of goods, as plaintiffs are informed and believe, is now worth less than the balance due on them as aforesaid.

9. That *D. Pender* is wholly insolvent, but the firm of *Pender & Cotten* is abundantly solvent and able to pay its indebtedness.

[Wherefore, the plaintiffs, *E. Austen Jenkins* and *Robert H. Jenkins*, partners as aforesaid, pray judgment for the sum of *$119.36* and interest against *D. Pender*, trading as *D. Pender & Co.*; and all the plaintiffs pray judgment.][1]

1. That *W. R. Ricks* be restrained from paying to *Ida L. Bryan*, *Zilphia Killebrew* and *Henry Pender* the amounts due upon the above described notes.

2. That a receiver be appointed of said notes and stock of goods sold to *Ricks*, to take charge of the goods, sell the same and hold the proceeds until the further order of this Court.

3. That as to the sum of *$300* paid to *Ricks*, and the sum of *$250* paid to *Ida L. Bryan*, as above set forth, and as to the amount of the goods of *D. Pender & Co.*, appropriated to the payment of the debts of *Pender & Cotten*, and as to the amount of the several notes due by *Ricks*, in the event they are paid to the parties now holding them, these plaintiffs pray to be subrogated to the rights of said creditors of *Pender & Cotten* against the said firm, that they receive from *Bridgers* and *Philips*, trustees, whatever may be coming to them under said trust, and that they have judgment against *M. E. Cotten*, administratrix, for any deficiency.

4. That this cause be referred to some competent person to state such accounts as may be necessary.

5. For general relief and costs.

[(*Signature and verification as in Form No. 5927.*)][2]

(*b*) *To Satisfy Notes which Defendant Agreed to Save Plaintiff Harmless From.*

Form No. 17125.[3]

[(*Address as in Form No. 4283.*)][2]

The bill of complaint of *Hiram Stephenson* against *Henrietta Hess*, *Adolph Hess*, *Randolph Rothschild*, and *H. R. Howard*, special receiver, filed in the *Circuit* Court of *Mason* county. The plaintiff complains and says, that in the year *1884* the defendants, *Henry Hess* and *Adolph Hess*, were members of a firm doing business under the name, style and firm of *Hess & Co.*; that as such firm they carried on the business of retail merchants in the town of *Point Pleasant*, *Mason* county, *West Virginia*; that prior to the *21st* day of *June*, *1884*, the members of said firm became involved in litigation regarding said business, and as one of the results thereof the goods, wares and merchandise of said firm were placed in the hands of the defendant, *H. R. Howard*, as special receiver appointed by the court for that purpose; that on or about the *31st* day of *October*, *1884*, the said receiver sold the

1. The words enclosed by [ ] are not the exact words of the complaint.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. This form is the bill of complaint set out as an exhibit in the case of Howard *v.* Stephenson, 33 W. Va. 116. No objection was raised to the bill. See, generally, *supra*, note 2, p. 593.

goods, wares and merchandise then in his hands as such receiver to the defendant, *Rudolph Rothschild*, for the sum of $2,250 00, payable in *three*, *six* and *twelve* months; that said *Rothschild* had been a clerk in the employment of the said firm of *Hess & Co.*, and was then, and still is, perfectly insolvent; that the aforesaid sale to him was effected through and by the defendants, *Henry* and *Adolph Hess*, who are brothers and were the principal members of the aforesaid firm of *Hess & Co.*

Plaintiff further says, that through and by the earnest solicitation of the said *Adolph Hess* he was induced to join with the said defendant, *R. Rothschild*, in making *three* several notes payable to said defendant, *H. R. Howard*, in payment of said purchase-price of said goods, wares and merchandise sold to the said *Rothschild*, as aforesaid, the said notes bearing date the *31st* of *October*, 1884, and payable as follows, to wit: *One* for the sum of $562.50 in *ninety* days; *one* for the sum of $843.75 in *six* months; and *one* for $843.75 in *twelve* months from the date, and all bearing interest from date; that, while the plaintiff appears as a joint maker of said notes, yet in truth and in fact the said *Rothschild* alone was principal, and the plaintiff was a surety.

Plaintiff says he was at said time "informed" by the said *Henry* and *Adolph*, and believed, that the said *Rothschild* would execute to *Rankin Wiley, Jr.*, a deed of trust upon the said goods, wares and merchandise so purchased of the said receiver for the use and benefit of the plaintiff, and for the purpose of indemnifying him against loss by reason of his said suretyship, and that plaintiff was afterwards informed, and believed, that said deed of trust had been executed as promised; but he subsequently learned that such was not the case, but that a deed of trust executed to the said *Wiley* as trustee upon said property instead of indemnifying this plaintiff only further secured the aforesaid receiver.

Plaintiff further says, he is informed and believes that the said *Rothschild* sold a large portion of said goods, wares and merchandise and turned over the proceeds thereof to the defendants *Henrietta*, *Henry* and *Adolph Hess*, and that, a short time before the said *Rothschild* quit business, the defendant, *Henrietta Hess*, began the business of merchandising with a full stock in the building formerly occupied by the firm of *Hess & Co.* and afterwards by the said *Rothschild*, with the defendants, *Henry* and *Adolph*, as agents and salesmen for her.

Plaintiff further says that about the ——— day of *April*, 1885, he learned that the first of the aforesaid notes had been paid off, but that no adequate preparations were being made by said *Rothschild* for the payment of the other *two* notes, one of which was then near maturity; that then he for the first time learned that he was not secured by the said deed of trust of *Rankin Wiley, Jr.*, and that the defendant *Howard* informed him that he (*Howard*) would not enforce said deed of trust, as this plaintiff was amply financially responsible; that at the same time plaintiff also learned that the defendant *Rothschild* had disposed of the larger part of the stock of goods bought of the receiver, as aforesaid, and that only a very small remnant of said stock was left; that on or about the *29th* day of *April*, 1885, under the

direction and dictation of the defendants *Henry* and *Adolph Hess*, the defendant *Rothschild* turned over to the said *Wiley* the remainder of said goods, wares and merchandise, together with the accounts yet in his possession, and that on said day the plaintiff, upon the solicitation of said *Henry* and *Adolph*, and with the consent of the said *Howard*, received from the said *Wiley* the said goods, wares, and merchandise and accounts, and then and there sold the same to the defendant *Henrietta Hess* through her agents *Henry* and *Adolph*; and, in consideration thereof, the said *Henrietta*, *Henry* and *Adolph Hess* made, signed, sealed, and delivered to plaintiff a certain writing obligatory (a copy whereof is herewith filed, and marked "*A*"), whereby, among other things, they promised and bound themselves, jointly and severally, to pay any and all such balance as might be due and unpaid of the said *two* last-described notes of the said *Rothschild* and this plaintiff to said receiver, and they also further bound themselves to save harmless this plaintiff from the payment of any part of said notes, or any costs or expenses that might be sustained by him by reason of his having signed said notes, except that the said parties were not to become liable for any lawyer fees, trustees, commissioners, or clerk hire that had theretofore accrued in relation to said wares, goods and merchandise.

Plaintiff further says, that said receiver, as such, on the *6th* day of *February*, 1*886*, obtained a judgment in the *Circuit* Court of said county against the said *Rothschild* and one of the said notes for the sum of $*907.02*, with interest, until paid, and costs amounting to $*16.20*, which judgment, interest, and cost amount to the sum of $*935.80*; and on the *8th* day of the same month said receiver obtained another judgment in the said court against the said *Rothschild* and this plaintiff on the other of said notes for the sum of $*868.07*, with interest, until paid, and costs which amount to $*17.55*, which judgment, interest and costs amount to the sum of $*897.19*. Copies of said judgments are herewith filed, and marked "*B*" and "*C*."

Plaintiff further says that the defendant *Rudolph Rothschild* is wholly insolvent, and a non-resident of this State, and has no property within this State subject to a levy of execution or other process, and further says that executions have been issued on said judgments and levied on the personal property of this plaintiff, but that said executions remain unsatisfied, and said judgments are unpaid, and are a lien upon his real estate. He further says that his personal property is insufficient to satisfy said judgment or any considerable part thereof.

Plaintiff further says he is informed and believes that said receiver is about to institute proceedings necessary to enforce his aforesaid lien upon plaintiff's said real estate, and subject it to the payment of said judgments, as he is legally entitled to do, which if done, will work irreparable injury to this plaintiff.

Plaintiff further says that at the time he sold the goods, wares, and merchandise to the said *Henrietta Hess*, as aforesaid, he is informed and believes, and so charges the facts to be, that she had on hand, and was the owner of, at least $*5,000.00* worth of personal property, as her separate estate, and that at said date she had, as her own

separate estate, in the store-house occupied by her as a store in *Point Pleasant*, *West Virginia*, at least $5,000.00 worth of goods, wares and merchandise. He further says that she is still engaged in selling goods, wares and merchandise in the said store, being the same room owned by Mrs. *Sarah Hess*, wife of the defendant *Adolph Hess*, on the east side of *Main* street in said town; and further says that the stock now on hand in said rooms is but a mere remnant of the aforesaid stock, and he is informed, believes, and charges will not exceed in value the sum of $1,000.00; but that what there is of it is her own separate estate. Plaintiff is also informed, believes, and charges that the residue of said stock has been sold, transferred, removed, and wasted, and the stock converted into money for the express purpose of avoiding the payment of said notes aforesaid, and the judgments obtained thereon, and that the said *Henrietta Hess* had no other estate or property of any kind than the aforesaid remnants of the former stock, together with the few notes and accounts of little value, unless it be cash on hand, of which this plaintiff with certainty knows nothing.

Plaintiff says that he has received from said parties goods, notes, checks, bills, and cash, aggregating in value the sum of $467.26, which he is to pay upon said judgments, and for which the said *Henrietta*, *Henry*, and *Adolph Hess* are not to be further liable, leaving a balance due on said judgments, and for which, by the provisions of said writing, they are liable, of $1,375.73, together with $100.00 costs and expenses sustained by him since the making of said writing obligatory, by reason of his having signed said notes.

Plaintiff further says that the defendants *Henry Hess* and *Adolph Hess* are wholly insolvent, and have no property within the State upon which execution or other process could be levied, and that he is informed and believes that the defendant *Henry Hess* has left the State, and is now a resident of the State of *Maryland*.

Plaintiff further says that the said *Henrietta Hess* is, and was at the time of the said purchase of goods, wares, and merchandise of this plaintiff, and at the time she signed, sealed, and delivered said writing obligatory, the wife of the defendant *Henry Hess*, and that all of the aforesaid goods, wares, merchandise, notes, and accounts is and was her separate estate.

Plaintiff further says that the aforesaid mercantile business being carried on by the defendant *Henrietta Hess* is being grossly mismanaged, and the stock wasted; that the said *Henrietta* is incompetent and unable to manage such a business successfully; that she has in charge of said store the defendant *Adolph Hess*, who is totally unreliable in business, and unfit to have charge of said property; that at times he is physically unable to attend to said business, and leaves the store in the hands of a small boy, who is unable to transact the business, and that the defendants *Henrietta* and *Adolph* pay little or no attention to said business, and that, unless the said *Henrietta* and her agents and employees be restrained and enjoined from selling, removing, or otherwise disposing of said property, these defendants will have no property left from which the said balance, $1,475.73, can be made, but that the plaintiff will be compelled to pay the same at a ruinous sacrifice of his property.

Plaintiff further says that the defendant *H. R. Howard* neglects and declines to take steps to collect said judgment, or any part thereof, or any balance due thereon, from any of said defendants.

Plaintiff further says that on the *25th* day of *April*, 1*886*, he instituted this suit for the purpose of enforcing the provisions of the aforesaid writing obligatory, and for the purpose of having the aforesaid separate personal property of the defendant *Henrietta Hess* preserved and protected from waste and subjected to the payment of the balance of $*1,475.73*, due, as aforesaid, and plaintiff is advised and believes and so charges the facts to be, that from and after the time of the institution of this suit, for the purpose of enforcing the provisions of said writing obligatory against the parties thereto, it became an abiding lien upon all the separate personal property of the said defendant *Henrietta Hess*, to the extent of the sum of $*1,475.73*, and that said property, being so liable, should be preserved from waste, and subjected to the satisfaction of said lien, and for all other purposes for which it could be legally applied by a court of equity.

Plaintiff therefore prays that a proper decretal order be made by your Honor, enforcing the provisions of the said writing obligatory, and that the aforesaid separate personal estate of the defendant *Henrietta Hess* be preserved from waste, and be subjected to the payment of the said sum of $*1,475.73* and the costs of this suit; and that the said *Henrietta Hess*, her agents and employees, be restrained, enjoined, and inhibited from controlling, managing, selling, or otherwise disposing of said property, or any part thereof, and that a special receiver be appointed to take exclusive charge, possession, management and control of said mercantile business, together with the goods, wares and merchandise, books, notes, and accounts owned by or belonging to the defendant *Henrietta Hess*, and to proceed to sell said goods, wares and merchandise for cash, and collect said notes and accounts, and apply the proceeds thereof, first, to the payment of the costs of this suit, and then to the payment of $*100.00* to this plaintiff as his costs and expenses as aforesaid, and then to pay off to the said *H. R. Howard*, receiver, the said sum of $*1,375.73*, the balance due on said judgments on said notes. He also asks such other and further general relief as the court may see fit to grant, and as in duty bound will ever pray, etc.

Hiram Stephenson, Pltff.

(6) Of Property Consigned by Plaintiff, Where Consignee is Insolvent.

Form No. 17126.[1]

New York Supreme Court — *Westchester* County.

1. *New York.* — Code Civ. Proc., § 713.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 2, p. 593.

This is the form of complaint for the appointment of a receiver in the case of Mathushek Piano Mfg. Co. *v.* Pearce, 78 Hun (N. Y.) 610, and is copied from the records. An order appointing a receiver was affirmed.

Mathushek Piano Manufacturing Company, plaintiff, against *James Pearce*, defendant. } Proposed amended complaint as allowed and served.

The amended complaint of the plaintiff respectfully shows to this court on information and belief:

1st. — That, at the times hereinafter mentioned the plaintiff was and still is a corporation organized and existing under and by virtue of the laws of the state of *Connecticut*, and at said times had, and still has, a place of business at No. *80 Fifth* Avenue, in the city of *New York*, and was and is duly authorized to do business in this state.

2nd. — That heretofore and between the *fourteenth* day of *July*, 18*81*, and the *tenth* day of *February*, 18*91*, this plaintiff, under agreement with the defendant, consigned and delivered to the defendant a large number of pianos of the agreed wholesale price of the sum of *sixty-five thousand one hundred and twelve and 5-100* dollars, and that the agreement, under which such pianos were consigned and delivered to the said defendant, was that said defendant should receive said pianos and sell the same for cash, or lease the same in his name on account of this plaintiff, and upon the receipt of each piano the defendant was to pay *fifteen* dollars, and *ten* dollars monthly in advance until the wholesale price of each piano should be paid.

That it was further agreed that if said amounts were not collected and paid over to the plaintiff this plaintiff should have a right to demand or to take said pianos into its possession, and that the defendant should pay the expense of the return of the said pianos to the plaintiff, and should guarantee the plaintiff for any loss or damage to said pianos by fire or otherwise, and that defendant should allow the plaintiff, or its agent, to examine said pianos, at all proper times, and that, in pursuance of such agreement, whenever any of said pianos were delivered, the defendant was to and did sign and deliver to the plaintiff a certain agreement, setting forth, among other things, that he had hired and received from the plaintiff a certain piano therein described, of a value therein mentioned, which he hereby agreed to pay the plaintiff, in certain monthly installments therein named, in advance, at No. *80 Fifth* Avenue, *New York*, with *ten* dollars carriage or freight, and that in pursuance of such agreement, whenever any of said pianos were delivered the plaintiff was to and did sign a certain statement of terms attached to said agreement, and that a copy of said agreement and statement, omitting dates, numbers and description of pianos, and price and payments, are hereto annexed, marked schedule *A* and *A1*, to be taken as part of this complaint.

3d. — That the wholesale price of said pianos, as agreed upon by the plaintiff and defendant, amounts to the sum of *sixty-five thousand one hundred and twelve and 5-100* dollars, and that the defendant, has from time to time, paid on account thereof as aforesaid from said sales and leases of said pianos, the sum of *forty-three thousand one hundred eighty-three and 9-100* dollars, leaving now due on the wholesale price of said pianos the sum of *twenty-one thousand nine hundred twenty-eight and 96-100* dollars, no part of which has been paid.

4th. — That when the defendant received the said hereinbefore mentioned pianos, he from time to time sold some of them on some installment plan by which in case the installments were not promptly paid the buyer would forfeit his payments and be compelled to return the piano, or sold the same on some other terms, and some of said pianos the defendant leased, and that from the proceeds of such sales and rentals the defendant paid to the plaintiff the sum of *forty-three thousand one hundred eighty-three and 9-100* dollars hereinbefore mentioned, and that the defendant failed and neglected to pay over and account for all he had collected and received from sales and rentals of said pianos, and that there is now a considerable amount due from various purchasers of such pianos to whom the defendant has sold the same, as aforesaid, and that various of said pianos have been leased by the defendant to various people for longer or shorter terms, and that several of said pianos are still in the possession of the defendant.

5th. — That the defendant refused to pay to the plaintiff the amount received by him for the sale and rental of said pianos due to the plaintiff to the amount of the wholesale price of said pianos, and refuses to return the pianos of the plaintiff's in his possession, and asserts and claims that he is entitled to all that he has collected and not paid over, as well as rentals therefor, together with any of said pianos in his possession, or leased.

6th. — That the said agreed wholesale price of said pianos is due and payable.

7th. — That at various times when said pianos were delivered to the defendant in pursuance of the agreement set forth in paragraph *2* of this complaint, the defendant obtained the same by representations made to plaintiff as to his solvency, which representations were as follows:

In the year 1*881*, and at various times subsequent thereto and up to the year 1*887*, the defendant before and upon receipt of said pianos represented to this plaintiff that his assets were twice his liabilities, and on or about *May 24th*, 1*887*, the defendant represented to the plaintiff that his stock and lease account were worth the sum of $*26,000*, and that his entire indebtedness, at that time, was only the sum of $*300*, and such claims as he owed this plaintiff. And on *September 24th*, 1*890*, the defendant represented to this plaintiff that his assets, on that day were $*45,000*, and that his indebtedness consisted of only $*4,000* and the amount of his indebtedness to this plaintiff.

And on *March 17th*, 1*891*, the said defendant represented that his assets were $*45,000*, and that his liabilities outside of the amount owing this plaintiff were $*4,100*, and that relying on these representations so made, this plaintiff entered into the agreement set forth in the *2nd* paragraph of the complaint, and from time to time consigned and delivered the goods therein mentioned, believing that said representations were true, although subsequently in the year 1*892* plaintiff found that said representations were false, and that the defendant knew that they were false at the time he made the same.

8th. — That in order to induce the plaintiff to enter into said agree-

ment mentioned in paragraph *2* of this complaint, and to induce the plaintiff to consign and deliver to the defendant the pianos as aforesaid, and with intent to defraud the plaintiff of some part of the said proceeds of the sales and rentals of said pianos as well as of some of said pianos themselves, the defendant falsely and fraudulently made the hereinbefore mentioned representations of his solvency, whereas, in truth, he was insolvent, and that induced by said false and fraudulent representations, and solely on the faith thereof, the plaintiff entered into said agreement and consigned and delivered to the defendant said pianos as aforesaid.

9th. — That the defendant threatens to sell and dispose of the said pianos now in his possession, as well as others of said pianos leased by him, and to collect the amounts that may be payable for certain of said pianos sold by him.

10th. — That defendant is insolvent, and that a judgment against him will be unavailing, and worthless, if he is suffered to sell and dispose of said pianos now in his possession, or those leased by him, or to collect the amounts that may be payable for those of said pianos consigned and delivered to him as aforesaid which have been sold by him.

11th. — That heretofore the plaintiff has demanded of the defendant a return of said pianos in his possession or leased by him, as well as payment of any and all sums collected by the defendant and due to the plaintiff from the sales and rentals of any of said pianos consigned and delivered to him as aforesaid, but such demand has not been complied with, and the defendant claims the exclusive right to collect from customers to whom certain of said pianos have been sold, and has notified them to pay to him alone.

12th. — That the interests of the plaintiff as well as of the defendant require the appointment of a receiver of said pianos in the possession of the defendant, and of the said pianos leased by him, and of the rentals of any of said pianos leased by him, and of any amounts that have not been collected and which are due, or that may become due for any of said pianos heretofore consigned and delivered by plaintiff to defendant, which have been sold by the defendant.

Wherefore, the plaintiff demands judgment:

1. — That an account be taken of all the pianos consigned and delivered to the defendant pursuant to the agreement mentioned in paragraph *2* of this complaint, said account to show when each piano was consigned and delivered, and to show the wholesale agreed price of each piano, and when the monthly payments of same were to be made, and to show the total amount of said wholesale price of all of said pianos and interest on said wholesale price of each piano from the time when same became due and payable.

2. — That an account be taken of all the moneys belonging to the plaintiff collected and received by the defendant on the sales and rentals of said pianos.

3. — That an account be taken of all of said pianos in the possession of the defendant, or that are now held by persons under lease from the defendant.

4. — That plaintiff have judgment for the return and delivery to it

of said pianos in the possession of the defendant, and all of said pianos leased by the defendant, and for the payment to it of the amount that may be due and payable on account of sales and rentals of any of the said pianos heretofore consigned and delivered by plaintiff to the defendant, and that the plaintiff have judgment against the defendant for the balance that may be found due from the defendant to the plaintiff on such accountings, after deducting the amounts heretofore paid by the defendant to the plaintiff, and the value of such pianos now in the defendant's possession or leased by him, and the amount of said sales or rentals that now remain unpaid and uncollected.

5. — That the defendant and his agents pending this action, and until the further order of this court, be enjoined from selling, disposing of, removing, or in any wise interfering with said pianos now in the defendant's possession or leased by him, except to preserve the same, and that the defendant and his agents be enjoined and restrained from collecting or receiving any amounts that are or may hereafter become due and payable from sales or rentals of any of said pianos heretofore consigned and delivered by the plaintiff to the defendant.

6. — That a receiver of the said pianos in the possession of the defendant or leased by him, and of the amounts that are or may hereafter become due and payable from sales or rentals of any of said pianos heretofore consigned and delivered by the plaintiff to the defendant, may be appointed with the usual powers and duties.

7. — And for such other and further relief as may be just, with costs of this action.

John W. Alexander, Plaintiff's Attorney,
Postoffice address and office, No. *45 Warburton* Ave.,
Yonkers, N. Y.

City and county of *New York*, ss.:

John W. French, being duly sworn, says that he is the agent and manager in the state of *New York* of the *Mathushek Piano Manufacturing Company*, plaintiff above named, and the foregoing complaint is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true, and that the reason why this verification is not made by the plaintiff is that the plaintiff is a foreign corporation.

Deponent further says that the grounds of his belief as to all matters therein not stated upon his knowledge, are as follows: The agreements and statements, schedule *A*, and *A1*, referred to in the complaint, the same being in the possession of this deponent, and information obtained thereby and from admissions and statements made to deponent by officers and employees of the plaintiff, and by admissions and statements made by the defendant to the deponent.

John W. French.

Sworn to before me this *2d* day of *August*, 1893.

Arthur W. Silber, Notary Public,
City and Co. of *N. Y.*

(7) Of Property of Foreign Corporation.[1]

Form No. 17127.[2]

Supreme Court of the State of *New York* — County of *Suffolk.*

Emanuel Popper, plaintiff,
against
The Supreme Council of the Order of Chosen Friends, defendant.

The plaintiff complains of the defendant and alleges:

First: That the plaintiff is a citizen of the United States and a resident of the state of *New York.*

Second: That the defendant is a foreign corporation organized and existing under the laws of the state of *Indiana*, and under Chapter *37* of Article *1* of the Statutes of the state of *Indiana*, and has property within the counties of *New York*, *Kings*, *Westchester* and *Suffolk* and within the state of *New York.*

Third: That prior to the *29th* day of *April*, 1*885*, one *Henrietta Popper* was duly elected and admitted as a beneficial member of the said *Order of Chosen Friends*; that said *Henrietta Popper* continued such beneficial member until her death on the *5th* day of *May*, 19*00*, and was at all times a beneficial member in good standing and entitled to all the benefits and privileges pertaining to such membership, and that said *Henrietta Popper* at all times performed all the duties incumbent upon her as a beneficial member of said corporation; and at all times promptly paid all dues and assessments as provided in and by

1. **Requisites of Bill, Complaint or Petition, Generally.** — See *supra*, note 2, p. 593.

That defendant was doing business in the state at time bill was filed need not be alleged. The court may take jurisdiction where it is made to appear that the foreign corporation has done business in the state and still has property there, although at the time when the bill or petition was filed its business was entirely suspended. Albert *v.* Clarendon Land Invest., etc., Co., 53 N. J. Eq. 623.

Precedent. — In Albert *v.* Clarendon Land Invest., etc., Co., 53 N. J. Eq. 623, a bill filed against a foreign corporation by a stockholder residing in New Jersey, asking that the corporation be declared insolvent and that a receiver be appointed, alleged that the company was organized in England with a capital stock of five hundred thousand pounds, and that "the company has carried on its business in different parts of the United States, including the state of *New Jersey*, and now has goods and chattels in this state, and that it has become insolvent and largely indebted beyond its ability to pay and has recently suspended its business," and had defaulted in payment of certain debentures; that certain judgments have been recovered against it in New York, and that it is hopelessly insolvent and that its business cannot be carried on so as to pay its debts or yield a profit to its stockholders. The bill was verified. A motion to dismiss the bill for want of equity, on the ground that it did not appear that the company was doing business in the state of New Jersey, and that it was not alleged with any certainty that it had such assets in the state as to warrant the court assuming jurisdiction over it, was dismissed.

2. *New York.* — Code Civ. Proc., § 713.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, this page.

This form is the complaint in Popper *v.* Supreme Council, etc., 61 N. Y. App. Div. 405, and is copied from the records. A demurrer to the complaint, on the ground that the court had no jurisdiction of the person of the defendant or the subject of the action, and that the complaint did not state facts sufficient to constitute a cause of action, was overruled.

the laws, rules and regulations of said corporation, and has otherwise complied with all the requirements thereof, and performed all the conditions on her part.

Fourth: That pursuant to the relief fund laws of the defendant, and upon the payment by said *Henrietta Popper* of all moneys and assessments required to entitle her thereto, and the performance of all conditions of said relief fund laws, on or about the *29th* day of *April*, 1*885*, the defendant made, executed and delivered to the said *Henrietta Popper*, a certificate in writing, in the form required by the relief fund laws wherein and whereby it was certified that said *Henrietta Popper* has been accepted and initiated by *Washington Council*, No. *19*, of *New York*, the said being a subordinate body existing under and created by the *Supreme Council of the Order of Chosen Friends*, the defendant herein, and entitled to all the privileges and membership and rights of membership and had thereby become a member of the *Order of Chosen Friends*, and to a benefit not exceeding *one thousand* dollars from the relief fund of such order, and that in case of death said sum should be paid to her husband *Emanuel Popper*, plaintiff herein, in the manner and subject to the conditions set forth in the laws governing such relief fund and in the application of said *Henrietta Popper* for membership. That in and by said certificate it was provided that the same should be in full force and binding when accepted in writing by the councillor and secretary, and the seal of the subordinate council affixed, so long as said *Henrietta Popper* should comply with the requirements of the constitution, laws and regulations then in full force or thereafter to be adopted for the government of the order, otherwise and also in case of the granting of a new certificate, to be null and void.

Fifth: That upon the delivery of the said certificate to the said *Henrietta Popper* the same was immediately accepted in writing by said *Henrietta Popper* and her acceptance attested by the councillor and secretary and the seal of the subordinate council, to wit: *Washington Council*, No. *19*, of *New York*, affixed.

Sixth: The plaintiff shows that said *Henrietta Popper* during her life-time, from and after the making and delivery of said certificate as aforesaid, fully complied with all the requirements of the constitution, laws and regulations in force at the time said certificate was issued as aforesaid and thereafter adopted for the government of the order, and that no new certificate was at any time granted after the making and issuance of the certificate aforesaid; that said *Henrietta Popper* departed this life at the city of *New York* on the *5th* day of *May*, 1*900*; that at the death of said *Henrietta Popper*, the said certificate was and still is in full force and effect; that said *Henrietta Popper* has never been suspended or expelled from said order; that said *Henrietta Popper* and said *Washington Council*, No. *19*, of *New York*, has been at no time after the making and issuing of said certificate delinquent and that said certificate has never been surrendered, canceled, vacated, forfeited or lapsed.

Seventh: That by reason of the premises this plaintiff became entitled to receive from the defendant upon the death of said *Henrietta Popper* the sum of *one thousand* dollars.

Eighth: Plaintiff further shows that due notice and proof of the death of said *Henrietta Popper* has been given to the defendant, and payment of the said sum of *one thousand* dollars has been demanded, and that more than *sixty* days have elapsed since the filing of said proofs, but defendant neglects and refuses to pay the same.

Ninth: That the defendant is insolvent and has not paid its just and lawful debts arising out of claims due and payable on policies and certificates of insurance issued by it to its members, and that a receiver of said defendant has been duly appointed in the state of *Indiana* by reason of such insolvency, by a court of competent jurisdiction, and reduced to his possession the property of defendant therein situated, and claims to have the right to reduce to his possession the assets and properties situated in this state as hereinafter set forth.

Tenth: That plaintiff is a resident of the state of *New York* and a citizen of said state, and that said defendant is justly indebted to many other residents and citizens of this state on past due certificates of insurance, and on protested checks and drafts, and that many of said creditors have begun actions or proceedings at law in the tribunals of this state against said defendant and issued mesne process therein by means of which certain property and assets within this state belonging to defendant has been seized, attached and refused to the possession of the sheriffs of sundry counties of this state.

Eleventh: That the defendant has certain property in this state consisting of moneys on deposit in certain banks and moneys due and owing to it by subordinate councils upon assessments levied by it and collected by said subordinate councils in its behalf, and that payment thereof has been demanded by said receiver so appointed in *Indiana*, and there is fear and danger that the same will be so paid to said receiver and this plaintiff be left remediless in the courts of this state and compelled to submit to a foreign jurisdiction and participate, if at all, with others with whom the plaintiff has no community of interest, in a fund over which neither plaintiff nor others nor any court of this state will have jurisdiction or control, and said funds in this state will be wasted and dissipated and improvidently applied.

Twelfth: That by reason of the mesne process and attachments hereinbefore mentioned and issued against the defendant, and by reason of further process and attachments threatened to be issued by and in behalf of residents and citizens of this state against said defendant, such funds of the defendant may be so levied upon, seized or attached by virtue of such writs, process or attachments issued in this state, will not only be wasted and dissipated, but a large part thereof will be uselessly and unjustly expended and spent in fees and charges which should properly be applied to the payment of the just debts of the defendant, and other creditors of said defendant will be left hopeless and remediless, and those creditors who have obtained and threatened to or will obtain mesne writs, process and attachments will obtain an unfair, unjust and unconscionable advantage over them.

Thirteenth: That this action is brought by plaintiff in his behalf and in behalf of all others similiarly situated who may come in and join as co-plaintiffs with the plaintiff in this action and participate in their just proportion in the expenses and costs of this action.

Fourteenth: That neither plaintiff nor others similarly situated, as he is advised by his counsel learned in the law and verily believes, have an adequate remedy at law.

Wherefore plaintiff demands judgment:

1. That the funds and moneys and other property of said defendants situated in this state may be brought into this court and taken possession of by a receiver to be appointed by it.

2. That all claims against said fund of citizens and residents of this state may be ascertained, and said funds so brought into this court may be equitably distributed among such of said claimants as may be entitled thereto.

3. That a temporary receiver be appointed to so take possession of said funds, moneys and other property of said defendant with the usual powers of a receiver, to so hold the same until judgment or other further order of the court.

4. That said defendant be required to show cause why said temporary receiver should not be made permanent, and that notice be given to it as the court may direct.

5. That plaintiffs have such other and further relief in the premises as may be proper.

6. That the plaintiff have the costs and disbursements of this action.

William McCloskey, Attorney for Plaintiff,
Office and P. O. address, No. *302 Broadway*,
New York City.

State of *New York*, } ss.:
County of *New York*. }

Emanuel Popper, being duly sworn, deposes and says that he is the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Emanuel Popper.

Sworn to before me this *22d* day of *December*, 1900.
Henry Flugelman, Notary Public.
New York Co., *N. Y.*

b. Stipulation of Parties for.

Form No. 17128.

(Precedent in Hooper *v.* Winston, 24 Ill. 355.)[1]

1. After the filing of this stipulation, a petition or motion was prepared and presented to the court for the purpose of carrying out its terms, and on hearing the court passed an order in conformity to it. No objection was made to the form of the stipulation.

Cook County Court *of Common Pleas.*

Frederick H. Winston, Trustee,
vs.
Ashley Gilbert, Trustee, *et al.*
} In *Chancery.*

It is hereby stipulated and agreed by the attorneys and agents for the parties, plaintiffs and defendants in the above entitled cause, and by the mortgagor, that the Hon. *John M. Wilson*, Judge of the *Cook* County Court *of Common Pleas*, shall appoint *E. R. Hooper* receiver, for the purpose of taking possession of and selling the goods and chattels embraced in the several mortgages and deeds of trust, referred to in the bill of complaint in said cause, and shall pass an order authorizing the sale of said goods and chattels, either together with the leases of the house and appurtenances, known as the "*McCardel House*," in the city of *Chicago*, as a whole, or separately from said leases, and either at public or private sale, as the said receiver shall deem most advantageous for all parties concerned, and may sell for cash or on short credit, as he may deem most expedient, and that the proceeds of said sale of said goods and chattels, after the payment of such liens as are undisputed, and such demands and liabilities against said "*McCardel House*," as it has been or may be necessary to incur and pay, in order to keep the said house in operation, shall be paid into the said *Cook* County Court *of Common Pleas*, to abide such decision as the said court may make in the premises.

It is also further agreed, that the said receiver be authorized to pay the mortgage debt, and costs and expenses incurred, of *Henry L. Wilson*, and that the same shall be deducted from the proceeds of the sale of said goods and chattels, before the same are paid into court.

Provided, that before said receiver shall sell said property at private sale, he shall obtain the consent thereto of the mortgage creditors, their agents or attorneys.

Provided, also, if it is deemed best to sell both the leases and goods and chattels as a whole, that the mortgage debt held by *Ashley Gilbert*, secretary to the *Commercial Exchange Company*, shall be paid out of the proceeds of said sale, and not paid into court, if the same are sufficient.

Erastus Corning & Co.,
John Davidson,
By *Sedgwick & Walker*, Attorneys.
John F. Clements,
Attorney for *Henry L. Wilson.*
Jonas H. Crane and
Commercial Exchange Co.,
By *E. R. Hooper*, Attorney.
Thomas W. Hutchinson,
Agent for *Hitchcock & Co.*
John McCardel,
John Taylor,
James J. Johnson,
James Burton,
By *King, Scott & Wilson*, Attorneys.

c. Notice of Application.[1]

1. Necessity of Notice — *In General.* — The general rule is that notice of the application for a receiver must be given to the opposite party. Fischer *v.* Superior Ct., 110 Cal. 129; Longstaff *v.* Hurd, 66 Conn. 350; Bostwick *v.* Isbell, 41 Conn. 305; Moyers *v.* Coiner, 22 Fla. 422; Fricker *v.* Peters, etc., Co., 21 Fla. 254; Johns *v.* Johns, 23 Ga. 31; E. A. Moore Furniture Co. *v.* Prussing, 71 Ill. App. 666; Craver, etc., Mfg. Co. *v.* Whitman, etc., Mfg. Co., 62 Ill. App. 313; Gilbert *v.* Block, 51 Ill. App. 516; Elwood *v.* Greenleaf First Nat. Bank, 41 Kan. 475; Mestier *v.* A. Chevallier Pavement Co., 51 La. Ann. 142; State *v.* New Orleans, 43 La. Ann. 829; Katz *v.* Brewington, 71 Md. 79; Nusbaum *v.* Stein, 12 Md. 315; Triebert *v.* Burgess, 11 Md. 452; Jones *v.* Schall, 45 Mich. 379; Meridian News, etc., Co. *v.* Diem, etc., Paper Co., 70 Miss. 695; Tibbals *v.* Sargeant, 14 N. J. Eq. 449; De Bemer *v.* Drew, 57 Barb. (N. Y.) 438; People *v.* O'Brien, 111 N. Y. 1; Gibson *v.* Martin, 8 Paige (N. Y.) 481; Sandford *v.* Sinclair, 8 Paige (N. Y.) 373; Austin *v.* Fegueira, 7 Paige (N. Y.) 56; Verplanck *v.* Mercantile Ins. Co., 2 Paige (N. Y.) 438; People *v.* Norton, 1 Paige (N. Y.) 17; Field *v.* Ripley, (Supreme Ct. Spec. T.) 20 How. Pr. (N. Y.) 26; People *v.* Albany, etc., R. Co., (Supreme Ct. Spec. T.) 7 Abb. Pr. N. S. (N. Y.) 265; Grandin *v.* La Bar, 2 N. Dak. 206; Cincinnati, etc., R. Co. *v.* Jewett, 37 Ohio St. 649; Fredenheim *v.* Rohr, 87 Va. 764; Larsen *v.* Winder, 14 Wash. 109; Ruffner *v.* Mairs, 33 W. Va. 655; Ogden *v.* Chalfant, 32 W. Va. 559; Hutton *v.* Lockridge, 27 W. Va. 428.

Under Statute. — In some states, it is provided by statute that notice of the application must be given to the opposite party. Ala. Civ. Code (1896), § 799; Hendrix *v.* American Freehold Land Mortg. Co., 95 Ala. 313; Harwell *v.* Potts, 80 Ala. 70; Micou *v.* Moses, 72 Ala. 439; Ariz. Rev. Stat. (1901), § 1534; 2 Ga. Code (1895), § 4904; Horner's Stat. Ind. (1896), § 1230; Iowa Code (1897), § 3822; Miss. Anno. Code (1892), § 574; Vause *v.* Woods, 46 Miss. 120; Mont. Code Civ. Proc. (1895), § 951; State *v.* Second Judicial Dist. Ct., 20 Mont. 284; Neb. Comp. Stat. (1899), § 5838; N. Y. Code Civ. Proc., § 714; O'Connor *v.* Mechanics Bank, 54 Hun (N. Y.) 272; S. Car. Laws (1897), No. 325; Allen *v.* Cooley, 53 S. Car. 414; Tenn. Code (1896), § 6268. Or good or sufficient cause shown why it should not be given. Ala. Civ. Code (1896), § 799; Hendrix *v.* American Freehold Land Mortg. Co., 95 Ala. 313; Moritz *v.* Miller, 87 Ala. 331; Harwell *v.* Potts, 80 Ala. 70; Micou *v.* Moses, 72 Ala. 439; Horner's Stat. Ind. (1896), § 1230; Miss. Anno. Code (1892), § 574; Tenn. Code (1896), § 6268.

Necessity Dispensed With. — Where the opposite party is out of the jurisdiction of the court, or cannot be found, or where for some other reason it becomes absolutely necessary that the court interfere before there is time to give notice to the opposite party to prevent the destruction or loss of property, the notice may be dispensed with. Pollard *v.* Southern Fertilizer Co., 122 Ala. 409; Word *v.* Word, 90 Ala. 81; Dollins *v.* Lindsey, 89 Ala. 217; Thompson *v.* Tower Mfg. Co., 87 Ala. 733; Moritz *v.* Miller, 87 Ala. 331; Briarfield Iron Works Co. *v.* Foster, 54 Ala. 622; Satterfield *v.* John, 53 Ala. 127; Crowder *v.* Moone, 52 Ala. 220; Fischer *v.* Superior Ct., 110 Cal. 129; Jacksonville Ferry Co. *v.* Stockton, 40 Fla. 141; Moyers *v.* Coiner, 22 Fla. 422; Fricker *v.* Peters, etc., Co., 21 Fla. 254; State *v.* Jacksonville, etc., R. Co., 15 Fla. 201; Johns *v.* Johns, 23 Ga. 31; English *v.* People, 90 Ill. App. 54; E. A. Moore Furniture Co. *v.* Prussing, 71 Ill. App. 666; Craver, etc., Mfg. Co. *v.* Whitman, etc., Mfg. Co., 62 Ill. App. 313; Wabash R. Co. *v.* Dykeman, 133 Ind. 56; Chicago, etc., R. Co. *v.* Cason, 133 Ind. 49; Pressley *v.* Harrison, 102 Ind. 14; Howe *v.* Jones, 57 Iowa 130; Bisson *v.* Curry, 35 Iowa 72; French *v.* Gifford, 30 Iowa 148; Nusbaum *v.* Stein, 12 Md. 315; Triebert *v.* Burgess, 11 Md. 452; Blondheim *v.* Moore, 11 Md. 365; Turnbull *v.* Prentiss Lumber Co., 55 Mich. 387; Cook *v.* Detroit, etc., R. Co., 45 Mich. 453; Buckley *v* Baldwin, 69 Miss. 804; Martin *v.* Tarver, 43 Miss. 517; Maynard *v.* Railey, 2 Nev. 313; People *v.* Albany, etc., R. Co., 55 Barb. (N. Y.) 344; Field *v.* Ripley, (Supreme Ct. Spec. T.) 20 How. Pr. (N. Y.) 26; Glines *v.* Supreme Sitting, etc., (Supreme Ct. Spec. T.) 22 Civ. Proc. (N. Y.) 437; People *v.* Albany, etc., R. Co., (Supreme Ct. Spec. T.) 7 Abb. Pr. N. S. (N. Y.) 265; Gibson *v.* Martin, 8 Paige

(1) In General.

Form No. 17129.[1]

(*Title of court and cause as in Form No. 5915.*)

To *Richard Roe*, defendant in the above entitled cause:

You are hereby notified that an application will be made by the undersigned, the plaintiff in the above entitled cause, to the *Posey Circuit* Court, at the court-house in the city of *Mount Vernon*, in said county of *Posey*, on the *tenth* day of *September*, 1899, at *ten* o'clock in the *fore*noon, or as soon thereafter as counsel can be heard, for the appointment of a receiver in the above cause, for the purpose of (*Here state for what purpose the receiver is to be appointed*).

Dated this *twenty-fifth* day of *August*, 1899.

John Doe, Plaintiff.

Form No. 17130.[2]

(*Commencing as in Form No. 6954, and continuing down to* *) for an order for the appointment of a receiver of the rents and profits of

(N. Y.) 481; Sandford *v.* Sinclair, 8 Paige (N. Y.) 373; Verplanck *v.* Mercantile Ins. Co., 2 Paige (N. Y.) 438; People *v.* Norton, 1 Paige (N. Y.) 17; People *v.* Albany, etc., R. Co., 1 Lans. (N. Y.) 308; Cincinnati, etc., R. Co. *v.* Jewett, 37 Ohio St. 649; Fredenheim *v.* Rohr, 87 Va. 764; Ruffner *v.* Mairs, 33 W. Va. 655; Oil Run Petroleum Co. *v.* Gale, 6 W. Va. 525.

Requisites of Notice, Generally. — For the formal parts of a notice in a particular jurisdiction see the titles Motions, vol. 12, p. 938; Notices, vol. 13, p. 212.

Place of application must be stated in the notice. Miss. Anno. Code (1892), § 574; Neb. Comp. Stat. (1899), § 5838; Fredenheim *v.* Rohr, 87 Va. 764.

Time of application must be stated in the notice. Miss. Anno. Code (1892), § 574; Neb. Comp. Stat. (1899), § 5838; Fredenheim *v.* Rohr, 87 Va. 764.

Papers on which application is based must be stated in the notice. Neb. Comp. Stat. (1899), § 5838. And see Hungerford *v.* Cushing, 8 Wis. 320, where it is held that copies of the papers upon which a motion for the appointment of a receiver is founded should be served with a notice of the motion, unless they have been filed with the clerk, in which case it is sufficient if reference be made to them in the notice. In Shainwald *v.* Lewis, 7 Sawy. (U. S.) 148, the notice stated "that it is based upon the affidavits of the respondent herein, with copies of which you are herewith served, and upon all and singular the records, papers, files, and proceedings in this suit." It was not objected to.

Name of proposed receiver must be stated in notice. Neb. Comp. Stat. (1899), § 5838.

Names of proposed sureties of proposed receiver and of the proposed sureties of applicant must be stated in the notice. Neb. Comp. Stat. (1899), § 5838.

Precedent. — In Wilson *v.* Maddox, 46 W. Va. 641, is set out the following notice: "To *E. W. Smith*, *A. A. Smith*, *Delia Smith*, *Sarah A. Maddox*, and *Adeline Swisher*: Take notice that on the *20th* day of *January*, 1898, the plaintiffs in the chancery cause of *Betty Wilson* and others, now pending in the *circuit* court of *Harrison* County, State of *West Virginia*, will make a motion in the *circuit* court of said County of *Harrison*, in said chancery cause, to have a special receiver appointed therein as provided in section *28* of chapter *133* of the Code, to take possession and control of the *one hundred and twenty-five* acres of land mentioned and described in the bills of said chancery cause, wherein they are plaintiffs and you and others are defendants. This the *13th* day of *January*, 1898. *Betty Wilson* and Others, by Counsel." A receiver was not appointed, however, no good cause being shown why one should be appointed.

1. *Indiana.* — Horner's Stat. (1896), § 1230.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, p. 646.

2. See, generally, *supra*, note 1, p. 646.

the estate of the defendant, *Richard Roe*, in said complaint mentioned, with the usual powers of and directions to receivers, and for such other and further relief as may be just.

(*Signature and office address of attorney, date and address as in Form No. 6954.*)

(2) In Foreclosure Proceedings.

Form No. 17131.[1]

In Chancery of *New Jersey*.

Between *David Forshay*, Complainant, and *Diederich W. Hutaf et als.*, Defendants. } No. 2. On Bill, etc. Notice of Application for Receiver.

Sir: Take notice that an application will be made to the Chancellor at his chambers in the city of *Newark* on *Monday* the *twenty-seventh* day of *January* instant, at *ten* o'clock in the *fore*noon or as soon thereafter as counsel can be heard thereon, for the appointment of a Receiver to take possession of the mortgaged premises mentioned and described in the bill in this cause and in the petition (a copy of which is hereto annexed) and rent the same and keep the same rented and receive the rents, issues and profits thereof and hold the same subject to the further order or decree of this Court in this cause, with all the power and authority and subject to all the responsibilities of Receivers; and on such motion we will read the petition and affidavit, a copy of which is hereto annexed and served herewith.

Dated *January 16*, 1879.

Yours Respectfully,
Muirheid & McGee, Sols. of Complt.

To *August Vanath*, Esq.

Form No. 17132.[2]

Supreme Court, County of *Kings*.

Mary E. Veerhoff, as Executrix of the Last Will and Testament of *Ernst H. Veerhoff*, deceased, plaintiff, against *Mary E. Miller* and *George M. Miller*, her husband; *Marion Thompson*, *Henry J. Platt*, *Thomas O'Mahony*, *Ernest Tieman*, *Joseph E. McGivern*, *Joseph Butcher* and *Frederick Cordes*, defendants. } Notice of motion, read on behalf of moving party.

To *John J. Crawford*, Attorney for defendant *Marion Thompson*.

Sir: Take notice that on the annexed affidavits of the plaintiff, *Henry B. Fanton*, and *Louis H. Myers* and the pleadings herein, a

1. This form is copied from the records of the case.
See, generally, *supra*, note 1, p. 646.

2. *New York.* — Code Civ. Proc., § 714.
See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, p. 646.
This form is the notice of motion in the case of Veerhoff *v.* Miller, 30 N. Y. App. Div. 355, and is copied from the records. An order made at a special

motion will be made at a *Special* Term of this court, to be held at *Chambers* in the county court house, in the Borough of *Brooklyn*, *N. Y.*, on the *5th* day of *April*, 1898, at *10.30 A.* M., or as soon thereafter as counsel can be heard, for an order appointing a receiver of the rents, issues and profits of the premises described in the complaint in this action, and for such other or further order as to the court may seem proper.

Dated *March 25*, 1898.

Samuel Cohn, Plaintiff's attorney,
5 Beekman street, Borough of *Manhattan*, *New York.*

(3) In Partnership Proceedings.[1]

Form No. 17133.[2]

(*Title of court and cause as in Form No. 6954.*)

Please take notice that upon the verified complaint in this action, a copy of which is hereto annexed and served upon you, a motion will be made by the undersigned at a *special* term of the above entitled court, to be held at the court-house in the city of *Poughkeepsie*, in said county of *Dutchess*, on the *twenty-third* day of *December*, 1893, at *ten* o'clock in the *fore*noon, or as soon thereafter as counsel can be heard, for an order for the appointment of a receiver of all the partnership property of the firm of *Richard Roe & Company*, as set forth in the complaint herein, with the usual powers of and directions to receivers, and for such other and further relief as may be just.

(*Signature and office address of attorney, date and address as in Form No. 6954.*)

(4) In Sequestration Proceedings.

Form No. 17134.[3]

Supreme Court, *Cayuga* County.

term of the supreme court denying plaintiff's motion was, on appeal to the appellate division, reversed and the motion for a receiver granted.

1. **Precedent.** — In Booth *v.* Smith, 79 Hun (N. Y.) 384, the notice of motion was as follows:

"*Alfred H. Booth*
vs.
Hannibal Smith and *Mary A. Huntington*, as administrators of the goods, chattels and credits of *James Vassar Harbottle*, deceased.
Supreme Court.

Take notice that upon the verified complaint herein — a copy of which is hereto annexed and served upon you — the undersigned will move this court at a *Special* Term thereof, to be held at the court house in the city of *Poughkeepsie*, on the *23rd* day of *December*, 1893, at *ten* o'clock *a.* m., for an order appointing a receiver of all the partnership property of the firm of *M. Vassar & Co.* (not including real estate) as set forth in the complaint herein, and for such relief as may be just."

A receiver was not appointed in this case, because the complaint failed to show any special necessity for one.

2. *New York.* — Code Civ. Proc., §§ 714, 1947.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, p. 646.

3. *New York.* — Code Civ. Proc., §§ 714, 1788.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, p. 646.

This is the form of notice of motion

The National Bank of Auburn
against
The Rheubottom & Teall Manufacturing Company.

Take notice that upon the summons and complaint in this action and the affidavit of *Charles I. Avery*, copies of which are served herewith upon you, a motion will be made at the next *Special* Term of this court appointed to be held at the court-house in the city of *Rochester*, *N. Y.*, on the *23d* day of *February*, 1891, at the opening of court on that day, or as soon thereafter as counsel can be heard,* for an order appointing *Thomas Jones*, receiver of *The Rheubottom & Teall Manufacturing Company*, with the usual powers of receivers, and the usual injunction, and such other or different order as to the court shall seem proper.

Yours, etc.,
Charles I. Avery, Plaintiff's attorney,
120 Genesee street, *Auburn*, *N. Y.*

To Hon. *Charles F. Tabor*, Attorney-General.
The Rheubottom & Teall Manufacturing Company.

d. Motion or Petition.[1]

(1) In General.

for appointment of receiver in the case of National Bank of Auburn *v.* Rheubottom Mfg. Co., and is copied from the records of the case of Jones *v.* Blun, 145 N. Y. 333. The form of this notice was not objected to.

1. **Motion.** — It is the general practice to make application for the appointment of a receiver by motion. Supreme Sitting, etc., *v.* Baker, 134 Ind. 293; Naylor *v.* Sidener, 106 Ind. 179; Pressley *v.* Harrison, 102 Ind. 14; Pouder *v.* Tate, 96 Ind. 330; Barnes *v.* Jones, 91 Ind. 161; Bitting *v.* Ten Eyck, 85 Ind. 357; Hottenstein *v.* Conrad, 9 Kan. 435; Walker *v.* House, 4 Md. Ch. 39; Drury *v.* Roberts, 2 Md. Ch. 157; Dutton *v.* Thomas, 97 Mich. 93; Rankin *v.* Rothschild, 78 Mich. 10; Barry *v.* Briggs, 22 Mich. 201; Connor *v.* Allen, Harr. (Mich.) 371; State *v.* Egan, 62 Minn. 280; Simmons *v.* Henderson; Freem. (Miss.) 493; Ladd *v.* Harvey, 21 N. H. 514; Coddington *v.* Tappan, 26 N. J. Eq. 141; Tibbals *v.* Sargeant, 14 N. J. Eq. 449; Parkhurst *v.* Muir, 7 N. J. Eq. 307; Heathcot *v.* Ravenscroft, 6 N. J. Eq. 113; Kean *v.* Colt, 5 N. J. Eq. 365; Waterbury *v.* Merchant's Union Express Co., 50 Barb. (N. Y.) 157; McCarty *v.* Stanwix, (Supreme Ct. Spec. T.) 16 Misc. (N. Y.) 132; Macdonald *v.* Trojan Button-Fastener Co., (Supreme Ct. Gen. T.) 10 N. Y. Supp. 91; Smith *v.* Fitchett, (Supreme Ct. Spec. T.) 15 Civ. Proc. (N. Y.) 207; Browning *v.* Bettis, 8 Paige (N. Y.) 568; Marten *v.* Van Schaick, 4 Paige (N. Y.) 479; Walker *v.* Trott, 4 Edw. (N. Y.) 38; West *v.* Swan, 3 Edw. (N. Y.) 420; Quinn *v.* Brittain, 3 Edw. (N. Y.) 314; *In re* Hybart, 119 N. Car. 359; Pearce *v.* Elwell, 116 N. Car. 595; Bryan *v.* Moring, 94 N. Car. 694; Coates *v.* Wilkes, 92 N. Car. 376; Rheinstein *v.* Bixby, 92 N. Car. 307; Levenson *v.* Elson, 88 N. Car. 182; Young *v.* Rollins, 85 N. Car. 485; Jones *v.* Thorne, 80 N. Car. 72; Twitty *v.* Logan, 80 N. Car. 69; Rollins *v.* Henry, 77 N. Car. 467; Davis *v.* Reaves, 2 Lea (Tenn.) 649; Henshaw *v.* Wells, 9 Humph. (Tenn.) 568; Cameron *v.* Groveland Imp. Co., 20 Wash. 169; Brundage *v.* Home Sav., etc., Assoc., 11 Wash. 277; Schreiber *v.* Carey, 48 Wis. 208; Morris *v.* Branchaud, 52 Wis. 187; Finch *v.* Houghton, 19 Wis. 149; Hungerford *v.* Cushing, 8 Wis. 320; Beecher *v.* Bininger, 7 Blatchf. (U. S.) 170; Haines *v.* Carpenter, 1 Woods (U. S.) 262.

And see list of statutes cited *supra*, note 1, p. 591.

Requisites of Motion, Generally. — For the formal parts of a motion in a particular jurisdiction see the title Motions, vol. 12, p. 938.

Form No. 17135.[1]

The State of *Ohio*, *Vinton* County. } In the Court *of Common Pleas.*

John Doe, plaintiff, against *Richard Roe*, defendant.

Now comes the plaintiff, *John Doe*, by *Jeremiah Mason*, his attorney, and moves the court that a receiver be appointed in the above entitled action on the following grounds, to wit: (*Here state the grounds for appointment, numbering each ground in consecutive order.*)

Jeremiah Mason, Attorney for Plaintiff.

(2) In Foreclosure Proceedings.

Form No. 17136.[2]

In Chancery of *New Jersey.*

Between *David Forshay*, complainant, and *Diederich W. Hutaf et als.*, defendants. } No. 2. On Bill, etc. Petition for Receiver.

To His Honor *Theodore Runyon*, Esquire, Chancellor of the State of *New Jersey.*

The petition of *David Forshay*, the above named complainant, respectfully shows:

1. That the bill in the above stated cause was filed on the *fourteenth* day of *January*, A. D. *1879*, for the purpose of foreclosing a mortgage dated *November 22*, *1876*, for *thirteen hundred* dollars, given by *Diederich W. Hutaf* and wife to your petitioner, upon which the whole principal sum together with interest from its date is due, owing and unpaid to your petitioner.

2. That said mortgage is on a lot of land with a *two* story and basement brick front dwelling house erected thereon, said lot of land being *twenty-two* feet wide and *ninety-five* feet deep and known as No. *110 Bloomfield* Street in the City of *Hoboken.*

3. That besides the fact that large arrears of interest are due to your petitioner there are liens of record affecting said premises which are paramount to the lien of your petitioner's mortgage as follows, viz:

A mortgage for $*3,000*, bal. due	$*2,000 00*
Taxes of *1873* (Sold)	*91 61*
Taxes of *1874* (Sold)	*91 30*
Taxes of *1875* (Sold)	*87 83*
Taxes of *1876* (Sold)	*85 53*
Taxes of *1877* (Sold)	*84 97*
Taxes of *1878*	*64 99*
Water Rents of *1878*	*6 90*
Making a total of	$*2,514 63*

of principal not computing any penalties or interest.

1. See, generally, *supra*, note 1, p. 650. This form is copied from the original papers in the case.
2. See, generally, *supra*, note 1, p. 650.

4. That said premises are subject also to liens subsequent to your petitioner's mortgage as follows, viz.

A mortgage of..... .....$*1,000 00*
A judgment for..... *232 68*

Making a total of.....$*1,232 68*
not counting any interest.

5. That said lot and building are not at a reasonable valuation worth more than *two thousand* dollars and therefore constitute an inadequate security for the encumbrances herein mentioned.

6. That the encumbrances on said premises prior to and including and subsequent to your petitioner's said mortgage amount in the aggregate (including principal, penalties and interest) to about *five thousand* dollars.

7. That *Diederich W. Hutaf*, the maker of said mortgage, and *August Vonath*, the present owner of said premises, are both insolvent as your petitioner verily believes. That said *Vonath* has received rents from said premises and has neglected to apply said rents to a reduction of any of said liens or on account of interest due on your petitioner's mortgage — so that your petitioner has no other way of collecting his mortgage except by a sale of the mortgaged premises which are insufficient in value to liquidate such indebtedness, and the other liens above stated, and your petitioner verily believes that he is in danger of losing a portion of his mortgage debt.

Your petitioner therefore prays that pending this suit, a Receiver of said mortgaged premises may be appointed in this cause by this Honorable Court to take possession of said mortgaged premises and rent the same and keep the same rented and receive the rents, issues and profits thereof and hold the same subject to the further order or decree of this Court in this cause with all the power and authority and subject to all the responsibilities of Receivers.

Dated *January 16*, 1879. *Muirheid & McGee*,
Sols. of Petitioner.

State of *New Jersey*, }
Hudson County. } ss. *David Forshay* being duly sworn on his oath says: I am the petitioner named in the foregoing petition. Said petition and the matters and facts therein stated are true. I am acquainted with the mortgaged premises and familiar with values in their vicinity. Said premises are worth about *two thousand* dollars — but not more than that.

David Forshay.

Sworn and subscribed on this *16th* day of *January*, A. D. 1879.
(SEAL) *Norton Porter*, Notary Public
within and for the county and state aforesaid.

2. Proceedings Upon Application.

a. Answer.[1]

1. **For the formal parts** of an answer in a particular jurisdiction see the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799; ANSWERS IN EQUITY, vol. 1, p. 854.

(1) Confessing that Receiver Ought to be Appointed.

Form No. 17137.[1]

(*Venue and title of court and cause as in Form No. 1323.*)

The defendant, the *United States Encaustic Tile Company*, for answer to the complaint in the above cause, admits the allegations thereof and confesses that a receiver ought to be appointed.

Harrison, Miller and Elam,
Attorneys for Defendant.

(2) Denying Necessity for Receiver.[2]

Form No. 17138.[3]

(Precedent in Hutchinson *v.* Michigan City First Nat. Bank, 133 Ind. 278.)

[(*Venue and title of court and cause as in Form No. 1323.*)][4]

For a partial answer to so much of said complaint as asked for the appointment of a receiver herein, the defendant, *William B. Hutchinson*, assignee of the *Hopper Lumber and Manufacturing Company*, says that he admits the execution of the mortgage to the plaintiff, set out and exhibited with the complaint; and that *James S. Hopper*, president of said *Hopper Lumber and Manufacturing Company*, pretended to execute what purported to be a chattel mortgage to the *Sutton Manufacturing Company*, upon a large amount of personal property belonging to said defendant corporation, including the machinery in said complaint mentioned and described; and that said *Sutton Manufacturing Company* gave notice that it intended to sell said personal property

1. *Indiana.* — Horner's Stat. (1896), § 1222.

See also list of statutes cited *supra*, note 1, p. 591.

This answer is set out in one of the pleadings in Mauch Chunk First Nat. Bank *v.* U. S. Encaustic Tile Co., 105 Ind. 227. The object of that suit was to vacate the order appointing a receiver asked for in the complaint to which this answer was filed, on the ground that it was made in vacation. The court refused to vacate the order of appointment.

2. **Denial of Equities of Bill.** — It is a general rule that a receiver will not be appointed in a case where the equities of the plaintiff's bill are fully denied by the sworn answer of the defendant. Williamson *v.* Monroe, 3 Cal. 383; Thompson *v.* Diffenderfer, 1 Md. Ch. 489; Simmons *v.* Henderson, Freem. (Miss.) 493; Buchanan *v.* Comstock, 57 Barb. (N. Y.) 568; Henn *v.* Walsh, 2 Edw. (N. Y.) 129; Crombie *v.* Order of Solon, 157 Pa. St. 588; Cameron *v.* Groveland Imp. Co., 20 Wash. 169; Wilson *v.* Maddox, 46 W. Va. 641.

Requisites of Answer, Generally. — For the formal parts of an answer in a particular jurisdiction consult the titles Answers in Code Pleading, vol. 1, p. 799; Answers in Equity, vol. 1, p. 854.

That defendant has no property is not sufficient answer to prevent the appointment of a receiver. Turnbull *v.* Prentiss Lumber Co., 55 Mich. 387; Fuller *v.* Taylor, 6 N. J. Eq. 301; Browning *v.* Bettis, 8 Paige (N. Y.) 568; Bloodgood *v.* Clark, 4 Paige (N. Y.) 574.

3. *Indiana.* — Horner's Stat. (1896), § 1222.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 2, this page.

This was the second paragraph of the answer. A demurrer to this paragraph was held by the supreme court to have been improperly sustained, on the ground that it fully met the allegations contained in the complaint relating to the appointment of a receiver.

4. The matter to be supplied within [ ] will not be found in the reported case.

under said pretended chattel mortgage; but he denies that he has ever permitted or intended to permit said *Sutton Manufacturing Company*, or any person acting in its behalf, to take possession of any of the property claimed by the plaintiff under its mortgage, or that he ever intended to permit said *Sutton Manufacturing Company*, or any person acting in its behalf, to sell or dispose of said property, but, on the contrary, he avers the fact to be, that before the application of the plaintiff for the appointment of the receiver herein, he had refused to permit said *Sutton Manufacturing Company* to take possession of any portion of the property under said chattel mortgage, which fact would have been made known to the plaintiff upon inquiry.

And this defendant further shows that as such assignee he has filed his certain suit in equity in the *United States Circuit* Court for the District of *Indiana* against said *Sutton Manufacturing Company* to have said pretended chattel mortgage decreed null and void, and has procured from said court a restraining order enjoining and restraining said *Sutton Manufacturing Company* from proceeding with said proposed sale; that, at all times since his acceptance of said trust, he has retained possession and control of all of the property of every nature and description which has come into his hands as such trustee under such assignment, and he intends to continue to retain the possession thereof, and the same to dispose of and administer for the benefit of all the bona fide creditors of said *Hopper Lumber and Manufacturing Company* according to their several and respective rights therein, as they may be decreed and determined by the proper courts having jurisdiction thereof, and at all times subject to the direction of this honorable court in the premises.

Wherefore, he says that there was no just ground for the application to this court for the appointment of a receiver herein; and such receiver having been appointed without notice to him, or opportunity afforded to him to make any showing why such receiver should not be appointed, said receiver ought now to be discharged, and all costs made upon said application, and growing out of said appointment, ought to be taxed against the plaintiff, and he prays the judgment of this court accordingly.

[(*Signature and verification as in Form No. 6635.*)][1]

b. Order to Show Cause.[2]

(1) In General.

Form No. 17139.[3]

Supreme Court, *Suffolk* County.

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **Order to Show Cause.** — Notice to the opposite party of an application for the appointment of receiver may be by an order or rule to show cause. Moritz *v.* Miller, 87 Ala. 331; Prouty *v.* Hallowell, 53 Minn. 488; Coddington *v.* Tappan, 26 N. J. Eq. 141; Rheinstein *v.* Bixby, 92 N. Car. 307; Phœnix Mut. L. Ins. Co. *v.* Grant, 3 MacArthur (D. C.) 220.

For the formal parts of an order or rule to show cause in a particular jurisdiction consult the title Orders, vol. 13, p. 356.

3. See, generally, *supra*, note 2, this page.

John Doe, plaintiff,
against
Richard Roe, defendant. } Order to Show Cause.

Upon reading the summons and verified complaint in this action, and the affidavit of *John Doe*, verified the *tenth* day of *September*, 1899, and upon motion of *Jeremiah Mason*, attorney for the plaintiff,

Ordered, that the defendant herein, *Richard Roe*, show cause at a *special* term of the *Supreme* Court to be held at the court-house in the village of *Riverhead*, in said county of *Suffolk* and state of *New York*, on the *twenty-fourth* day of *October*, 1899, at *ten* o'clock in the *fore*noon, or as soon thereafter as counsel can be heard, why an order should not be made appointing some suitable and competent person receiver of all the property and assets of the defendant specified in the annexed complaint, and to take and hold said property and assets during the pendency of this action, with all the powers, rights, duties and liabilities of a receiver in such cases, and restraining the defendant, his agents and servants, during the pendency of this action, from transferring, disposing of or in any manner interfering with the said property and assets of said defendant, and enjoining and restraining any suits or proceedings against said defendant.

It is further ordered that meanwhile the defendant, his agents and servants, be restrained and enjoined from paying out any funds or transferring any property, disposing of any assets or property belonging to the defendant or in his custody, and all persons be restrained from bringing or prosecuting any suit or suits against said defendant pending the application hereinbefore described.

Service of a copy of this order upon the defendant or his attorney, together with copies of the papers whereon the same is granted, made on or before the *twenty-first* day of *October*, 1899, shall be sufficient.

Dated the *twentieth* day of *October*, 1899.

John Marshall, J. *S.* C.

(2) In Foreclosure Proceedings.

(*a*) *By Senior Mortgagee, Where Receiver has been Appointed in Proceeding by Junior Mortgagee.*

Form No. 17140.[1]

Supreme Court, *Westchester* County.

Holland Trust Company, as trustee under the mortgage executed to it by the *Consolidated Gas and Electric Light Company of Westchester County*,
against
The Consolidated Gas and Electric Light Company of Westchester County, and others.

Upon the complaint in this action, the petition of *Julius S. Mor-*

1. *New York.*—Code Civ. Proc., § 714.
See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 2, p. 654.
This is the form of order to show

gan, the affidavit of *James R. Van Woert*, verified *November 2d*, 1894, the complaint and other papers now on file in the office of the clerk of *Westchester* county in the action in the *Supreme* Court of *Westchester* county, wherein the *American Debenture Company* is plaintiff and the *Consolidated Gas and Electric Light Company of Westchester County* is defendant; the affidavit of *George M. Van Hoesen*, verified *November* ———, 1894, the record of the mortgage in the office of the register of *Westchester* county in Liber *1027* of Mortgages, page *413*, and the record of the mortgage contained in said register's office in Liber *953* of Mortgages, page *445*, let the defendants, *Clarance D. Turney*, as receiver of said *Consolidated Gas and Electric Light Company of Westchester County*, the *Portchester Standard Gas Light Company*, the *Consolidated Gas and Electric Light Company of Westchester County*, and the *American Debenture Company*, show cause at a *Special* Term of this court to be held in and for the county of *Westchester*, at the court house in *White Plains* on *Saturday*, *November 10th*, 1894, at the opening of court on that day, or as soon thereafter as counsel can be heard, why said *Turney* should not be superseded as receiver as aforesaid and another receiver appointed in his place and stead, for the plaintiff in this action, and why such other, further and general relief should not be granted as the case disclosed may warrant.

Sufficient reason appearing therefor, it is ordered that service of this order to show cause less than *eight* days before it is returnable, be sufficient, and that service may be made not later than *Thursday*, *November 7th*, 1894.

Brooklyn, *November 3*, 1894.

Willard Bartlett, J. *S.* C.

(*b*) *Of Rents and Profits of Mortgaged Premises.*

Form No. 17141.[1]

Supreme Court, *Queens* County.

Reuben W. Ross
against
Florence G. Vernam, et al.

Upon the annexed affidavit of *Reuben W. Ross*, the plaintiff herein, and upon the summons and complaint herein, and upon all the papers and proceedings herein, let the defendant, *The Arvernam Company*, and each and every defendant appearing herein and demanding service of papers, and *Frederick A. Ward*, Esq., the receiver of a portion of the premises described in the complaint herein, heretofore appointed, show cause before me or one of the justices of this court at a *Special* Term thereof to be held at the court house in the city of *Brooklyn* on

cause in the case of Holland Trust Co. *v.* Consolidated Gas, etc., Co., 85 Hun (N. Y.) 454, and is copied from the records. A new receiver was appointed.

1. *New York.* — Code Civ. Proc., § 714.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 2, p. 654.

This is the order appointing a receiver in the case of Ross *v.* Vernam, 6 N. Y. App. Div. 246, and is copied from the records. The order was affirmed by the appellate division of the supreme court.

the *30th* day of *March*, 1896, at *10.30* o'clock in the *fore*noon, why a receiver for the benefit of the plaintiff of the rents, issues and profits of the mortgaged premises described in the complaint herein, should not be appointed, with power to lease the said premises in whole or in part for the term of *one* year or such other term as the court may direct, and with power to pay the current charges, taxes and assessments thereon, and to keep the same intact, and institute and carry on summary proceedings, and with power to make repairs, and with such other powers as the court may deem proper and necessary, and for such other and further relief as the court may deem just. Let service hereof on or before the *27th* day of *March*, 1896, be sufficient.

Dated *Brooklyn*, *March 26th*, 1896.

Augustus Van Wyck, J. S. C.

(*c*) *Temporary Receiver.*

Form No. 17142.[1]

At a *Special* Term of the *Supreme* Court of the state of *New York*, held in and for the county of *Kings*, at the city of *Brooklyn*, on the *20th* day of *October*, 1896.

Present.—Hon. *Nathaniel H. Clement*, J.

Citizens' Savings Bank, plaintiff, against *Marvelle C. Webber* and others, defendants. } Action No. 5. Order to show cause for appointment of temporary receiver.

On the amended summons and amended complaint herein, the petition of the plaintiff for the appointment of *Howard B. Snell*, as temporary receiver of the rents and profits of the mortgaged premises herein, verified *October 16th*, 1896, the affidavits of *Henry Merckle*, verified *October 17th*, 1896, the affidavit of *David A. Manson*, verified *October 16th*, 1896, the affidavit of *George E. Lovett*, verified *September 4th*, 1896, the consent of said *Howard B. Snell* to act as such temporary receiver, all hereto annexed, and upon the order granted herein on *October 16th*, 1896, for the service of the amended summons herein upon the defendant, *Jennie C. Wilder*, by publication thereof, and upon all papers and proceedings heretofore had herein, let the defendants, *Jennie C. Wilder*, *Mary A. Wilder*, *Marvelle C. Webber*, individually, and *Marvelle C. Webber* and *Frank F. Johnson*, as executors, etc., or their respective attorneys, show cause at a *Special* Term of this court, to be held at the county court house in the city of *Brooklyn*, on the *twentieth* (*20th*) day of *October*, 1896, at *10.30* o'clock in the *fore*noon of that day, or as soon thereafter as counsel can be heard, why an order appointing *Howard B. Snell*, *Esq.*, counsellor at law, of the city of *New York*, temporary receiver of the rents and profits of the mortgaged premises herein should not be made, and for such other and further relief as may be just and proper.

1. *New York.*—Code Civ. Proc., § 714.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 2, p. 654.

This is the form of order to show cause for appointment of a temporary receiver in the case of Citizens' Sav. Bank *v.* Wilder, 11 N. Y. App. Div. 63, and is copied from the records. A

Service of this order and of the papers hereto annexed upon the defendant, *Jennie C. Wilder*, by depositing a copy thereof in the post office at the city of *Brooklyn*, enclosed in a securely closed post-paid wrapper, directed to *Jennie C. Wilder*, *542 Putnam* Avenue, *Brooklyn*, on *October 17th*, 1896, shall be sufficient, and service upon the attorneys for the other defendants who have appeared herein on *October 17th*, 1896, shall be sufficient.

Dated at Chambers, *October 17th*, 1896.

N. H. Clement, J. *S.* C.

(3) In Proceedings Against Insolvent Corporation.[1]

Form No. 17143.[2]

In *Supreme* Court, County of *Kings*.

The People of the State of New York, plaintiffs,
against
Empire Loan and Investment Company, defendant.

Order to Show Cause.

Upon reading the summons and verified complaint in this action, and the affidavit of *Charles R. Hall* and *John D. Monarily*, verified *October 12th* and *19th*, 1896. On motion of *G. D. B. Hasbrouck*, deputy attorney general, of counsel for plaintiffs,

Ordered, That the defendant *Empire Loan and Investment Company* show cause at a *Special* Term of this court at the court-house in the city of *Poughkeepsie*, *N. Y.*, on the *24th* day of *October*, 1896, at *10* o'clock *A.* M., why an order should not be granted appointing some suitable and competent person temporary receiver of all the property and assets of the defendant during the pendency of this action, with all the powers, rights, duties and liabilities of a temporary receiver in such cases, and restraining the defendant, its officers, agents and servants from exercising any corporate rights of said defendant dur-

temporary receiver was appointed, and it was held that his appointment was regular in all respects.

1. **Precedent.** — In Hall *v.* U. S. Ins. Co., 5 Gill (Md.) 484, is set out the following order to show cause, which was introduced in evidence in that case:

"Ordered by the court this *24th May*, 1834, that injunction issue, as prayed, upon the complainant's filing bond, with security to be approved by the judges of this Court, in the penalty of *twenty thousand* dollars, to indemnify the defendants against all costs and damages from said injunction. And it is further ordered by the Court, that the defendants show cause on *Tuesday next* at *10* o'clock, why a receiver should not be appointed to take charge of all the effects of the defendants, and administer the same according to justice and equity, provided a copy of this order be served on the president of the said company, or on the board of directors of said company, or left at the office for doing business of said company, before *3* o'clock of this day.

S. Archer,
R. B. Magruder,
John Purviance,
Judges of *B. C. C.*"

No objection was made to the form of this order.

2. *New York.* — Code Civ. Proc., § 714.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 2, p. 654.

This is the form of order to show cause in the case of People *v.* Empire Loan, etc., Co., 15 N. Y. App. Div. 69, and is copied from the records. A receiver was appointed.

ing the pendency of the action, and from transferring, disposing of or in any manner interfering with, the property or assets of said defendant, and enjoining and restraining any suits or proceedings against said defendant. It is further ordered, That meanwhile, the defendant, its trustees, officers, agents and servants be restrained and enjoined from paying out any funds or transferring any property, disposing of any assets or property belonging to the defendant or in its custody, and all persons are restrained from bringing or prosecuting any suit or suits against the defendant pending the application hereinbefore described.

Service of a copy of this order upon the defendant or its attorney, together with the copy of the papers whereon the same was based on or before *October 21*, 1896, will be sufficient.

Dated *October 20th*, 1896.

J. F. Barnard, J. S. C.

c. Counter-affidavit Opposing Application.[1]

Form No. 17144.[2]

In the *Supreme* Court, *Dutchess* County.

Alfred H. Booth
vs.
Hannibal Smith and *Mary A. Huntington*, as administrators of the goods, chattels and credits of *James Vassar Harbottle*, deceased.

Jefferson County, ss.

Hannibal Smith, being duly sworn, says that he is one of the defendants above named and one of the administrators of the goods,

1. Counter-affidavit — *Generally.* — An application being made for the appointment of a receiver, it is the practice for the defendant to oppose the application by counter-affidavit. Irwin *v.* Everson, 95 Ala. 64; Micou *v.* Moses, 72 Ala. 439; Leeds *v.* Townsend, 74 Ill. App. 444; Pressley *v.* Harrison, 102 Ind. 14; Pouder *v.* Tate, 96 Ind. 330; Barnes *v.* Jones, 91 Ind. 161; Clark *v.* Raymond, 84 Iowa 251; Rankin *v.* Rothschild, 78 Mich. 10; Turnbull *v.* Prentiss Lumber Co., 55 Mich. 387; Prouty *v.* Hallowell, 53 Minn. 488; Ladd *v.* Harvey, 21 N. H. 514; Kean *v.* Colt, 5 N. J. Eq. 365; McCarty *v.* Stanwix, (Supreme Ct. Spec. T.) 16 Misc. (N. Y.) 132; Willis *v.* Corlies, 2 Edw. (N. Y.) 281; Whitehead *v.* Hale, 118 N. Car. 601; Pearce *v.* Elwell, 116 N. Car. 595; City Nat. Bank *v.* Bridgers, 114 N. Car. 381; Forsaith Mach. Co. *v.* Hope Mills Lumber Co., 109 N. Car. 576; Rheinstein *v.* Bixby, 92 N. Car. 307; Cameron *v.* Groveland Imp. Co., 20 Wash. 169; Finch *v.* Houghton, 19 Wis. 149.

And see list of statutes cited *supra*, note 1, p. 591.

Answer Treated as Counter-affidavit. — In some jurisdictions the answer has been treated as a counter-affidavit. Rankin *v.* Rothschild, 78 Mich. 10; Ladd *v.* Harvey, 21 N. H. 514; Browning *v.* Bettis, 8 Paige (N. Y.) 568; Pearce *v.* Elwell, 116 N. Car. 595; City Nat. Bank *v.* Bridgers, 114 N. Car. 381; Rheinstein *v.* Bixby, 92 N. Car. 307; Fairbairn *v.* Fisher, 4 Jones Eq. (57 N. Car.) 390; Ryder *v.* Bateman, 93 Fed. Rep. 16.

Requisites of Affidavit, Generally. — For the formal parts of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

2. *New York.* — Code Civ. Proc., §§ 713, 1947.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, this page.

chattels and credits of *J. V. Harbottle*, deceased; that the summons and complaint herein were served upon him *December 14th*, 1894, with the notice of an application upon the complaint for an order appointing a receiver of all the copartnership property of *M. Vassar and Co.*, excepting the real estate as set forth in the complaint; that said application is made upon the complaint; that the said *John Vassar Harbottle* died on the *7th* day of *January*, 1893, and directly thereafter and in *January*, 1893, the defendants were appointed administrators of his estate by the Surrogate of *Dutchess* county.

That heretofore the plaintiff, *Alfred H. Booth*, presented a claim for about $9,000, and the said administrators rejected said claim and offered to refer under the statute.

That the said *Alfred H. Booth* neglected and refused to enter into such reference, and instead thereof has brought this action.

Deponent further says that the said administrators in no manner have interfered with the right of said *Alfred H. Booth* to wind up the affairs of said partnership as a surviving partner, and he has had, without interference on the part of the said administrators, the possession of all the books and accounts of said copartnership, and all of the assets of said copartnership, and he is now in the undisputed possession thereof as surviving partner.

That the said administrators believe said *Alfred H. Booth* to be entirely financially responsible, and they have been willing and still are willing that he should exercise his rights as surviving partner, being subject to the legal requirement of an accounting for his acts as said surviving partner.

That there is no danger, as the said defendants believe, in leaving the matters in the hands of the said plaintiff as surviving partner and upon his personal responsibility as such surviving partner.

Deponent further alleges and believes that it would be unjust to appoint the plaintiff as receiver in this action, and entirely unnecessary; that the matters which will be litigated in this action, to a large extent, will be matters of the personal relation of the said plaintiff in said partnership, and the relative liability of the said estate as to any partnership estate, and especially any indebtedness to said plaintiff.

That it would be unjust to clothe the plaintiff with the power of a receiver herein, who thereby would be empowered to act in behalf of the defendants as well as himself even in the settlement of his own claims.

That the said defendants have not applied for a receiver and will not apply for a receiver unless the said plaintiff refuses at the proper time to exhibit to them all the matters relating to said partnership.

Deponent further says that if a receiver is to be appointed, such receiver should be one not interested as the plaintiff is in his own behalf, but one who should fairly represent the interest of all parties.

This is the form of counter-affidavit in the case of Booth *v.* Smith, 79 Hun (N. Y.) 384, and is copied from the records. An order appointing a receiver was reversed in the appellate division, on the ground that no necessity for the appointment was shown. The counter-affidavit was not objected to.

Deponent further says that if it shall be deemed wise and proper to appoint a receiver, deponent would suggest *Robert E. Taylor* of *Poughkeepsie, New York*, and if it shall be determined that a receiver shall be appointed, and that the plaintiff shall be represented specially in such receivership, that then the *two* receivers shall be appointed, to wit: *Alfred H. Booth* for himself, and *Robert E. Taylor* or some person satisfactory to the defendants, and that neither of such receivers shall have the power to adjust any claim excepting upon the joint action of said receivers.

Deponent further says that the said complaint does not make out a case for the appointment of a receiver upon application of the plaintiff as he verily believes, and asks that the application be denied, or if not denied, that *Robert E. Taylor* be appointed the receiver alone or in conjunction with *Alfred H. Booth*, but deponent asks that said application be denied.

Hannibal Smith.

Subscribed and sworn to before me this *16th* day of *December*, 1893.

J. R. Pawling, Notary Public.

d. Reference.[1]

(1) Notice of Motion for Reference.[2]

(*a*) *To Appoint Receiver.*

Form No. 17145.[3]

(*Commencing as in Form No. 6954, and continuing down to* *) for an order that it be referred to a referee, to be appointed by said court, to appoint a receiver of the rents and profits of the estate of *Richard Roe*, the defendant in this action, as set forth in said complaint, with the usual powers of and directions to receivers, and to take from such receiver such security as the court shall direct, and for such other and further relief as may be just.

(*Signature and office address of attorney, date and address as in Form No. 6954.*)

1. **Proceeding by Reference.** — In *New York*, it was the practice of the courts of chancery to refer the appointment or nomination of a receiver to a referee or master. Hudson *v.* Plets, 11 Paige (N. Y.) 180; Matter of Eagle Iron Works, 8 Paige (N. Y.) 385; Gihon *v.* Albert, 7 Paige (N. Y.) 278; Fitzburgh *v.* Everingham, 6 Paige (N. Y.) 29; Haggarty *v.* Pittman, 1 Paige (N. Y.) 298; Lee *v.* Huntoon, Hoffm. (N. Y.) 447; Green *v.* Hicks, 1 Barb. Ch. (N. Y.) 309; Lottimer *v.* Lord, 4 E. D. Smith (N. Y.) 183; Austin *v.* Dickey, 3 Edw. (N. Y.) 378. And this practice, not being inconsistent with any of the provisions of the code and the present rules governing the court, has not been abrogated, but, on the contrary, continues in force and may be said now to exist by special enactment. Wetter *v.* Schlieper, (C. Pl. Spec. T.) 7 Abb. Pr. (N. Y.) 92.

For forms in proceedings relating to reference, generally, see the title References.

2. **For the formal parts** of a notice of motion in a particular jurisdiction see the title Motions, vol. 12, p. 938.

3. *New York.* — Code Civ. Proc., §§ 713, 827.

(*b*) *To Nominate Receiver.*

Form No. 17146.[1]

(*Commencing as in Form No. 6954, and continuing down to* *) for an order of reference to a referee, to be appointed by the said court, to nominate and report to said court a suitable person to be appointed receiver of the rents and profits of the estate of the defendant, *Richard Roe*, mentioned in the said complaint, and to report as to the amount of security required of the said receiver, and the sufficiency of the sureties proposed, and for such other and further relief as may be just.

(*Signature and office address of attorney, date and address as in Form No. 6954.*)

(2) Order of Reference.[2]

(*a*) *To Appoint Receiver.*

aa. In General.

Form No. 17147.[3]

(*Title of court and cause as in Form No. 14696.*)

On reading and filing (*Here enumerate the motion papers*), together with satisfactory proof of service of said notice of motion and papers upon *Jeremiah Mason*, attorney for *Richard Roe*, the defendant above named, and upon reading and filing (*Here specify papers, if any, filed by the defendant in opposition to the motion*), and upon hearing *Oliver Ellsworth*, attorney for the above plaintiff, in argument, in support of said motion, and *Jeremiah Mason*, attorney for defendant (or *no one appearing*), in opposition,*

Ordered, that it be referred to *Andrew Jackson*, of the city of *Albany*, in the county of *Albany* aforesaid, counsellor at law, to appoint a receiver of (*designating property*), and that the said referee take from said receiver security for the faithful performance by said receiver of his trust, to wit, a bond in the sum of *five thousand* dollars, with *two* or more sufficient sureties to be approved by the said referee, and file said bond with the clerk of this court (or *of the county of Albany*).

And it is further ordered that said receiver, upon the filing of such security and of the said referee's report, shall be vested with the usual rights and powers of receivers under this court (*state any special power to be exercised by the receiver*).

And it is further ordered that thereupon the above defendant, *Richard Roe*, deliver to the said receiver upon his demand said (*specifying property to be delivered*).

Enter: *John Marshall*, J. *S.* C.

1. *New York.* — Code Civ. Proc., §§ 713, 827.

2. For the formal parts of an order in a particular jurisdiction see the title Orders, vol. 13, p. 356.

3. *New York.* — Code Civ. Proc., §§ 713, 827.

bb. In Creditor's Suit.

Form No. 17148.[1]

(*Commencing as in Form No. 17147, and continuing down to* *)

Ordered, that it be referred to *Andrew Jackson*, of the city of *Albany*, in the county of *Albany* aforesaid, counsellor at law, to appoint a receiver of the estate and property, both real and personal, choses in action, debts and all equitable interests and other effects which belong to the above named defendant, *Richard Roe*, or which were held in trust for him at the time of the commencement of this action, or in which he, the said *Richard Roe*, had any beneficial interest, except such property as is by law exempt from execution, and except where the aforesaid trust has been created by or the fund was held in trust as trustee from some other person than the said defendant (*where plaintiff seeks to subject specific property to his execution after removing incumbrance, add*, "and of the following property, and the rents, issues, profits and income thereof, to wit," *describing the property*).

And it is further ordered that said referee take from said receiver security for the faithful performance by said receiver of his trust, to wit, a bond in the sum of *five thousand* dollars, with *two* or more sufficient sureties to be approved by the said referee, and file said bond with the clerk of this court (or *of the county of Albany*).

And it is further ordered that the said receiver, upon the filing of such security and of the said referee's report, shall be vested with the usual rights and powers of receivers under this court.

And it is further ordered that the said defendant appear before the said referee, and on oath and under the direction of the said referee assign, convey, transfer and deliver over to the said receiver all the estate, property, choses in action and other effects as to which said receiver is appointed as aforesaid, together with all vouchers and papers relating thereto, and that the said defendant, *Richard Roe*, from time to time, produce such books and papers, and submit to such examination in relation to the property or effects which he is hereby directed to assign and deliver over to said receiver, as said referee shall direct.

And it is further ordered that the said plaintiff, *John Doe*, be at liberty to examine before the said referee witnesses in relation to real property to be sold, chattels real and personal, and equitable interests, choses in action and other effects of the said defendant, *Richard Roe*, and also as to any matter charged in the complaint in this action and not admitted by the said defendant, *Richard Roe*, on such examination, so far as may be necessary to carry out the provisions of this order.

And it is further ordered that the said receiver, when so appointed, shall have full and general power and authority to sue for and collect any and all debts, demands and rents belonging to the said defendant, *Richard Roe*, which may be transferred to him, the said receiver, and also to compromise and settle all such debts, demands and rents as are unsafe or of a doubtful character, but the said receiver will not,

1. *New York.* — Code Civ. Proc., §§ 713, 827.

in his accounts, be allowed costs incurred in the prosecution of any suit by said receiver against any insolvent debtor from whom said receiver is unable to collect his costs, unless such action is brought by order of this court, or by the consent of all persons interested in the funds in the hands of said receiver.

And it is further ordered that the tenants of such of the real estate of the said defendant, *Richard Roe*, as may be assigned or transferred to the said receiver, attorn to said receiver, or, when necessary, the said receiver may apply to the court for an order that any or all of such tenants attorn and pay rents to him, and it is hereby permitted the said receiver to make leases from time to time as may be necessary, of any or all of said real estate so assigned or transferred to him, for a term not exceeding (*specifying term*).

And it is further ordered that the said receiver do, without any unreasonable delay, convert into money all the personal estate and effects which may be assigned or transferred over to him, but the said receiver is not without the special order of the court, to sell any real estate, although he may sell all desperate debts and other doubtful claims to personal property at public auction upon giving public notice of at least *ten* days of the time and place of such sale.

It is further ordered that before making said appointment said referee shall ascertain whether a receiver be already appointed of the estate and effects of the said defendant, and if a receiver be already appointed, and if the referee shall appoint such receiver to be the receiver herein also, then all the rights and powers herein provided shall attach to such receiver.

Enter: *John Marshall*, J. *S.* C.

cc. In Partnership Proceedings.

Form No. 17149.[1]

(*Commencing as in Form No. 17147, and continuing down to* *.)

Ordered, that it be referred to *Andrew Jackson*, of the city of *Albany*, in the county of *Albany* aforesaid, counsellor at law, to appoint a receiver of the copartnership stock, premises, outstanding debts and effects of the copartnership of the above named plaintiff and defendant, carried on at the said city of *Albany* under the firm name and style of *Doe & Roe*, and in the pleadings in this action mentioned.

And it is further ordered that the said referee take from the said receiver security for the faithful performance by said receiver of his trust, to wit, a bond in the sum of *five thousand* dollars, with *two* or more sufficient sureties to be approved by the said referee, and file said bond with the clerk of this court (or *of the county of Albany*).

And it is further ordered that the said receiver, on the filing of such security and of the said referee's report, be vested with the usual rights and powers of receivers under this court.

And it is further ordered that the said referee be at liberty to

1. *New York.* — Code Civ. Proc., §§ 713, 827.

examine the aforesaid plaintiff and defendant, *John Doe* and *Richard Roe*, as to the copartnership stock, premises, outstanding debts and effects in the hands and possession or power, or under the control, of the said plaintiff and defendant; and that they, the said *John Doe* and the said *Richard Roe*, under the direction of the said referee, and on oath if required, deliver over to the person to be appointed receiver as aforesaid all and every the said stock, premises, outstanding debts and effects, and all books, vouchers and papers relating to the said copartnership, and in case it shall be necessary for the recovery thereof to put any of the said debts in suit, the same may be done after an order of the court has been obtained to prosecute.

And it is further ordered that the person to be appointed receiver as aforesaid, without delay, sell and turn into money such part of the copartnership estate and effects as shall not consist of money, and said receiver pay all debts due, and to become due, from said copartnership.

Enter: *John Marshall*, J. *S.* C.

dd. Of Estate of Deceased Person in Case of Executor or Administrator.

Form No. 17150.[1]

(*Commencing as in Form No. 17147, and continuing down to* *.)

Ordered, that it be referred to *Andrew Jackson*, of the city of *Albany*, in the county of *Albany* aforesaid, counsellor at law, to appoint a receiver to receive the rents and profits of the freehold and leasehold estates of the said testator, *Richard Roe*, and to collect and get in the outstanding personal estate of the said testator, and the debts due or owing in respect to the business or trade of a merchant of the said testator, carried on by the said testator up to the time of his death and since the time of his death by the defendant *Samuel Short*.

And it is further ordered that the said referee take from said receiver security for the faithful performance by said receiver of his trust, to wit, a bond in the sum of *five thousand* dollars, with *two* or more sufficient sureties to be approved by the said referee, and to file said bond with the clerk of this court (or *of the county of Albany*).

And it is further ordered that said receiver, upon the filing of such security and of the said referee's report, shall be vested with the usual rights and powers of receivers in this court (*state any special power to be exercised by the receiver*).

And it is further ordered that the tenants of the said estate of the said testator attorn and pay to said receiver their rents in arrear and accruing rents, and it is permitted the said receiver to make leases from time to time as may be necessary of said estate, but not for a term exceeding (*specifying term*) without the special order of the court.

1. *New York.*— Code Civ. Proc., §§ 713, 827.

And it is further ordered that the said referee be at liberty to examine the defendant, *Samuel Short*, as to the estate, stock, debts, and other effects of the said *Richard Roe*, in his hands, possession, power, or under the control of the said *Samuel Short*, and that he, the said *Samuel Short*, under the direction of the said referee and on oath if required, deliver over to the person to be appointed receiver as aforesaid all and every the said estate, stock, debts and effects, and all muniments, books, vouchers and papers relating thereto, and in case it shall be necessary for the recovery thereof to put any of the said debts in suit, the same may be done after an order of the court has been obtained to prosecute.

And it is further ordered that the person to be appointed receiver as aforesaid pay all debts due from the said *Richard Roe*, deceased, in the order required by the statutes relating to executors and administrators.

Enter: *John Marshall*, J. *S.* C.

ee. Pending Reference for Accounting.

Form No. 17151.[1]

(*Commencing as in Form No. 17147, and continuing down to* *.)

Ordered, that it be referred to *Andrew Jackson*, of the city of *Albany*, in the county of *Albany* aforesaid, counsellor at law, and to whom it has already been referred to take an account in this action, to appoint a receiver of (*designating the property*), and that the said referee take from said receiver security for the faithful performance by said receiver of his trust, to wit, a bond in the sum of *five thousand* dollars, with *two* or more sufficient sureties to be approved by said referee, and file said bond with the clerk of this court (or *of the county of Albany*).

And it is further ordered that the said receiver, after the filing of such security and of the said referee's report, and after he shall be duly qualified, proceed to take possession of the property, real and personal, in said affidavit (or *report*) referred to as remains unsold, and to sell said property so remaining unsold at public or private sale as to said receiver shall seem most for the interest of all parties, and to collect and reduce to money all debts, accounts and choses in action referred to in said affidavit (or *report*) as aforesaid as remain uncollected, and said receiver may compromise, or sell at public auction, after giving due notice, such of said debts, accounts and choses in action as are doubtful or uncollectible.

And it is further ordered that said receiver shall from time to time, as he may be required thereto by said referee, account before said referee for all of said property, debts, demands and choses in action and the proceeds thereof, and that said receiver hold in his hands and retain such proceeds subject to the further order and direction of the court.

Enter: *John Marshall*, J. *S.* C.

1. *New York.* — Code Civ. Proc., §§ 713, 827.

(*b*) *To Nominate Receiver.*[1]

Form No. 17152.[2]

(*Commencing as in Form No. 17147, and continuing down to* *.)

Ordered, that a receiver be appointed in this action to take charge of (*Here specify the property*).

It is further ordered that it be referred to *Andrew Jackson*, of the city of *Albany*, in said county of *Albany*, counsellor at law, to report a suitable person to be appointed such receiver, and to report the names of sureties proposed by him, with the amount for which said sureties should be liable, and their responsibility for the same.

Enter: *John Marshall*, J. S. C.

(3) SUMMONS TO ATTEND REFERENCE.

Form No. 17153.[2]

(*Title of court and cause as in Form No. 6954.*)

To *Richard Roe* (or *Jeremiah Mason, attorney for*) the defendant above named.

You are hereby required to attend before *Andrew Jackson*, the referee appointed by the above court under the order of the court dated the *tenth* day of *June*, 1899, a copy of which has been served upon you, to appoint a receiver in the above entitled action, at his office No. *10 State* street, in the city of *Albany*, in said county of *Albany*, on the *twenty-fifth* day of *June*, 1899, at *ten* o'clock in the *fore*noon, when he will receive proposals for a receiver under the said order of said court (*if notice be addressed to defendant and his personal attendance is necessary, add*, "The personal attendance of the defendant, *Richard Roe*, is required for the purpose of examination").

Dated the *twelfth* day of *June*, 1899.

Andrew Jackson, Referee.

Oliver Ellsworth, Plaintiff's Attorney.

(4) PROPOSAL OF PERSONS FOR RECEIVERS.

Form No. 17154.[2]

(*Title of court and cause as in Form No. 6954.*)

The plaintiff (or *defendant*) above named proposes *Josiah Crosby*, of No. *20 Main* street, in the city of *Albany*, in said county of *Albany*,

1. **Precedent.** — In Matter of Franklin Bank, 1 Paige (N. Y.) 85, it was ordered that it be referred to Thomas Bolton, Esquire, one of the masters of this court, to receive from any person or persons interested in this matter the nomination of the proper person to be appointed receiver of the moneys and effects of the president, directors and company of the Franklin Bank in the city of New York, and to report to this court the names of the persons so nominated, and their respective fitness for the said appointment. And it was further ordered that the said master also report the names of the sureties who might be proposed for the said persons respectively, and as to the fitness and sufficiency of the said supposed sureties to give bond with the person who might be appointed receiver as aforesaid in the sum of fifty thousand dollars.

No objection was made to this form of order.

2. *New York.* — Code Civ. Proc., §§ 713, 827.

counsellor at law, for receiver of the estate (or *rents and profits of the estate*) mentioned in the order of this court dated the *twenty-third* day of *March*, 1900.

And the said *Josiah Crosby* proposes *Samuel Short*, of No. *10 West* street, in said city of *Albany*, and *William West*, of No. *20 Windham* street, in said city of *Albany*, as his sureties.

Dated *June 25*, 1900.

Jeremiah Mason, Plaintiff's Attorney.

(5) Affidavit of Value of Real Property in Controversy.

Form No. 17155.[1]

(*Title of court and cause, and venue as in Form No. 8805.*)

Samuel Short being duly sworn, says:

That he is a resident of the town of *Huntington*, in the county of *Suffolk* and state of *New York*.

That the lands, tenements, premises (*or other property*) mentioned in the pleadings in the above cause, and of which a receiver is directed to be appointed, are now, exclusive of taxes and all other deductions and outgoings, at the yearly rent of *two hundred* dollars.

Samuel Short.

(*Jurat as in Form No. 8805.*)

(6) Report of Referee.

(a) *Of Appointment of Receiver.*

Form No. 17156.[1]

(*Title of court and cause as in Form No. 6954.*)

Pursuant to an order of this court made in this cause, dated the *sixteenth* day of *December*, 1899, whereby it was referred to the undersigned to appoint a receiver of the estate (or *of the rents and profits of the estate*) of *Richard Roe* the defendant above named, and to take from the receiver so appointed proper security for the performance of his trust, I, *Andrew Jackson*, the referee in said order named, do respectfully report:

That I have been attended on said reference by the attorneys and counsel of all the parties to the above entitled action, and thereupon proceeded with the matters so referred.

That *Samuel Short*, of No. *10 West* street, in the city of *Albany*, counsellor at law, was proposed on the part of the plaintiff for such receiver, and no person being proposed by the defendant, and no objection being made to his appointment, and it appearing to me that the said *Samuel Short* was a fit and proper person to execute said trust, I have appointed him receiver of the estate aforesaid.

That *William West*, of No. *20 Main* street, in said city of *Albany*, and *Francis Fern*, of No. *50 West* street, in said city of *Albany*, were proposed by the said *Samuel Short* as his sureties, and being satisfied

1. *New York.* — Code Civ. Proc., §§ 713, 827.

by the affidavits of the said *William West* and *Francis Fern* that they, the said *William West* and the said *Francis Fern*, are each of them worth the sum of *ten thousand* dollars above all their liabilities, I approved of them as such sureties.

That thereupon the said *Samuel Short*, *William West* and *Francis Fern* jointly and severally executed a bond in the usual form to the people of the state of *New York* in the penalty of *ten thousand* dollars, conditioned for the faithful discharge by the said *Samuel Short* of his duties and trust as such receiver.

That I have caused the said bond, with my approval endorsed thereon, and the affidavits of justification of the said sureties, to be filed with the clerk of the county of *Albany*.

All of which is respectfully submitted.

Dated *October 5*, 1900.

Andrew Jackson, Referee.

(*b*) *Naming Suitable Person for Receiver.*

aa. In General.

Form No. 17157.[1]

(*Title of court and cause as in Form No. 6954.*)

Pursuant to an order of this court made in this cause, dated the *sixteenth* day of *December*, 1899, whereby it was referred to the undersigned to report a suitable person to be appointed receiver of the estate (or *of the rents and profits of the estate*) of *Richard Roe*, the defendant above named, and the proper security to be required from such receiver for the performance of his trust, I, *Andrew Jackson*, the referee in said order named, respectfully report:

That I have been attended on said reference by the attorneys and counsel of all the parties to the above entitled action and thereupon proceeded with the matters so referred.*

That *Samuel Short*, of No. *10 West* street, in the city of *Albany*, counsellor at law, was proposed on the part of the plaintiff for such receiver, and no person being proposed by the defendant, and no objection being made, and upon due examination it appearing to me that the said *Samuel Short* is a fit and proper person to execute said trust, I do respectfully recommend him as a suitable person to be appointed receiver as aforesaid.

That *William West*, of No. *20 Main* street, in the city of *Albany*, and *Francis Fern*, of No. *30 West* street, in the city of *Albany*, were proposed by the said *Samuel Short* as his sureties, and being satisfied by the affidavits of the said *William West* and the said *Francis Fern* that they, the said *William West* and the said *Francis Fern*, are each of them worth the sum of *ten thousand* dollars above all their liabilities, I approved of them as such sureties and do recommend them as such to the court.

That thereupon the said *Samuel Short*, *William West* and *Francis Fern* jointly and severally executed a bond in the usual form to the people of the state of *New York* in the penalty of *ten thousand* dollars,

1. *New York.* — Code Civ. Proc., §§713, 827.

conditioned for the faithful discharge by the said *Samuel Short* of his duties and trust as such receiver, which bond appears to me to be sufficient in form and substance, and is herewith submitted.

All of which is respectfully submitted.

(*Date and signature as in Form No. 17156.*)

bb. PROPOSING SEVERAL PERSONS.

(*aa*) *In General.*

Form No. 17158.[1]

(*Commencing as in Form No. 17157, and continuing down to* *.)

That *Samuel Short*, of No. *10 West* street, in the city of *Albany*, counsellor at law, and *William West*, of No. *20 State* street, in the city of *Albany*, counsellor at law, were proposed on the part of the plaintiff for such receivers.

That *Nathan Hale*, of No. *20 Main* street, in the city of *Albany*, and *Francis Fern*, of No. *30 West* street, in the city of *Albany*, were proposed by the said *Samuel Short* and *William West* as their sureties, and upon due inquiry I am satisfied that the said *Nathan Hale* and *Francis Fern* are good security.

That no person was proposed by the defendant (*or state facts as the case may be*).

That *Henry Black*, of No. *10 Monroe* street, in the city of *Albany*, counsellor at law, and *Calvin Clark*, of No. *50 State* street, in the city of *Albany*, counsellor at law, were proposed on the part of *George Gray*, a creditor of the defendant *Richard Roe* to the amount of *ten thousand* dollars, or thereabouts, for such receivers.

That *John Smith*, of No. *100 Main* street, in the city of *Albany*, and *James Jones*, of No. *50 West* street, in the city of *Albany*, were proposed by the said *Henry Black* and *Calvin Clark* as their sureties, and upon due inquiry I am satisfied that the said *John Smith* and *James Jones* are good security.

(*Continuing in this manner, stating the names proposed by each party to the proceeding and the names of sureties proposed.*)*

That of the persons so proposed as receivers as aforesaid I have ascertained that *Samuel Short*, *William West* and *Henry Black* will serve whether appointed alone or associated with one or more persons, and that all of said persons are fit for the appointment; as to the other persons named, I have not been able to ascertain whether they will or will not serve alone.

All of which is respectfully submitted.

(*Date and signature as in Form No. 17156.*)

(*bb*) *In Case of Corporation, Naming Several Stockholders.*

Form No. 17159.[1]

(*Commencing as in Form No. 17158, and continuing down to* *.)

I do further report that I have considered said proposals and am of the opinion that the receivers to be appointed should consist of *five*

1. *New York.* — Code Civ. Proc., §§ 713, 827.

persons; that by testimony taken before me I find that all of the said persons so proposed as receivers are stockholders of the defendant company, and that of said persons so proposed the first named *three* are directors of the said defendant company; that at a special meeting of the directors of the said company, at which meeting there were present *thirteen* out of *seventeen*, the whole number of directors of said company, a resolution was duly passed recommending the said persons to be proposed as such receivers, upon the express understanding that they, the said persons to be proposed, would, if appointed, accept such trust and perform the duties thereof without any compensation except for their actual expenses; that by testimony taken before me I find that all the said persons so proposed as such receivers are residents of the city of *Albany* and of good repute as to pecuniary circumstances, integrity and capacity for business, and I am therefore of the opinion that the said *Samuel Short*, *William West*, *Francis Fern*, *Henry Black* and *Calvin Clark* are suitable persons to be appointed receivers of the said company for the purposes referred to in said order, and I do recommend them as such to the court.

All of which is respectfully submitted.

(*Date and signature as in Form No. 17156.*)

(7) Notice of Motion to Confirm Report of Referee.[1]

Form No. 17160.[2]

(*Title of court and cause as in Form No. 6954.*)

Take notice that a motion will be made by the undersigned, at a *special* term of the *Supreme* Court to be held at the court-house in the city of *Albany*, in the said county of *Albany*, on the *tenth* day of *September*, 1900, at *ten* o'clock in the *fore*noon, or as soon thereafter as counsel can be heard, for an order confirming the report of the referee heretofore appointed to appoint a suitable person as receiver in this action, a copy of which report is herewith served upon you, and for such other and further order as may be just.

(*Signature, office address of attorney, date and address as in Form No. 6954.*)

(8) Order Confirming Report of Referee and Appointing Receiver.[3]

Form No. 17161.[4]

(*Commencement as in Form No. 6957.*)

Upon reading and filing the report of *Andrew Jackson*, the referee

1. **For the formal parts** of a notice of motion in a particular jurisdiction see the title Motions, vol. 12, p. 938.

2. *New York.* — Code Civ. Proc., §§ 827, 1713.

3. **Confirmation of Report.** — Where it is referred to a master to report a proper person to be appointed a receiver and to approve of sureties to be given by such receiver, the appointment is not complete until it is confirmed by the special order of the court. Matter of Eagle Iron Works, 8 Paige (N. Y.) 385.

For the formal parts of an order in a particular jurisdiction see the title Orders, vol. 13, p. 356.

4. *New York.* — Code Civ. Proc., §§ 713, 827.

appointed by order of this court, dated the *tenth* day of *September*, 1899, to report a suitable person for receiver in this cause, and also to report what security should be required of such receiver, and on motion of *Jeremiah Mason*, attorney for said plaintiff, and upon hearing the said *Jeremiah Mason*, in support of said motion, and *Oliver Ellsworth*, attorney for defendant, in opposition,

Ordered, that the said report be confirmed, and that *Samuel Short*, of the city of *Albany*, in said county of *Albany*, counsellor at law, be appointed receiver of (*Here specify the property*), and that *William West* and *Francis Fern*, both of said city of *Albany*, the sureties named in said report of said referee, be approved as sureties for the said receiver, and that the bond of the said receiver heretofore approved by the said referee, be filed with the clerk of the county of *Albany*, and that the appointment of said receiver shall date from the time of the filing of the said bond with said clerk.

It is further ordered that (*Here set out the powers of and directions to the receiver*).

Enter: *John Marshall*, J. *S.* C.

e. Order or Decree.[1]

(1) Denying Application.

Form No. 17162.[2]

At a *Special* Term of the *Supreme* Court, held in and for the county of *Kings*, Chambers, in the County Court House, Borough of *Brooklyn*, city of *New York*, on the *6th* day of *April*, 1898.

Present — Hon. *Augustus Van Wyck*, Justice.

Mary E. Veerhoff, as Executrix of the Last Will and Testament of *Ernst H. Veerhoff*, deceased, plaintiff, against *Mary E. Miller* and *George M. Miller*, her husband; *Marion Thompson*, *Henry J. Platt*, *Thomas O'Mahony*, *Ernest Tieman*, *Joseph E. McGivern*, *Joseph Butcher* and *Frederick Cordes*, defendants.	Order denying motion.

Upon reading and filing the affidavit of *Mary E. Veerhoff*, *Henry B. Fanton*, and *Louis H. Myers*, verified the *25th* day of *March*, 1898, and the affidavit of *Robert H. Thompson*, verified the *4th* day of *April*, 1898, and upon the pleadings herein, and after hearing *Samuel Cohn*, Esq., counsel for the plaintiff, in favor of the motion, and *John J. Crawford*, attorney for the defendant *Marion Thompson*, it is

Ordered, that the motion for the appointment of a receiver of the

1. **For the formal parts** of an order or decree in a particular jurisdiction see the titles Judgments and Decrees, vol. 10, p. 645; Orders, vol. 13, p. 356.

2. *New York.*— Code Civ. Proc., § 713 *et seq.*

See also list of statutes cited *supra*, note 1, p. 591.

This form is copied from the records in Veerhoff *v.* Miller, 30 N. Y. App. Div. 335. The order was reversed and the motion granted by the appellate division.

rents of the premises described in the complaint herein during the pendency of this action be and the same hereby is denied, with *ten* dollars costs to be paid by the plaintiff to the defendant *Marion Thompson.*

Enter: *A. V. W.*, J. S. C.

(2) Granting Application.[1]

1. Requisites of Order or Decree, Generally.— For the formal parts of an order or decree in a particular jurisdiction see the titles Orders, vol. 13, p. 356; Judgments and Decrees, vol. 10, p. 645.

Findings of Fact. — In appointing or refusing to appoint a receiver, the judge is presumed to have found the facts in accordance with the contention of the party in whose favor he decided the motion, and need not find the facts specifically, unless the losing party requests him to do so. Reliance Lumber Co. *v.* Brown, 4 Ind. App. 92; Whitehead *v.* Hale, 118 N. Car. 601; City Nat. Bank *v.* Bridgers, 114 N. Car. 381; Dwelle *v.* Hinde, 8 Ohio Cir. Dec. 177.

Description of Property — *In General.* — The order or decree should direct the receiver to take into his possession and control only such property as is the subject of the litigation. Kreling *v.* Kreling, 118 Cal. 413; Adams *v.* Hannah, 97 Ga. 515; People *v.* Grant, (Supreme Ct.) 19 N. Y. St. Rep. 906; Whitney *v.* New York, etc., R. Co., 32 Hun (N. Y.) 164; Scott *v.* Farmers' L. & T. Co., 32 U. S. App. 468.

Specific Property Described in Bill. — Where a receiver of specific property is sought, and such property is described in the application, it must be described with certainty in the order or decree. Steele *v.* Walker, 115 Ala. 485; Havemeyer *v.* Superior Ct., 84 Cal. 327; Hale-Berry Co. *v.* Diamond State Iron Co., 94 Ga. 61; O'Mahoney *v.* Belmont, 62 N. Y. 133; St. Louis, etc., R. Co. *v.* Whitaker, 68 Tex. 630.

General Description Sufficient.—Where the application is for the appointment of a receiver of the property of an insolvent debtor, or of a corporation or partnership, or of an executor or administrator of a decedent, and no description is contained in the application, it is sufficient if the order describe the property generally as all the property of the insolvent, corporation, or decedent. Havemeyer *v.* Superior Ct., 84 Cal. 327; Hale-Berry Co. *v.* Diamond State Iron Co., 94 Ga. 61; Showalter *v.* Laredo Imp. Co., 83 Tex. 162. Although it is better to state distinctly what the assets are and where located, so as to enable the receiver to more readily and intelligently carry out the order in the premises. Hale-Berry Co. *v.* Diamond State Iron Co., 94 Ga. 61.

Sufficient Description. — An order appointing a receiver is sufficiently specific in its description as to notes and books of accounts which specifies them thus: "The books, notes and accounts of the said defendant in the business of selling cigars, snuff, tobacco and other goods." Martin *v.* Burgwyn, 88 Ga. 78.

Where the order appointed a receiver of the rents and profits of the property known as "Burrows block and mills," it was held that this gave the receiver control of the private wharf which was connected with the property and which was primarily and principally constructed for the purpose of more conveniently carrying on said mills. Grant *v.* Davenport, 18 Iowa 179.

Where an order appointing a receiver of a corporation described the property as "all and every part of the properties, interests, effects, moneys, receipts, earnings, etc.," it was held to include the seal of the corporation. American Constr. R. Co. *v.* Jacksonville, etc., R. Co., 52 Fed. Rep. 937.

Where the petition praying for the appointment of a receiver stated that "said defendant has a large body of real estate in the city of *Laredo*, *Webb* county, *Texas*, of the value of $*150,000*, and a street railway and franchise in said city, of the value of $*100,000*, no other property within plaintiff's knowledge," and the order directed the receiver "to take charge of the property of said company, to have all the powers and perform all the functions of receivers under the law," it was held that the order embraced the whole of the property of the corporation, and that the petition did not clearly limit the application to less than the whole, and that the receiver was entitled to the

arrearages of stockholders for unpaid stock, which for the purpose of payment of debts and distribution of assets of the corporation were by statute to be treated as property. Showalter *v.* Laredo Imp. Co., 83 Tex. 162.

Directing Security — *In General.* — The order should direct that the receiver give security for the faithful discharge of his trust. Tomlinson *v.* Ward, 2 Conn. 396; Williamson *v.* Wilson, 1 Bland (Md.) 418; Matter of Schuyler's Steam Tow Boat Co., 136 N. Y. 169, 64 Hun (N. Y.) 384; Johnson *v.* Martin, 1 Thomp. & C. (N. Y.) 504; Mechanics' F. Ins. Co.'s Case, (Supreme Ct. Spec. T.) 5 Abb. Pr. (N. Y.) 444; Steele *v.* Sturges, (Supreme Ct. Spec. T.) 5 Abb. Pr. (N. Y.) 442; Grantham *v.* Lucas, 15 W. Va. 425.

In Banks *v.* Potter, (C. Pl. Spec. T.) 21 How. Pr. (N. Y.) 469, it was held that, by the practice which existed before the code, the order for the appointment of a receiver was to the effect that the master, unless the court appointed the receiver, should take from the person appointed by him the usual security, which was his own bond with two sureties for the performance of the trust, and file it in the proper office; and that upon filing the report of the master and such security the person appointed should be vested with all the rights and powers of a receiver according to the practice of the court, but the court in a proper case might dispense with the giving of sureties, and when the order was to that effect the appointment was complete with the filing of the receiver's own bond.

Under Statute.—In most of the states it is provided by statute that the court shall direct giving of security.

See list of statutes cited *supra*, note 1, p. 591.

Conveyance of Property — In General. — —In the absence of any statutory provision, property vests in the receiver only by a conveyance to him, and where personal jurisdiction has been acquired over the defendant the order may direct him to convey to the receiver. Merchants' Nat. Bank *v.* Pennsylvania Steel Co., 57 N. J. L. 336; Price *v.* Forrest, 54 N. J. Eq. 669; White's Bank *v.* Farthing, 101 N. Y. 344; Graham *v.* Lawyers' Title Ins. Co., 20 N. Y. App. Div. 440; Chautauque County Bank *v.* Risley, 19 N. Y. 369; Bailey *v.* Ryder, 10 N. Y. 363; Chautauque County Bank *v.* White, 6 N. Y. 236; Mann *v.* Pentz, 2 Sandf. Ch. (N. Y.) 257; Stewart *v.* McMartin, 5 Barb (N. Y.) 438; Fenner *v.* Sanborn, 37 Barb. (N. Y.) 610; Green *v.* Hicks, 1 Barb. Ch. (N. Y.) 309; Chipman *v.* Sabbaton, 7 Paige (N. Y.) 47; Clark *v.* Brockway, 3 Keyes (N. Y.) 13; Scouton *v.* Bender, (Supreme Ct. Gen. T.) 3 How. Pr. (N. Y.) 185; Tomlinson, etc., Mfg. Co. *v.* Shatto, 34 Fed. Rep. 380; Shainwald *v.* Lewis, 6 Fed. Rep. 766.

In *Massachusetts*, it is held that in the absence of statute the title to choses in action belonging to the defendant do not pass to the receiver, and the court has no power to compel the transfer. Amy *v.* Manning, 149 Mass. 487; Harvey *v.* Varney, 104 Mass. 436.

Under Statute — *Personal Property.* — The weight of authority is that where the proceeding is under statute the mere appointment of the receiver vests in him the title to all personal property, choses in action and equitable interests of the debtor, and that no order of assignment is necessary. Young *v.* Clapp, 147 Ill. 176; Price *v.* Forrest, 54 N. J. Eq. 669; Willison *v.* Salmon, 45 N. J. Eq. 257, Harrison *v.* Maxwell, 44 N. J. L. 316; Miller *v.* Mackenzie, 29 N. J. Eq. 291; Edmonston *v.* McLoud, 16 N. Y. 543; Becker *v.* Torrance, 31 N. Y. 631; Bostwick *v.* Menck, 40 N. Y. 383; Wing *v.* Disse, 15 Hun (N. Y.) 190; Iddings *v.* Bruen, 4 Sandf. Ch. (N. Y.) 223; Fessenden *v.* Woods, 3 Bosw. (N. Y.) 550; Ball *v.* Goodenough, (N. Y. Super Ct. Spec. T.) 37 How. Pr. (N. Y.) 479; Storm *v.* Waddell, 2 Sandf. Ch. (N. Y.) 494; Wilson *v.* Wilson, 1 Barb. Ch. (N. Y.) 592; Cooney *v.* Cooney, 65 Barb. (N. Y.) 524; Wilson *v.* Allen, 6 Barb. (N. Y.) 542; Albany City Bank *v.* Schermerhorn, Clarke (N. Y.) 297, 9 Paige (N. Y.) 372; Tillinghast *v.* Champlin, 4 R. I. 173; Barker *v.* Dayton, 28 Wis. 367. The usual practice is, however, to have an assignment executed to receiver. Mann *v.* Pentz, 2 Sandf. Ch. (N. Y.) 257.

Real Estate. — At common law, a receiver did not take title to the debtor's real estate except where the court specially directed the debtor to convey. Wing *v.* Disse, 15 Hun (N. Y.) 190; Chautauque County Bank *v.* White, 6 N. Y. 236. But it has been held that under statute real estate, like person-

alty, vests in the receiver by virtue of his appointment alone. Cooney *v.* Cooney, 65 Barb. (N. Y.) 524; Hayes *v.* Buckley, (County Ct.) 53 How. Pr. (N. Y.) 173; Clan Ranald *v.* Wyckoff, 41 N. Y. Super. Ct. 527; Bostwick *v.* Menck, 40 N. Y. 383; Porter *v.* Williams, 9 N. Y. 142. But see *contra* Moak *v.* Coats, 33 Barb. (N. Y.) 498 (*affirmed* (Ct. App.) 33 How. Pr. (N. Y.) 618); Wilson *v.* Wilson, 1 Barb. Ch. (N. Y.) 592; Scott *v.* Elmore, 10 Hun (N. Y.) 68. See also Manning *v.* Evans, 19 Hun (N. Y.) 500; Wing *v.* Disse, 15 Hun (N. Y.) 190, wherein it is held that the legal estate of the debtor in real estate vests in the receiver on his appointment and the filing and recording of his bond, but that any beneficial interest in the rents and profits merely, and not of the land itself, can be reached only by a direct action for that purpose, and then only so much as may be necessary for the debtor's support can be taken.

Distribution. — An interlocutory order appointing a receiver should not direct a distribution of the proceeds of the property, as distribution cannot be made until final decree. West *v.* Chasten, 12 Fla. 315; Nussbaum *v.* Price, 80 Ga. 205.

Preferring Debts — Quasi Public Corporation. — Where a corporation of which a receiver has been appointed is in its nature quasi public, the order may direct that certain debts, such as operating expenses, have priority of payment. Walker *v.* Green, 60 Kan. 20; Douglass *v.* Cline, 12 Bush (Ky.) 608; Guarantee Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 31 N. Y. App. Div. 511; Gurney *v.* Atlantic, etc., R. Co., 58 N. Y. 358; Farmers' L. & T. Co. *v.* Bankers', etc., Tel. Co., 148 N. Y. 315; Farmers' Loan Co *v.* Oregon Pac. R. Co., 31 Oregon 237; Cowan *v.* Pennsylvania Plate Glass Co., 184 Pa. St. 1; Crosby *v.* Morristown, etc., R. Co., (Tenn. 1897) 42 S. W. Rep. 507; Ellis *v.* Vernon Ice, etc., Co., 86 Tex. 109; McIlhenny *v.* Binz, 80 Tex. 1; Addison *v.* Lewis, 75 Va. 701; Manhattan Trust Co. *v.* Seattle Coal, etc., Co., 16 Wash. 499; Louisville, etc., R. Co. *v.* Wilson, 138 U. S. 501; Kneeland *v.* American Loan, etc., Co., 136 U. S. 89; St. Louis, etc., R. Co. *v.* Cleveland, etc., R. Co., 125 U. S. 658; Burnham *v.* Bowen, 111 U. S. 776; Union Trust Co. *v.* Souther, 107 U. S. 591; Miltenberger *v.* Logansport R. Co., 106 U. S. 286; Turner *v.* Indianapolis, etc., R. Co., 8 Biss. (U. S.) 315; Hale *v.* Frost, 99 U. S. 389; Fosdick *v.* Schall, 99 U. S. 235, Wallace *v.* Loomis, 97 U. S. 146; Pennsylvania Co. *v.* Jacksonville, etc., R. Co., 93 Fed. Rep. 60; Central Trust Co. *v.* Chattanooga, etc., R. Co., 89 Fed. Rep. 388; Manhattan Trust Co. *v.* Sioux City Cable R. Co., 76 Fed. Rep. 658; Putnam *v.* Jacksonville, etc., R. Co., 61 Fed. Rep. 440; Farmers' L. & T. Co. *v.* Kansas City, etc., R. Co., 53 Fed. Rep. 182; Finance Co. *v.* Charleston, etc., R. Co., 49 Fed. Rep. 693, 48 Fed. Rep. 188; Central Trust Co. *v* St. Louis, etc., R. Co., 41 Fed. Rep. 551. But such directions need not be embodied in the order of appointment They may be imposed at subsequent stages of the proceedings. Addison *v.* Lewis, 75 Va. 701; Morgan's Louisiana, etc., R., etc., Co. *v.* Texas Cent. R. Co., 137 U. S. 171; Fosdick *v.* Schall, 99 U. S. 235; Turner *v.* Indianapolis, etc., R. Co., 8 Biss. (U. S.) 315; Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. Rep. 551.

Private Corporation — *In General.* — But where the corporation is strictly private, the order should not direct preference of any claims. Raht *v.* Attrill, 106 N. Y. 423; Cowan *v.* Pennsylvania Plate Glass Co., 184 Pa. St. 1; Manhattan Trust Co. *v.* Seattle Coal, etc., Co., 19 Wash. 493; Wood *v.* Guarantee Trust, etc., Co., 128 U. S. 416; Baltimore Bldg., etc., Assoc., *v.* Alderson, 90 Fed. Rep. 142; Doe *v.* Northwestern Coal, etc., Co., 78 Fed. Rep. 62; Hanna *v.* State Trust Co., 70 Fed. Rep. 2; Fidelity Ins., etc., Co. *v.* Roanoke Iron Co., 68 Fed. Rep. 623; Farmers' L. & T. Co. *v.* Grape Creek Coal Co., 50 Fed. Rep. 481. *Contra* Jones *v.* Arena Pub. Co., 171 Mass. 22; Akron Iron Co. *v.* William N. Whitely Co., 11 Ohio Dec. (reprint) 192; 25 Cinc. L. Bul. 203; and see also Matter of Stryker, 158 N. Y. 526.

Under Statute. — In some states, under statute the court may designate in the order the claims which shall have priority of payment. St. Paul Title, etc., Co. *v.* Diagonal Coal Co., 95 Iowa 551; Central Trust Co. *v.* Sloan, 65 Iowa 655; American Casualty Ins. Co.'s Case, 82 Md. 535; Lewis *v.* Fisher, 80 Md. 139; Hicks *v.* Consolidation Coal Co., 77 Md. 86; Little *v.* Dusenberry, 46 N. J. L. 614; Vane *v.* Newcombe, 132 U. S. 220;

Newgass *v.* Atlantic, etc., R. Co., 72 Fed. Rep. 712.

Six Months Rule. — The usual rule is to allow claims for material and labor accruing within the six months preceding the appointment of the receiver preference, but in the absence of statute the order need not thus limit the time. Rutherford *v.* Pennsylvana Midland R. Co., 178 Pa. St. 38; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434.

In Walker *v.* Green, 60 Kan. 20, is set out, in an order appointing receivers of a railroad company, the following conditions relating to liability incurred in the operation of the road. "The receivers herein are therefore further directed to pay all just and legal debts, demands, and liabilities due or owing by the defendant company, which accrued or were incurred for work, labor, materials, machinery, fixtures and supplies of every kind and character, done, performed or furnished in the improvement, equipment or operation of said road and its branches, and all just and legal liabilities incurred by the said company in the transportation of freight and passengers, including damages for injuries to employees or other persons and to property, which have accrued, or upon which suit has been brought or was pending, or judgment rendered, within *twelve* months last past. The receivers are authorized and directed to pay all such debts and liabilities, as the same shall accrue, out of earnings of the road. For all liabilities incurred by the receivers in the operation of the road they may be sued in any court of competent jurisdiction, or the claimant may, at his election, file an intervening petition in this cause, and have his demand adjudicated in this court. Judgment obtained against the receivers in the state courts which are not appealed from, and judgment against the company on demands which the receivers are by the terms of this order required to pay, not appealed from, will be audited and allowed by the receivers as of course; or will, upon filing a transcript of the same in the master's office of this court, be audited and allowed as of course, as adjudicated claims against the receivership. The receivers may be sued in any court of competent jurisdiction without an application by the plaintiff in such suit to this court for leave to do so."

It was held that the right of the court to impose these equitable conditions was undoubted.

In Union Trust Co. *v.* Souther, 107 U. S. 591, an order appointing a receiver of a railroad contained the following condition. "And said receiver, after paying the expenses of operating, maintaining, and repairing said railroad and property, and after making such other payments herein authorized as are or may be necessary for the conduct of such receivership, shall pay and discharge all amounts due and owing by said railroad company for labor, or supplies, that may have accrued in the operation and maintenance of such railroad property within *six* months immediately preceding the rendition of this decree." The condition was held a valid one.

In Louisville, etc , R. Co. *v.* Wilson, 138 U. S. 501, there was the following provision in the order appointing receiver· "It is further ordered, adjudged and decreed that the said receiver, out of the income that shall come into his hands from the operation of the said railway or otherwise, do proceed to pay all just claims and accounts for labor, material, supplies, salaries of officers and wages of employees that may have been earned or furnished within *six* months prior to *January 1. 1885*, and all taxes."

No objection was made to the provision, but it was held that the term "wages of employees," as used in the order, did not include the services of counsel employed for special purposes.

In Scott *v.* Farmers' L. & T. Co., 32 U. S. App. 468 note, an order of the circuit court appointing receivers in a foreclosure suit contained the following among other provisions.

"And it appearing to the court that the defendant company owes debts and has incurred liabilities which the holders thereof could, without any interference with the legal or equitable rights of the complainant under the mortgage set out in the bill, collect by proceedings at law from said defendant, by seizing its rents, income and earnings, and in other lawful modes, if not restrained from so doing by this court, and that it would be inequitable and unjust for the court to deny to said creditors their legal right to collect their several debts by appointing receivers to take and receive the earnings of said road during the pendency of

this suit, as prayed by the complainant, without providing for the payment of such debts and liabilities.

It is therefore declared that this order appointing receivers herein is made upon this express condition, namely: That all debts, demands and liabilities due or owing by the defendant company, which were contracted, accrued, or were incurred in this district, or are due or owing to any resident of this district, for ticket and freight balances or for work, labor, materials, machinery, fixtures, and supplies of every kind and character, done, performed, or furnished in the repair, equipment, or operation of said road and its branches, in the State of *Minnesota*, and all liabilities incurred by the said company in the transportation of freight and passengers, including damages for injuries to employees or other persons, and to property, which have accrued or upon which suit has been brought or was pending, or judgment rendered in this State within *twelve* months last past, and all liability of said company to persons or corporations who may have heretofore become residents or citizens of this district who may have become sureties for said company on stay or supersedeas bonds, or cost bonds, or bonds in garnishment proceedings, without regard to the date of said bonds, or whether such bonds were furnished in actions or proceedings pending within this district or elsewhere, together with all debts and liabilities which the said receivers may incur in operating said road, including claims for injury to persons and property as aforesaid, shall constitute a lien on said railroad and all property appurtenant thereto, in this district, paramount to the lien of the mortgages of which foreclosure is sought in the bill in this case; and that said railroad shall not be released or discharged from the liens hereby declared until such debts and liabilities are paid. The receivers are authorized and directed to pay all such debts and liabilities, as the same shall accrue, out of the earnings of the road, if practicable, or out of any funds in their hands applicable to that purpose, and if not sooner discharged then the same shall be paid out of the proceeds of the sale of said road."

The order relating to the payment of debts in the district of Minnesota, being made by a court of ancillary jurisdiction, was restricted in its operation to debts due to citizen of that district, or debts contracted or payable in that district. The validity of the order was not contested, and the debts embraced therein were paid by the receivers from moneys derived from the earnings of the road and other sources.

Directing Suit. — The order appointing the receiver may contain a clause authorizing him to sue generally. Comer *v.* Bray, 83 Ala. 217; Taylor *v.* Canaday, 155 Ind. 671; Hatfield *v.* Cummings, 142 Ind. 350; Frank *v.* Morrison, 58 Md. 423; Hayes *v.* Brotzman, 46 Md. 519; Fogg *v.* Supreme Lodge, etc., 156 Mass. 431; Boyd *v.* Royal Ins. Co., 111 N. Car. 372; Lathrop *v.* Knapp, 37 Wis. 307; Schultz *v.* Phenix Ins. Co., 77 Fed. Rep. 375. But in Witherbee *v.* Witherbee, 17 N. Y. App. Div. 181, it was held in a partnership proceeding that an order of appointment which authorized the receiver to prosecute and defend, without the further order of the court, all actions brought or about to be brought against copartners or any of them, pertaining to such copartnership business, was too broad, because it authorized in advance the commencement of suits without any knowledge of what they were for or of the necessity thereof.

In Comer *v.* Bray, 83 Ala. 217, a receiver was "authorized and directed to institute such suits in law or equity as in his judgment may be necessary, against all persons who are indebted to said bank, or against whom debts are claimed by said bank, and who fail or refuse to pay without suit; * * * and said receiver is also further authorized to defend any suits at law or in equity affecting the assets of said bank in his charge, which may be instituted in any court in this state; and for prosecuting and defending such suits, he is hereby authorized and empowered to employ competent counsel, at reasonable rates for the service to be performed in each such cases." It was held that the receiver could properly file a bill for the foreclosure of a mortgage given to the bank.

Directing Sale of Property. — The order may direct a sale of property, both real and personal, pending the action, in a proper case. Forsaith Mach. Co. *v.* Hope Mills Lumber Co., 109 N. Car. 576.

Directing Continuance of Business. — In Sager Mfg. Co. *v.* Smith, 45 N. Y.

App. Div. 358, the order appointing receiver contained, among other things, the following: "The said receiver is hereby fully authorized and directed to take immediate possession of all and singular the property above described, wherever situated or found, and to collect all accounts and sums due or to become due to the *Worcester Cycle Manufacturing Company*, and for that purpose to carry on and continue the business of said defendant company as the same is now carried on, and so far as may be necessary to preserve its rights under its contracts, acting in all things under the order and direction of the court. * * * Said receiver is hereby fully authorized to continue to operate and carry on the business of the defendant Cycle Company, in such manner as the same is now conducted, or in such manner as will in his judgment produce the most satisfactory results, so far as may be necessary, for the preservation from loss of the outstanding contracts of said defendant Cycle Company, and to collect and receive all the income therefrom, and all the debts due said company of all kinds, and for such purpose is hereby vested with full power, at his discretion, to employ and discharge and fix the compensation of all such officers, attorneys, managers, superintendents, agents and employees as may be required in the discharge of his trust, with the approval of one of the judges of this court. * * * Said receiver shall from time to time, out of the funds coming into his hands from the operation of the property and otherwise, pay the expenses of operating the same and executing his trust, and all taxes and assessments upon the said property or any part thereof."

It was held that this order authorized the receiver to complete any contracts which the cycle company had entered into and which were partially performed, to the end that the contract price might become due and collectible.

Injunction. — The order may contain an injunction against interference, by the debtor or other person interested, with the possession of the receiver of, or the prosecution of suits involving, the property. Collins *v.* Colley, (N. J. 1887) 11 Atl. Rep. 118; Hilton Bridge Constr. Co. *v.* New York Cent., etc., R. Co., 145 N. Y. 390; Morgan *v.* New York, etc., R. Co., 10 Paige (N. Y.) 290; Temple *v.* Glasgow, 42 U. S. App. 417.

In Temple *v.* Glasgow, 42 U. S. App. 417, that part of the order appointing a receiver which related to an injunction was as follows:

"The officers and agents of the said company are hereby enjoined and restrained from exercising any rights or control over the property, assets, books and papers of said company, and from interfering in any manner whatever with the control and management of the receivers over and with the same.

And all persons who are or claim to be creditors of the said company are hereby enjoined and restrained from instituting any suit or suits against the said company; and in case any such suit or suits has or have been heretofore instituted against the said company, the further prosecution of the same is or are hereby enjoined and restrained."

No objection was made to the form of this injunction.

Nonresident Receiver. —Where the receiver appointed is a nonresident, the court may direct that he appoint an agent within the jurisdiction of the court upon whom process may be served. New York Security, etc., Co. *v.* Equitable Mortg. Co., 71 Fed. Rep. 556.

In New York Security, etc., Co. *v.* Equitable Mortg. Co., 71 Fed. Rep. 556, a paragraph of the order was as follows:

"It is further ordered that said receivers designate, in due form, some person having an office in the place in which the office of the clerk of the circuit court of this district is located, on whom service of notices, writs, and other process may be made, and that said receivers execute and file in said clerk's office a notice, stating the name and residence of such agent, and that he is authorized, in behalf of the receivers, to receive and accept service of notices and writs and other process, as herein designated, and that service of notices and writs on said agent shall be equivalent to personal service on said receivers, whether said notices or writs are issued out of this or any state court."

It was held that it was competent for the court in appointing receivers to impose such conditions and obligations. (*Citing* Central Trust Co. *v.* Texas, etc., R. Co., 22 Fed. Rep. 135; Union Trust Co. *v.* Souther, 107 U. S. 591.)

When order is made upon an ex parte application, it should show why it was

(*aa*) *In Administration of Decedent's Estate.*[1]

necessary to appoint the receiver without notice. Bacon *v.* Northwestern Stove Co., 3 Ohio Cir. Dec. 143.

Precedent. — In State *v.* Rivers, 64 Iowa 729, is set out, as an exhibit, the following order:

"Be it remembered, that on the *twenty-fourth* day of *April*, 1880, at the adjourned term of the *circuit* court of *Iowa* in and for *Polk* county, *Iowa*, begun on the *twentieth* day of said month, and held at the court house in said county, the following, among other proceedings, were had and entered of record. Present, *John Mitchell*, sole Judge; *J. L. Keyes*, clerk, etc.

On the *twenty-fourth* day of *April*, 1880, the same being the *59th* day of the *January* term, 1880, of this court, this cause came up for hearing upon the motion of plaintiff for more specific statement, etc., in the answer of the defendants, *James* and *Marsh*, and upon the amendment to the petition asking the appointment of a receiver to take charge of the real estate in controversy until the final determination of this cause, or the further action of the court in the premises.

Both parties appear by their attorneys, and plaintiff asks and obtains leave to amend its said motion; and the court, having heard counsel, and being fully advised in the premises, sustains such motion in part, and directs that defendants attach to their answer a copy of the written lease, and an abstract of the title under which defendants claim possession of said premises. Defendants asking time to answer over, it is therefore ordered by the court that defendants file their amended answer herein on or before the *first Monday* in *June*, 1880; that *Stephen Adams*, sheriff of *Dallas* county, be, and he hereby is, appointed receiver herein, to take and have the charge, custody and care of the premises in controversy, to wit: The northeast quarter, the east half of the northwest quarter, the northeast quarter of the southwest quarter and the north half of southeast quarter of section *twenty-nine*, township *eighty-one*, range *twenty-six*, *three hundred and sixty* acres, in *Des Moines* township, *Dallas* county, *Iowa*, and all appurtenances thereunto belonging; that said *Adams* file with the clerk of this court his receiver's bond, in the penalty of $*1,000*, with sureties to be approved by clerk, and take the oath prescribed by law, whereupon he shall be vested with the usual rights and powers of a receiver of this court, for the special purpose aforesaid, using all reasonable care and diligence to prevent damage and waste to said premises, or to the crops, buildings and improvements thereon. And all parties to the aforesaid cause of action, or interested in said premises, are hereby directed to recognize and respect said officer accordingly. To all which *Robert James* and *Willis Marsh* except.

John Mitchell, Judge."

No objection was made to this order.

1. In Administration Proceedings. — In administration proceedings, a receiver will be appointed when the executor or administrator has been guilty of misconduct, waste or misuse of assets and there is real danger of loss. Fairbairn *v.* Fisher, 4 Jones Eq. (57 N. Car.) 390; Stairley *v.* Rabe, McMull. Eq. (S. Car.) 22; Harmon *v.* Wagener, 33 S. Car. 487; Bowling *v.* Scales, 2 Tenn Ch. 63. But mere poverty on the part of the executor or administrator is not sufficient to warrant the appointment of a receiver. Fairbairn *v.* Fisher, 4 Jones Eq. (57 N. Car.) 390; Stairley *v.* Rabe, McMull. Eq. (S. Car.) 22; Bowling *v.* Scales, 2 Tenn. Ch. 63.

Requisites of Order or Decree, Generally. — See *supra*, note 1, p. 673.

Precedents. — In Morris *v.* Bradford, 19 Ga. 527, is set out the following order:

"*Isham Jones et al.* vs. *Andrew McLean*, administrator, *Thos. Glascock*, dec'd, *et al.* } In Equity.

James Beard vs. Same. } In Equity.

Sam'l W. Young vs. Same. } In Equity.

The defendant, *Andrew McLean*, having been, by the Court of Ordinary of *Richmond* county, removed from the administration of the estate of said *Thomas Glascock*, since the rendition of the verdict in said cases, and no other person applying for administration; and it being necessary that some person should be appointed to receive and dispose of said estate: It is ordered, that *William W. Holt* be, and he is

Form No. 17163.[1]

(Precedent in Harmon *v.* Wagener, 33 S. Car. 488.)[2]

[The State of *South Carolina*, County of *Newberry*. } In the Court *of Common Pleas.*

Thomas F. Harmon, as executor of the last will and testament of *Mary E. Harmon*, deceased, and in his own right, plaintiff,

against

Frederick W. Wagener and *Robert A. Wagener*, partners under the firm name of *F. W. Wagener & Company*, *et als.*, defendants.][3]

On hearing the pleadings and orders in the above stated action, the affidavits in behalf of unsecured creditors of the above named *Mary E. Harmon*, deceased, the order to show cause why a receiver of the real and personal estate of said deceased should not be appointed, and the return of the said *Thomas F. Harmon* thereto, and affidavits submitted in his behalf, and after hearing argument of counsel, on motion of *O. L. Schumpert*, Esq., attorney for such unsecured creditors,

It is adjudged, that the said *Thomas F. Harmon* has failed to administer the estate of his said testatrix, as required by law and the will of his said testatrix, and demanded by the interests of

hereby appointed, receiver, with full power to sell and dispose of said estate, or any part thereof, wheresoever the same may be; and as such receiver, to give and to execute all necessary titles to the purchasers, retaining out of the proceeds his travelling and other expenses, and such commission as may hereafter be determined on by the court. It is further ordered, that said receiver sell and dispose of said property, at such times, publicly or privately, and upon such terms, as he may think best; and that he report at each term of this court hereafter, his proceedings in the premises. It is further ordered, that the accounts of said administrator be referred to the Master in Equity, and that he report thereon at the next term of this court."

No objection was made to this order.

In Ladd *v.* Harvey, 21 N. H. 514, the order directed that Henry F. French, Esq., be appointed receiver in this case, and that a commission issue to him accordingly, upon his giving bond for the faithful discharge of his duties, according to the seventy-second rule of this court. He is to demand and receive from Nathaniel G. Harvey all the property now in his possession, to which his late wife Louisa was entitled by the will of Lydia Watson, deceased, and upon receiving the same is to hold it subject to the future order of this court.

It was also ordered, that an injunction issue restraining all the defendants, until the further order of the court, from paying to the said Harvey any money in discharge of any debt which arose out of the sum of $2,000, bequeathed by Lydia Watson to Louisa L. Ladd and from making any further change in the securities given for said sum or any part thereof, and from delivering to the said Harvey any personal property bequeathed by the said Lydia to the said Louisa.

And it was also ordered, that the said Harvey deliver to the receiver all the personal property in said Harvey's possession to which his wife became entitled by virtue of the will.

It was held that the appointment of a receiver in this case was proper.

1. *South Carolina.* — Code Civ. Proc. (1893), § 265.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, p. 679.

2. It was held by the supreme court that a case was made out for the appointment of a receiver, and that there was no error in this order of the circuit judge.

3. The matter enclosed by [] will not be found in the reported case.

creditors. It is also adjudged, that the said *Thomas F. Harmon* has become insolvent, if not so at the death of the said testatrix, and is therefore not a safe custodian of the estate committed to his care under the said will. It is also adjudged, that the estate of the said testatrix now visible is probably insufficient to extinguish the demands acknowledged and established against it. It is therefore ordered, that the injunction heretofore made by me against the further sale of property of the said estate by the said *Thomas F. Harmon*, and against the collection by him of notes, bonds, accounts, or other claims or demands belonging to the said estate, and also of all moneys belonging to the same, be continued, and made perpetual.

It is further ordered, that *D. B. Wheeler* be, and he is hereby, appointed receiver of all the tangible personal property, notes, bonds, stocks, accounts, and other choses in action belonging to the said estate, and also of all moneys belonging to the same, and that the said *Thomas F. Harmon*, immediately upon the execution by the said receiver of a bond in the penalty of *two thousand* dollars, with *two* such sureties as shall be approved by the clerk of the Court *of Common Pleas* for *Newberry* county, do deliver to the said receiver all the moneys, tangible property, notes, bonds, stocks, mortgages, accounts, and other choses belonging to said estate, including not only all the property which came into his hands in its present form at the death of his said testatrix, but also all notes or other evidences of indebtedness which have been made or executed in payment of previous indebtedness to her, and also notes or other obligations based upon collections of her estate and lent out by him, or based upon sales of property of the estate made by the said executor, and also all tangible property and choses in action purchased by the said *Thomas F. Harmon*, with moneys or property belonging to the said estate. And it is further ordered, that the said receiver be, and he is hereby, authorized to demand, sue for, and collect all sums of money owing to the said estate. Motion refused as to real estate.

[(*Signature and date as in Form No. 6244.*)][1]

(*bb*) *In Mortgage or Trust Foreclosure Proceedings.*[2]

aaa. In General.

Form No. 17164.[3]

In Chancery of *New Jersey.*

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **Requisites of Order or Decree, Generally.** — See *supra*, note 1, p. 673.

Directing Conveyance of Property.—The court cannot direct conveyance to the receiver of property of the debtor which is not covered by the mortgage. St. Louis Car Co. *v.* Stillwater St. R. Co., 53 Minn. 129; Scott *v.* Farmers' L. & T. Co., 32 U. S. App. 468.

And see, generally, *supra*, note 1, p. 673.

An order that "the goods, wares and merchandise and effects" of the defendant be delivered to the receiver is erroneous, when the agreement of defendant, as stated in the bill, was that he would give a mortgage "of all his stock in trade in the city of *Baltimore.*" Triebert *v.* Burgess, 11 Md. 452.

3. This form is copied from the records of the case.

See, *supra*, note 2, this page.

Between
The Jersey City Insurance Company, complainant,
and
Margaret Emily McLaughlin, defendant.
} On Bill, etc. On Petition, etc. Order for Receiver.

Application having been made to the chancellor setting forth the inadequacy of the mortgaged premises to satisfy the complainant's mortgage against the same, the incumbrance of said premises by sales for arrears of taxes and by taxes and water rents which have become liens paramount to the lien of complainant's mortgage, the death of the mortgagor, the insolvency of her sole devisee, the present holder of the premises, and the non-payment of interest on complainant's mortgage, and praying that a receiver may be appointed to rent the same and to keep the same rented and receive the rents, issues and profits thereof, and due notice of the application for this order having been given, and it appearing reasonable and proper that said prayers should be granted,

It is on this *tenth* day of *August*, eighteen hundred and *eighty*, on motion of *Bedle, Muirheid and McGee*, solicitors of the said complainant, ordered that *John Hancock*, Esq., be and he hereby is appointed pending this suit a receiver of the mortgaged premises mentioned and described in the bill filed in this cause to take possession of said mortgaged premises and rent the same and keep the same rented and receive the rents, issues and profits thereof, and hold the same subject to the further order or decree of this court in this cause, with all the power and authority and with all the responsibilities of receivers.*

And it is further ordered that said receiver give bond to the chancellor for the faithful performance of his duties as receiver to be approved by *Josiah Crosby*, Esquire, one of the Masters of this court, as to amount and sufficiency of surety, before said receiver enters upon the duties of his office. Said bond to be filed with the clerk of this court.

(*Signature as in Form No. 10619.*)

bbb. Of College.

Form No. 17165.[1]

(Precedent in Worthington *v.* Oak, etc., Park Imp. Co., 100 Iowa 40.)[2]

[(*Venue and title of court and cause as in Form No. 12063.*)][3]

And now, this cause coming on to be heard upon the application of the plaintiffs for the appointment of a receiver, the plaintiffs appearing by *C. C. & C. L. Nourse*, their attorneys, and the defendants, the *Oak and Highland Park Improvement Company* and *Highland Park Normal College* by *E. J. Goode*, their attorney, and *O. H. Longwell* by *Barcroft & McCaughan*, his attorneys, and *L. M. Mann* in person, and all parties consenting thereto, it is ordered and adjudged

1. *Iowa.* — Code (1897), § 3822.
See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 2, p. 681.

2. No objection was made to the form of this order.

3. The matter to be supplied within [] will not be found in the reported case.

that *L. M. Mann* be, and he is hereby, appointed receiver of the property described in the mortgage, with full authority to take possession thereof, and receive, manage, and control the rents and income arising therefrom. It is further ordered that the said receiver have authority, and he is hereby directed, to continue to operate the said college, as an institution of learning, affording like facilities as heretofore, and to operate the dormitories and boarding department of said college in connection therewith, and to make all contracts for professors, teachers, servants, helpers, and assistants he may find necessary to the successful operation and continuance thereof. Said receiver is also hereby authorized to employ the present president, *O. H. Longwell*, to take charge of the educational department of said college, upon such terms as he may agree upon with the said *Longwell*, and also to recognize and adopt any contracts now outstanding made by the said *Longwell* for the employment of professors for help for the ensuing year, or for printing and advertising for the ensuing year, and for work and labor and supplies for the ensuing year, so far as the said receiver may deem the same necessary and advantageous to the successful operation of the college. The receiver is also authorized to effect an insurance of the property, and to pay all taxes and assessments against the same. And the receiver is further authorized to issue receiver's certificates in payment of, or to raise money for the employment or purchase of work and labor, material, or supplies, as above authorized, and the same shall be a first lien upon any funds coming into his hands by virtue of his receivership; and the receiver has leave to apply to the court for such further order, or direction, as he may deem necessary from time to time to carry out the above orders. And it is further ordered that the said *L. M. Mann* give bond in the penal sum of *twenty thousand* dollars (*$20,000*), with sureties to be approved by the clerk of this court, conditioned as required by law, for the faithful performance of his duties.

Dated *July 27*, 1893. *C. P. Holmes*, Judge.

ccc. Of Farm.

Form No. 17166.[1]

(Precedent in Worrill *v.* Coker, 56 Ga. 670.)[2]

After hearing the bill, answer and affidavits in this case, and after argument of counsel, it is ordered, that *Moses Speer*, Esq., be, and he is hereby appointed receiver, to take charge of the farm mentioned in said bill, and receive the crops, issues, rents and profits arising therefrom, and hold them subject to the order of the court. If *John R. Worrill* withdraws his mules and other stock from said farm, which he is at liberty to do, the complainant, *Coker*, must furnish such stock as is necessary to said farm. He is also to supply said farm with all

1. *Georgia.* — 2 Code (1895), § 4900 *et seq.*

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 2, p. 681.

2. The defendants in this case entered their general demurrer to the bill for want of equity and moved to dismiss said bill and discharge the receiver, which demurrer was overruled and the receiver retained by the court. On exceptions, the judgment was affirmed.

needful implements of husbandry, and furnish all such supplies as are necessary to keep said farm in running order, and necessary to further the crop.

After the crops of the year are gathered, the receiver will report to this court the amount and kind thereof, and will keep an account of all expenditures and receipts, and be ready at any time to report to this court.

J. M. Clark, J. S. C. *S. W. C.*

At Chambers, *August 2d*, 1875.

ddd. Of Railroad.[1]

1. Requisites of Decree or Order, Generally. — See *supra*, note 1, p. 673.

Precedents. — In Pope *v.* Louisville, etc., R. Co., 173 U. S. 573, the order appointing a receiver was, in part, as follows:

"And it is further ordered that the defendant, the said *Chicago and South Atlantic Railroad Company*, or whoever may have possession thereof, do assign, transfer and deliver over to such receiver under the direction of *Henry W. Bishop*, a master in chancery of this court, all the property, real and personal, wheresoever found in this district, and all contracts for the purchase of land, and all other equitable interests, things in action, and other effects which belonged to, or were held in trust for, said defendant railroad company, or in which it had any beneficial interest, including the stock books of said railroad company, in the same condition they were at the time of exhibiting the said bill of complaint in this cause, except so far as necessarily changed in the proper management of said road, or in which it now has any such interest, and that said defendant, *Chicago and South Atlantic Railroad Company*, deliver over, in like manner, all books, vouchers, bills, notes, contracts and other evidences relating thereto, and also the stock books of said railroad company.

And it is further ordered that the said receiver have full power and authority to inquire after, receive and take possession of all such property, debts, equitable interests, things in action, and other effects, and for that purpose to examine said defendant, its officers and such other persons as he may deem necessary on oath before said master from time to time."

No objection was made to this order.

In Chicago Deposit Vault Co. *v.* McNulta, 153 U. S. 554, the order was, in part, as follows: "And the said receiver is hereby empowered and instructed to take possession of all of the said property described in said mortgage or appurtenant thereto, and to manage, control, and operate the said railroad described in said mortgage, preserve and protect all said property, and collect, as far as possible, all assets, choses in action, and credits due to said company, acting in all things under the orders of this court * * * Said receiver shall also have authority, subject to the supervision of the court, to make such repairs to said railway and property as are necessary in his judgment for carrying on the business thereof, and also to make all contracts that may be necessary in carrying on the business of said railroad, subject to the supervision of this court * * * It is further ordered that the said receiver, out of the income which shall come into his hands by the operation of said railroads or otherwise, proceed to make payments as follows: That he pay all current expenses incident to the creation or administration of his trust and to the operating of said railroad; that he pay all amounts now legally due or that shall hereafter become due for taxes on any of the property over which he is appointed receiver; that he pay all balances due or to become due to other rairoads or transportation companies on balances growing out of the exchange of traffic with such railway accruing *six* months prior hereto; * * * that he pay all rentals to become due upon rolling stock heretofore sold to said railroad company and partially paid for and necessary for use in the operation of the road over which the said receiver is appointed, covered by the mortgage described in the bill

herein, and which come into the hands of the receiver under the operation of this order."

The order further directed that after the discharges and making of the payments which were required by the terms of the order the receiver should retain any surplus remaining in his hands to be applied to the payment of the past due and matured interest coupons secured by the mortgage. The question was raised whether the order conferred upon the receiver authority to enter into a contract of lease involving a large annual expenditure and extending beyond the receivership, so as to make the contract a proper charge against the trust property under the administration of the court. It was held that the order was not broad enough in its terms to authorize the receiver to enter into such a contract of lease, so as to give it validity without the approval or confirmation of the court.

In Wallace *v.* Loomis, 97 U. S. 146, is an order set out in part as follows:

"It appears, by the affidavits and proofs duly submitted and filed in this cause, that the property in question, to wit, the railroad and connecting works, and other property late of the *Alabama and Chattanooga Railroad Company*, which are embraced in and covered by the mortgage known as the first mortgage of said company, are rapidly deteriorating in value, and being wasted, scattered, and destroyed, whereby the security of the first-mortgage bondholders, and the interest of all other persons concerned in said property, are subject to great hazard and danger of entire sacrifice.

And whereas the governor of *Alabama*, on behalf of said State, has purchased the said property at the sale thereof by the assignees in bankruptcy of the said company, for the purpose of protecting the interests of said State, as guarantor or indorser of $4,720,000 of said first-mortgage bonds, the indorsement of which has heretofore been recognized by the governor of *Alabama* as valid, or upon which he has heretofore paid interest, but it appears that the said State, as well as the said company, has failed to pay the full amount of interest due on said bonds;

And whereas, in the present condition of said property, it is impossible, without great sacrifice, to dispose of the same in any manner; and whereas it has been proposed and agreed by the parties interested that all further opposition to the proceedings in bankruptcy against said company in the *District* Court for the Middle District of *Alabama* shall be withdrawn, and that the said proceedings shall be affirmed; and that all other proceedings for the appointment of receivers in the several State and District courts shall be discontinued, so that the proceedings in this suit shall have full effect and operation without undue embarrassment, and that a receiver or receivers shall be appointed in this cause, to take charge of said property, and put the same into proper condition for its preservation and disposition, for the mutual benefit of all parties interested therein;

And whereas, in view of all the evidence and admissions of the parties, the court is satisfied that a receiver or receivers ought to be appointed to take charge of the entire property and manage the same, and to put the same in order and repair, to prevent the entire destruction thereof."

The order then appointed three receivers with power to take possession of the property and collect the debts and claims due to the company, and also with power to put the road and property in repair and to complete any uncompleted portions thereof, and to procure rolling-stock and to manage and operate the road to the best advantage, so as to prevent the property from further deteriorating, and to save and preserve the same for the benefit and interest of the first-mortgage bondholders and all others having an interest therein. The order also provided that, to enable the receivers to discharge the duty imposed upon them, they might raise money to the amount limited in the order, by loan if necessary, upon certificates to be issued by them which should be a first lien on the property.

It was held that the power of a court of equity to appoint receivers of the railroad property when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property and make the same chargeable as a lien thereon for its repayment, could not at this day be seriously disputed.

In Central Trust Co. *v.* St. Louis,

Form No. 17167.

(Precedent in Skiddy *v.* Atlantic, etc., R. Co., 3 Hughes (U. S.) 334.)[1]

[(*Venue and title of court and cause as in Form No. 11887.*)][2]

The motion for the appointment of a receiver in this cause having been argued and considered, it is ordered by the court,

First. That *Charles L. Perkins*, of *New York*, and *Henry Fink*, of *Lynchburg, Va.*, be and are hereby appointed joint receivers of all and singular the mortgaged premises specified and described in the deed of trust referred to in the plaintiffs' bill of complaint, including the entire line of railroad herein mentioned, all and singular the franchises, lands, tenements, and hereditaments of the said defendant company, all and singular the books, papers, and records thereof, all and singular the rolling stock, tools, machinery, engines, and all other personal property of every kind and description of the said company.

Second. That the said receivers, before entering upon the performance of their duties as such under this order, do each of them severally execute a bond with sureties to be approved as to form and sufficiency by a judge of this court, and filed with the clerk thereof in the sum of *one hundred thousand* dollars for the faithful discharge of his duties in the premises.

Third. That upon filing such bond the said receivers proceed to

etc., R. Co., 41 Fed. Rep. 551, is set out the following order:

"On this day comes the plaintiff, by *Phillips and Stewart*, its attorneys, and the defendant, by *J. M. & J. G. Taylor*, its attorneys, and the receivers, by *S. H. West*, their attorney, and *S. W. Fordyce*, one of the receivers, in proper person, and the proper order to be made by the court on the subject of the payment of debts and liabilities of the defendant company by the receivers came up for consideration; and, the court being now well and sufficiently advised in the premises, it is ordered that the following debts and demands against the company which have accrued since the execution of the mortgages in suit — viz., the debts due from the railroad company for tickets and freight balances, and for work, labor, materials, machinery, fixtures, and supplies of every kind and character, done, performed, or furnished in the construction, extension, repair, equipment, or operation of said road and its branches in this state, and all liabilities incurred by said company in the transportation of freight and passengers, including damages to person and property, and for breaches of contracts for the transportation of persons and property, and all claims and demands upon which suit has been heretofore brought or judgment recovered in the United States or state courts in this state, together with all debts and liabilities which the receivers may incur in operating said road in this state, including claims for injuries to persons and property — shall constitute a lien on said railroad, and all property appurtenant thereto, superior and paramount to the lien of the mortgages set out in the bill, as provided by the statute of this state, and said road shall not be released or discharged from said lien until said debts and liabilities are paid. The receivers are authorized and directed to pay all such debts and liabilities out of the earnings of the road, or out of any fund in their hands applicable to that purpose; and, if not sooner discharged, then the same shall be paid out of the proceeds of the sale of the road."

No exception was taken to this order because it was not made when the receiver was appointed.

1. No objection was made to the form of this order.

See, generally, *supra*, note 1, p. 684.

2. The matter to be supplied within [ ] will not be found in the reported case.

take possession of all and singular the premises whereof they are hereby appointed receivers; that they continue to run and operate the said railroad of the defendant as the same is now operated for the common carriage of freight and passengers, keeping the premises and property, both real and personal, in good condition and repair, to the end that the said road may be operated efficiently and with safety to the public; that they as such receivers have authority to employ, pay, and discharge, from time to time, in their discretion, all needful laborers, servants, agents, attorneys and counsel; to purchase and pay for all needful materials and supplies; to settle and adjust with other roads all traffic balances in the usual course of business; to make from time to time, in their best discretion, all needful and proper traffic arrangements with other roads for the interchange of business; to pay all taxes on the property whereof they are appointed receivers, that may be due and payable, or may become due and payable during this receivership; to prosecute and defend without the further order of this court all existing actions by or against said company; and to defend all actions that may hereafter be brought against the said company or against themselves, as such receivers, by the permission of this court, and to pay the expenses of such prosecution and defense, and also the expenses and disbursements of the plaintiffs, trustees in and about the appointment of the said receivers; to use the name of the said company in the prosecution of all such actions as they may find it proper or necessary in their discretion to bring, maintain, or defend, with full power to compromise, adjust, and settle, in their best discretion, all such actions, suits, or controversies now existing, or that may hereafter arise; to do whatever may be needful and proper to maintain and preserve the corporate organization and franchises of the company until the further order of this court, and to pay and expend such sum, and no more, for that purpose as may be hereafter, on application and hearing, ordered by this court; to redeem any and all securities of the company now pledged as security for loans of money, if any there be, if it shall be for the interest of the trust, hereby reposed in the said receivers so to do, but not otherwise.

Fourth. It is further ordered that as soon as may be, after the said receivers have entered upon the performance of their duties, they make a true, full, and perfect inventory of all and singular the real and personal property of every kind and description whereof they are appointed receivers, and which may come into their possession, and file the same with the clerk of this court, and due notice of such filing to be given to the plaintiffs' solicitors.

That the said receivers do keep full, true, and accurate accounts of all and singular their acts and doings in the premises; that they render and file with the clerk of this court such account within *ten* days after the expiration of every month of their receivership, and serve copies thereof upon the plaintiffs' solicitors, and that they have liberty to pass their accounts from time to time before *Matthew F. Pleasants*, who is hereby appointed a master for that purpose, on *ten* days' notice to the plaintiffs' solicitors after the service on them of such copy thereof; that any question which may arise on such accounting

be reported to this court for examination and decision, and that such accounting, when from time to time had and completed, shall be final and conclusive upon all parties, unless on due cause shown the same shall, during the pendency of this action, be opened on special application.

Fifth. It is further ordered that all moneys coming into the hands of the said receivers, or either of them, be by them deposited in one or more safe banks of deposit within the State of *Virginia*, to be approved by this court or a judge thereof, to the joint credit of the receivers, to be thence drawn out on their joint order or on the order of an agent or attorney to be by them agreed upon.

It is further ordered that the said receivers, exercising due prudence and caution in the selection thereof, shall not be responsible for the wrongful acts of their servants and agents.

It is further ordered that the said receivers shall not, nor shall either of them, in any case incur any personal or individual liabilities in the operation of the said line of railroad, or otherwise in the premises by reason of any act or thing done by them or either of them as receivers, or by their servants, agents, or attorneys, the said receivers respectively acting in good faith and in the exercise of their best discretion, but the mortgaged premises shall nevertheless be chargeable with any judgment which may be established against the receivers in any action brought against them by any person under leave of this court first had and obtained.

It is further ordered that the said receivers respectively shall in no case be responsible jointly for the acts of each other, but shall be responsible only severally each one for his own acts.

Sixth. It is further ordered that all applications for interlocutory order or relief in this action by or on behalf of any party thereto, or the receiver therein, shall be made on notice by the moving party to the party or parties of at least ten days, exclusive of the day of service, and on due proof of personal service of notice, unless the notice hereby required be waived in writing.

Seventh. It is further ordered that the said defendant and all persons whatsoever, be and they are hereby strictly commanded and enjoined peacefully to deliver up and surrender to the said receivers all and singular the premises whereof they are hereby appointed receivers under the penalty attaching by law to disobedience.

And in the meantime and until the actual taking possession of the said property by the said receivers, it is ordered that the said *Atlantic, Mississippi and Ohio Railroad Company*, its president, officers, agents, and attorneys, be and they hereby are enjoined and restrained from disposing of or parting with any of the said property, real or personal, except in the payment of the necessary daily expenses of said road, and that the said company forthwith deposit all moneys and available balances now in its possession or control, and which may come into its possession from day to day, except what is needed for the said necessary daily expenses, in the *Exchange National Bank of Norfolk*, subject to the order of this court in this cause.

Hugh L. Bond, Circuit Judge.
Ro. W. Hughes, District Judge.

Form No. 17168.

(Precedent in Kennedy *v.* St. Paul, etc., R. Co., 2 Dill. (U. S.) 454, note.)[1]

[(*Venue and title of court as in Form No. 11887.*)][2]

John S. Kennedy, *Henry M. Baker*, and *John S. Barnes*,

v.

The St. Paul & Pacific Railroad Company, *The First Division of the St. Paul & Pacific Railroad Company*, *The Northern Pacific Railroad Company*, *Walter S. Cutting*, *Russell Sage*, *Samuel J. Tilden*, *Edmund Rice*, *Horace Thompson*, *George T. M. Davis*, *John P. Yelverton*, *William G. Morehead*, and *George L. Becker*.

The application of the plaintiffs for the appointment of a receiver in this cause coming on for a hearing before me at my chambers in the city of *Davenport*, in the state of *Iowa*, and, after hearing the bill and various affidavits and proofs of the respective parties, and Messrs.

1. Modification of Order.—This order was subsequently modified as follows:

"The original order, appointing *Jesse P. Farley* receiver herein, having been made on the *first* day of *August*, 1873, and dated of that date, and the matters continued in and by said order coming on again before me at my chambers at *Davenport*, *Iowa*, on the *first* day of *September*, A. D. 1873, and having heard *Geo. L. Otis*, of counsel for said complainant, and *Horace Bigelow*, Esq., of counsel for *The First Division of the St. Paul & Pacific Railroad Company*, *George L. Becker*, and others, defendants herein; and, on motion of Mr. *Otis*, of complainant's counsel, it is hereby further ordered, that the aforesaid order appointing a receiver herein, as aforesaid, be, and the same is hereby, modified as follows, viz:—

1st. Until further order of the court, said debentures shall not be sold for less than par in the currency of the United States, and before any shall be sold the receiver must be satisfied that he can sell or place sufficient thereof to complete and equip the said road, or some one or more of the unconstructed intervals in the line thereof, or such portions of one or more of such unconstructed intervals as he may deem practicable.

2d. In case the whole interval between a point at or near *Melrose* and a point about *twelve* miles south of *Glyndon* shall be so constructed and equipped, and the portion of the road belonging to said *St. Vincent* extension, which is now ironed, shall be completed by the *3d* day of *December*, 1873, then the expense of so constructing, completing, and equipping the same shall be a first lien upon the line of the said *St. Vincent* extension, its road, lands, land grants, franchises, and property, from *St. Cloud* to the end of the present construction at a point about *ninety-two* miles north of *Glyndon*.

3d. In case the whole of the *Brainerd* extension, so-called, to wit: the line between *Watab* and *Brainerd*, shall be so constructed and equipped by the *3d* day of *December*, 1873, then the expense of so constructing and equipping the same shall be a first lien upon the whole of said extension line, its road, land, land grants, franchises, and property.

4th. All the expense of completing and equipping the portions of said extension lines already ironed, except in the case provided for in subdivision two, shall be a first lien upon the portions so completed and equipped.

5th. The expense of all construction of any portion of said lines, or either of them, other than construction upon some interval to be fully completed, as aforesaid, shall be a first lien upon that portion of the road so constructed, and upon all the land, land grants, franchises, and property of such constructed portion or portions.

6th. The bond of said receiver may be approved by either the judge of the said district court or by the judge of this court.

7th. All further and other matters are continued until the *first Monday* of *October* next.

John F. Dillon, *Circuit* Judge.

Dated *September 1*, 1873."

2. The matter to be supplied within [ ] will not be found in the reported case.

Gilman, Otis and Gilfillan, of counsel for the plaintiffs, and Mr. *Bigelow*, of counsel for the defendants, *The First Division of the St. Paul & Pacific Railroad Company*, *George L. Becker*, and *Horace Thompson*, and Mr. *Gray*, of counsel for the defendant, *The St. Paul & Pacific Railroad Company*, and Mr. *Smith*, of counsel for the defendant, *The Northern Pacific Railroad Company* appearing specially and objecting that the court has not jurisdiction of said defendant; and Mr. *Cuyler*, of counsel for the defendant, *William G. Morehead*, and, after due deliberation thereon, it is ordered, adjudged, and decreed, that *Jesse P. Farley*, Esq., of *Dubuque*, *Iowa*, be and he is hereby appointed receiver of all and singular that certain branch line of railroad of the defendant, *The St. Paul & Pacific Railroad Company*, or which the said railroad company is by law authorized to construct, and which is to be constructed and to run from a point at or near the town of *St. Cloud*, in the county of *Stearns*, and state of *Minnesota*, to the town of *St. Vincent*, in said state, and also of that other line of railroad of said defendant, *The St. Paul & Pacific Railroad Company*, which said railroad company is by law authorized to construct, and which is to be constructed and to run from *Watab*, in the county of *Benton*, to *Brainerd*, in the county of *Crow Wing*, within said state, as contemplated by various acts of the Congress of the United States; and also of all the right, title, and interest which said defendant, *The St. Paul & Pacific Railroad Company*, has now or shall at any time hereafter acquire by reason of the construction of said railroad, or of either, or of any part of either thereof, in, to, and concerning all the lands situate in said state of *Minnesota* and granted, or intended to be granted, by various acts of the Congress of the United States for the purpose of aiding in the construction of said lines of railroad, or which the said defendant, *The St. Paul & Pacific Railroad Company*, has acquired or may be entitled to, or may hereafter acquire, pertaining to said railroad by grants from said state of *Minnesota*, and of all and singular the roadbeds, tracks, bridges, viaducts, culverts, fences, freight-houses, wood-houses, machine shops, and other shops, and all other structures, buildings, and materials whatsoever, placed or to be placed on the said railroads respectively, or either or any part of either thereof, or acquired or to be acquired for the use of the same; and, also, of all locomotives, tenders, passenger, baggage, freight, cattle, and other cars, and all other rolling stock whatsoever; and, also, of all machinery, tools, implements, fuel, and materials now owned or hereafter to be acquired by said defendant, *The St. Paul & Pacific Railroad Company*, for constructing, operating, repairing, or replacing the said railroads, or either or of any part of either thereof, and of all the equipments or appurtenances of the said railroads, or of either or of any part of either thereof, and of all property, rights, franchises, privileges whatsoever, appertaining to the said railroads, or to either or any part of either thereof, now held or hereafter to be acquired by said defendant, *The St. Paul & Pacific Railroad Company*, together with all and singular the tenements, hereditaments, and appurtenances to the said railroad, lands, and premises, or any part thereof, belonging or in anywise appertaining; and, also, of all the estate, right, title, interest, property, possession, claim, and demand what-

soever, as well in law as in equity of the said defendant, *The St. Paul & Pacific Railroad Company*, in, to, and concerning the said railroad, and every part and parcel thereof, with the powers and duties hereinafter expressed.

And the said receiver is hereby authorized and directed forthwith to take possession of all and singular the aforesaid property, and to proceed without delay to construct and complete the unconstructed portions of said railroads, and to put those portions thereof already constructed, or partly constructed, in good order to be operated as a railroad, and to do the same, if practicable, by or before the *3d* day of *December next.*

And he is further authorized and directed to do and perform all acts and things necessary to be done and performed to vest and secure in said railroad company the title to all lands granted or intended to be granted by any acts of Congress or of the legislature of the state of *Minnesota* to the said railroad company.

And for such purpose the said receiver is hereby authorized and directed to borrow, on the terms as to time of payment and rates of interest set forth in the following form of debenture, a sum of money not exceeding $\$5,000,000$ as shall be necessary to complete and equip said railroads, so as to secure said lands as herein directed, and to issue to the person or persons advancing said sum or sums of money his debentures or certificates, with coupons or interest warrants attached, signed by him, expressing the amounts so advanced, and the terms upon which the same shall be advanced, which debentures or certificates shall be in the form following:—

"$\$$———. *St. Paul, Minnesota,* ———, 1873.

Five years after date, unless sooner paid, for value received, I promise to pay to ———, or his assigns, the sum of ——— dollars in gold, with interest thereon at the rate of *ten* per centum per annum, payable in gold semi-annually on the *first* days of *July* and *January* of each year at the city of *New York.*

This obligation is issued under and by virtue of certain provisions of an order of the *circuit* court of the United States for the district of *Minnesota*, dated on the ——— day of ———, 1873, a copy of which is indorsed hereon, and is part of the loan thereby authorized to be made by me as receiver of the *St. Paul & Pacific Railroad Company*, amounting, in all, to the sum of $\$5,000,000$.

The said loan, or so much thereof as may be required to complete the construction of the *St. Paul & Pacific* Railroad, and shall be borrowed by me for that purpose under the authority aforesaid, is made and constituted, as provided in the order of the court, a first lien upon all the property of every nature and description of the said railroad company; and the earnings of said railroad, after deducting the operating expenses and the expenses of the receivership, are pledged for the payment of the principal and interest of this obligation, according to the tenor thereof.

Failure to pay interest for six months will make principal due at option of holder. ———, Receiver."

(*Interest coupons annexed.*)

Until further order of the court, said debentures shall not be sold for less than par in the currency of the United States, and before any shall be sold the receiver must be satisfied that he can sell or place sufficient thereof to complete and equip the said road or some one or more of the unconstructed intervals in the line thereof.

And it is hereby further ordered, adjudged, and decreed that such debentures or certificates shall be, and they are hereby, adjudged to be a lien for the principal and interest thereof, upon all the lands, premises, and property hereinbefore mentioned, prior to all other liens or claims thereon whatsoever. And the defendant, *The St. Paul & Pacific Railroad Company*, is hereby ordered, adjudged, and decreed to pay the principal and the interest mentioned in such debentures or certificates at the times and according to the terms thereof, and in case of failure of said company to pay the interest or principal of such debentures or certificates according to the terms thereof, any holder, or any number of holders, of such debentures or certificates may institute and prosecute a suit in his or their name or names on behalf of himself or themselves, and all others, the holders of said debentures or certificates to enforce the lien and compel payment thereof.

And the said receiver is authorized to purchase all necessary material, to employ all necessary agents and servants, and to make all contracts necessary for the purposes aforesaid.

And the defendants, and each of them, having in their, his, or its possession, or under their, his, or its control any of the property hereinbefore mentioned, are hereby ordered forthwith, upon the demand of said receiver, to deliver the same into the possession of said receiver.

And the said defendants, and each of them, and their, his, or its officers, agents, attorneys, and servants, are hereby strictly enjoined and commanded absolutely to refrain from interfering with the said lands, premises, and property, or any part thereof, and from in any manner interfering with the said receiver in the performance, by him, of the acts which he is hereby directed to perform. This injunction shall not be construed to prohibit the officers of the *St. Paul & Pacific Railroad Company* from taking any steps necessary to secure to said company titles to lands granted to it, nor to prevent the *Northern Pacific Railroad Company* asserting before the departments at *Washington*, or in any court, its right to any lands granted to it.

And it is further ordered that said receiver, before entering upon the duties of his office, take and file with the clerk an oath to faithfully perform the duties thereof, and also file with the clerk a bond, with *two* or more sureties, to be approved by the judge of the *district* court of the United States for the district of *Minnesota*, in the sum of *one hundred thousand* dollars (*$100,000*), conditioned for the faithful performance of such duties.

That said receiver deposit all moneys coming into his hands in the registry of the court at *St. Paul*, and said money shall be paid out under the rules of the court.

That said receiver, after assuming the duties of his office, make

and file with the clerk on the *first* day of each month a full statement of the business of his office during the preceding month.

The main object of this order is to insure the completion of the said roads by the *3d* day of *December next*, and the receiver is instructed so to act, under the limitations aforesaid, and to see that this object shall be accomplished, and to proceed at once and with expedition.

All contracts for construction, or purchase of iron, to be approved by the court, or by one of the judges thereof.

It is the intention of the foregoing order, that if the said *$5,000,000*, or so much thereof as may be required fully to complete said extension lines, shall be furnished to or borrowed by the receiver, to give to the holders of the said receiver's debentures a first lien upon the said road, road-bed, franchises, and lands, and each and every part thereof, and the income and earnings of the said road, as specified in the above order. If, however, the receiver shall borrow upon the said debentures herein authorized, money sufficient to complete only some one or more of the unconstructed intervals in the line of said road, it is the intention of said order to give to the holders of the said debentures a first lien upon the road and road-bed so completed, and the franchises of the company pertaining thereto, and all the lands to which the said company may be entitled or may acquire by virtue of the completion of the said part or parts of said road.

And if any of the money so borrowed by the said receiver on the said debentures shall be used for finishing or putting in order any part of said road now ironed, the same to the extent thus used shall be a first lien on the part or parts of said road upon which it is used. All other matters are continued until the *first Monday* in *September next.*

Given under my hand *August 1*, 1873.

John F. Dillon, Circuit Judge.

(*cc*) *In Partnership Proceedings.*[1]

1. Requisites of Order or Decree, Generally. — See *supra*, note 1, p. 673.

Findings of Fact. — In Morey *v.* Grant, 48 Mich. 326, which was a proceeding brought for the purpose of winding up the affairs of a partnership and for an accounting and receiver, it was held that the order appointing a receiver should have contained a finding of such facts as would give authority for divesting the possession of the defendant partner.

See also, generally, *supra*, note 1, p. 673.

Description of Property. — An order for a receiver in a partnership case should be of all the partnership assets. Morey *v.* Grant, 48 Mich. 326.

See also, generally, *supra*, note 1, p. 673.

In Arnold's Petition, 15 R. I. 15, a decree was entered under the insolvency law (c. 237, Pub. Stat.) for the appointment of a receiver, appointing a certain person receiver "to take possession of all the property, evidences of property, books, papers, debts, choses in action, and estate of every kind, of said *Providence Lumber Co.*, and of said *Jesse Burdett* and *Eben Allen*, as copartners under the firm name and style of the *Providence Lumber Company*, and individually, including any estate and property attached or levied upon, within *sixty* days prior to the filing of said petition and remaining unsold, and including also all estate and property theretofore conveyed by said *Providence Lumber Company*, or by said *Jesse Burdett* and said *Eben Allen*, or either of them, in fraud of the rights of creditors or in violation of the provisions of chapter 237 of the Public Statutes," * * * following substantially the lan-

guage of the statute, and closing as follows: "And said debtors and each of them are hereby ordered to turn over and deliver up possession of all their aforesaid property and estate of every kind unto said receiver, that is now in their possession."

No objection was made to this order.

Directing Application of Proceeds. — In West *v.* Chasten, 12 Fla. 315, the receiver appointed was directed to "take charge of, manage and sell the goods of the late firm and apply the proceeds of said sale to the payment of the debts of *West, Brother & Company.*" This order was held to go too far, because it directed an application of the proceeds, which should not be done until final decree settling the rights of the parties.

See also, generally, *supra*, note 1, p. 673.

Precedents. — In Williamson *v.* Wilson, 1 Bland (Md.) 418, which was held to be a case in which a receiver should be appointed, is set out the following order of appointment:

"Whereupon it is ordered, that *Jacob Schley*, of the City of *Baltimore*, be and he is hereby appointed a receiver, with power and authority to receive and take charge and possession of the goods, wares and merchandise, books, papers, and effects of and belonging jointly to the said *Charles A. Williamson*, *John B. Wilson*, and *John N. Woodard*, lately trading under the name and firm of *Wilson, Williamson & Co.* And also with power and authority to sue for and to collect the debts due unto the said firm. And the said *Charles A. Williamson*, *John B. Wilson* and *John N. Woodard*, and each of them, are hereby required to yield up and deliver unto the said *Jacob Schley* the goods, wares, and merchandise, books, papers, and effects of or belonging to the said firm. And it is further ordered, that before the said *Jacob Schley* proceeds to act as a receiver by virtue of this order, he shall give bond to the State of *Maryland* in the penalty of *thirty thousand* dollars, with surety to be approved by the Chancellor, for the faithful performance of the trust reposed in him by this order, or which may be reposed in him by any future order in the premises. And it is further ordered, that the said *David Williamson, Jun'r*, be and he is hereby removed from the office of receiver, to which he was appointed by the order of this Court of the *third* instant; that he make report and render unto this Court a full and fair account of all the property or money which may have come to his hands, and of all his proceedings while he acted as such. And he is hereby directed and required to yield up and deliver over unto the said *Schley*, so soon as he shall have been qualified to act as receiver as before mentioned, all the goods, wares and merchandise, books, papers, and effects of the said firm which may have been received by him the said *Williamson*, or which he may now hold or have under his control. And it is further ordered, that the injunction heretofore granted in this case be and the same is hereby continued in full force until the hearing or further order."

In Gowan *v.* Jeffries, 2 Ashm. (Pa.) 296, the following order was made appointing a receiver in a partnership proceeding:

"The bill, affidavits and arguments of counsel having been heard in this case, it is ordered, that *John R. Vodges* be, and he is hereby, appointed receiver, with the ordinary powers of a receiver in chancery to take charge of the partnership property and collect the partnership funds and assets, until further order of the court. And it is ordered, that the said receiver shall present to the court, on or before the *sixth* day of *June next*, an inventory of all the assets which shall come into his possession; and from time to time, as often as shall be ordered, an account of receipts and disbursements; and shall abide such further order as may be made by the court in the premises."

Later there was a decree dissolving the partnership and continuing the receiver, which was as follows:

"The above cause having been brought to a hearing upon pleadings and proofs, and upon hearing of the counsel of the respective parties, and due deliberation being had thereupon, it is ordered, adjudged and decreed, and this court, by virtue of the power and authority herein vested, doth order, adjudge and decree, that the partnership mentioned in the pleadings, as constituted and established between the complainants and the defendant, by certain articles of agreement, referred to in the pleadings, and given in proof on the hearing, dated the *20th* of *February*, 18*38*, be and the same is hereby declared void

Form No. 17169.[1]

[(*Title of court and cause as in Form No. 12083.*)

And now, to wit, this *third* day of *April*, 1889,][2] after hearing, it is ordered and decreed that *Frederick A. Sobernheimer*, Esq., be, and he is hereby appointed receiver of all and singular the books, accounts, records, documents and papers of the late firm of *J. P. Eyre & Co.*, and the equipments, materials, tools, supplies, timber, money, choses in action and property of every description belonging to or appertaining to the said firm of *J. P. Eyre & Co.*, and to collect, take and receive the same and all the assets of the said firm until further order of this court in the premises, with full power and authority to prosecute or defend, without the further order of this court, any and

and dissolved from henceforth forever; and that the said parties complainants and defendant, are respectively enjoined from collecting, or receiving or intermeddling with the property of said firm; and that the appointment heretofore made, of *John R. Vodges*, Esq., as receiver, is hereby confirmed. And it is ordered, that he be continued as receiver, to collect the outstanding credits, and to take into his possession all the other property of the said firm; and, as speedily as may be, to convert the same into money, by public sale, after due and public notice thereof, in at least *three* of the daily newspapers of the city of *Philadelphia*, of not less than *ten* days, of time and place of such sale; and also to advertise in the same number of newspapers, for all the creditors of the said firm to present their claims against said firm to him, within *sixty* days after such advertisement; and likewise to audit and receive the proof of such debts, and also to ascertain what liens, if any, may be against said property; and what debts due to said partnership may be desperate and not worth pursuit; and thereupon to make report, with all convenient dispatch, and without waiting for the report of the master hereinafter directed, in this court, not only of the same debts so audited by him, but also of all his doings in the premises, for further directions, or other action of this court thereon. And it is hereby referred to *Joseph A. Clay*, Esq., as a master in chancery, to take an account of all and every the copartnership from the time of its commencement, and an account of the moneys received and paid by the parties respectively in regard thereto; which account, when so settled and adjusted by him, he shall likewise report to this court, together with the proofs upon which such settlement and adjustment shall have been founded. And that the said *Joseph A. Clay* shall likewise, in his capacity of master, take into his possession all the papers, vouchers, documents and evidences, of whatsoever kind, pertaining to said copartnership business, permitting said parties, or either of them, nevertheless, to take copies thereof, at their own expense respectively. And it is also further ordered, adjudged and decreed, that for the better taking of the said accounts, said master shall be at liberty to examine the said parties under oath or affirmation, by interrogation, or otherwise, as he shall direct; and the said parties, and each of them, are to produce, and leave with the said master, under oath or affirmation, all books, papers, vouchers and writings in the custody or power of such parties, or either of them, relating to said accounts or to the said partnership. And the said parties are respectively enjoined and required to execute all and every instrument necessary to enable the said receiver to vest in the purchaser or purchasers, at the sale directed as aforesaid, proper title to the partnership property, which may be sold as aforesaid. All questions as to the costs, and the compensation of said master and receiver, and further directions in the premises, reserved."

No objection was made to the decree.

1. This is an order of a Philadelphia court appointing a receiver, set out in the opinion in the case of Sobernheimer *v.* Wheeler, 45 N. J. Eq. 614. No objection was made to it.

See, generally, *supra*, note 1, p. 693.

2. The matter to be supplied within [ ] will not be found in the reported case.

all actions, either in law or in equity, which he may deem necessary and proper to commence or prosecute, and to defray the reasonable expenses thereof, and to pay the fees of counsel with whom he may consult in the discharge of his duties as receiver.

It is hereby further ordered that *John P. Eyre* and *Joseph S. Allen* and all persons under them, or who may have possession, custody or control of any property or assets of the said firm, shall deliver up and render to the said receiver all and singular the premises whereof he is appointed receiver as aforesaid.

[*Calvin Clark*, Prothonotary.][1]

bbb. And for Reference to Appoint New Receiver in Case of Failure of Appointee to Qualify.

Form No. 17170.[2]

(*Title of court and cause as in Form No. 6957.*)

Upon reading and filing (*Here enumerate the motion papers*), and after hearing *Jeremiah Mason*, attorney for the above plaintiff, in support of the said motion, and *Oliver Ellsworth*, attorney for the above defendant, in opposition, and it appearing that the copartnership heretofore existing between the plaintiff and the defendant has been dissolved,

Ordered, that the defendant be and he hereby is appointed receiver of the copartnership business mentioned in the complaint herein and of all the assets of the said copartnership, on executing, within *ten* days from the entry of this order and of the service of a copy thereof on the attorney of the defendant herein, a bond in the sum of *twenty thousand* dollars, with sufficient sureties to be approved by a justice of this court for the due and faithful performance by the said receiver of his trust; and that upon the execution and approval of said bond the said receiver be and he is hereby vested with the usual powers of receivers and the power to collect, sue for and recover the debts and demands that may be due and the property that may belong to the said copartnership, and that the said receiver (*Here specify additional powers if any are grantea*), until the further order of this court.

And it is further ordered that, in case the said plaintiff shall fail to complete his appointment by the filing and approval of the said bond within the time limited as aforesaid, it be referred to *Josiah Crosby*, Esq., of the city of *New York*, county and state of *New York*, counselor at law, to examine and ascertain and report to this court a suitable person or persons to be appointed receiver or receivers of the said copartnership business and the assets thereof, to be vested with all the powers aforesaid, and that said person or persons to be so appointed receiver or receivers furnish a bond in the sum of *twenty thousand* dollars with sufficient sureties, and that the said referee report as to the fitness and sufficiency of said sureties.

It is further ordered that, on the confirmation of the report of said referee, said defendant, under the direction of the said referee, and, if required, under oath, deliver to the said person or persons so

1. The matter enclosed by [ ] will not be found in the reported case.

2. See, generally, *supra*, note 1, p. 693.

appointed receiver or receivers all and every the copartnership property, assets, premises, outstanding debts and effects, together with all books and papers relating thereto.

It is further ordered that the plaintiff pay *twenty* dollars costs of this motion to abide the event.

Enter: *John Marshall*, J. *S.* C.

(*dd*) *In Proceedings Relating to Corporations.*[1]

1. Power to Appoint Receiver. — Courts of chancery have no general power to appoint receivers of a corporation. They can appoint them only where expressly authorized by statute. Coquard *v.* National Linseed Oil Co., 171 Ill. 480.

See list of statutes cited *supra*, note 1, p. 591.

Requisites of Order or Decree, Generally. — See *supra*, note 1, p. 673.

Restraining Collection of Debts. — On the appointment of receiver of all the property and effects of a corporation for the purpose of closing up its affairs, it is proper that the court should make it a part of the order that the directors and officers of the corporation be restrained from collecting any debts or demands due to the corporation, and from paying out, assigning or delivering any of the property, moneys or effects of the corporation to any other person, and from incumbering the same. Morgan *v.* New York, etc., R. Co., 10 Paige (N. Y.) 290.

Sequestration of Property. — In Central Trust Co. *v.* South Atlantic, etc., R. Co., 57 Fed. Rep. 3, is set out as an exhibit the following form of order:

"*Virginia.*

In Vacation. Before Hon. *D. W. Bolen*, Judge of the *Fifteenth* Judicial Circuit, Sitting During the Indisposition of Hon. *John A. Kelly*, Judge of the *Sixteenth* Judicial Circuit.

Jonas Wilder et als., C'm'p'ts, *v. Virginia, Tennessee & Carolina Steel and Iron Company*, D'f'ts. In Ch'nc'y.

Upon presentation and reading of the bill of complaint, verified by the affidavits of *Jonas Wilder*, *Wm. G. Sheen*, *John M. Bailey*, and *A. H. Blanchard*, the exhibits therewith filed, and the affidavits of *John R. Dickey*, *J. F. Hicks*, *Jonas Wilder*, *W. G. Sheen*, *A. J. Wilcox*, *J. H. Fleenor*, *H. L. Burson*, *F. N. Hash*, *W. F. Aldrich*, *A. A. Hobson*, *V. Keebler*, *M. J. Drake*, *John H. Dishner*, *F. W. Aldridge*, *John M. Bailey* (Nos. *1*, *2*, *3*, and *4*), *J. H. Winston*, *Jr.*, and upon motion of complainant for an order for an injunction and the appointment of a receiver, upon consideration of all which it is adjudged and ordered that upon the complainants, or some one of them, or someone for them, executing bond with good security before the clerk of the *circuit* court of *Washington* county, in the penalty of $*500.00*, conditioned according to law for the payment of all such damages as may be incurred, and all such costs as may be awarded in case this injunction shall be dissolved, an injunction is awarded, according to the prayer of the bill, to be directed unto the *Virginia, Tennessee and Carolina Steel and Iron Company*, its officers, agents, and employees, restraining it and them, and each of them, from collecting any money due it; from selling, mortgaging, removing, interfering with, or in any way disposing of, its property, or creating or incurring any liabilities upon the property of said company. And said injunction also to be directed to the defendants *F. W. Huidekoper*, *John H. Inman*, *A. H. Bronson*, *George S. Scott*, *Nathaniel Thayer*, *H. C. Fahnestock*, *George Blogden*, *W. G. Oakman*, *N. Baxter*, *Jr.*, *A. M. Shook*, *F. D. Carley*, *E. A. Adams*, *B. A. Ayers*, *C. L. James*, *J. C. Haskell*, *William P. Clyde*, *Exstine Norton*, restraining them, and each of them, from acting or assuming to act as directors of said *Virginia, Tennessee and Carolina Steel and Iron Company*, and from in any way transacting business in the name of, or in behalf of, the company, and from any interfering with any of the property of the company; also, restraining them from releasing or attempting to release any subscriber to the capital stock of said company from any liability on account of such subscription to the capital stock of said company. And said injunction also be directed to the *Bailey Construction Company*, *Bristol Land Company*, and the *South Atlantic and Ohio Railway Company*, their

aaa. For Dissolution of Corporation.[1]

agents, officers, or employees, and each and all of them, restraining them, and each of them, from collecting any money, incurring any liabilities, or in any way interfering with the property or business of the *South Atlantic and Ohio Railway Company*, *Bailey Construction Company*, *Bristol Land Company*, until the further order of court or judge in vacation. And as incident to the injunction, and for the purpose of preserving the property affected thereby, and for the purpose of protecting the rights and interests of all parties in interest, it is ordered and decreed that, upon the injunction herein allowed, being perfected, *John M. Bailey* be, and he is hereby, appointed a receiver in this case, and as such receiver will take charge and possession of the property and assets of the *Virginia, Tennessee and Carolina Steel and Iron Company*, and of the *Bailey Construction Company*, of the *South Atlantic and Ohio Railway Company*, and of the *Bristol Land Company*, and manage, operate, and control the same, and collect all money due to either of said corporations; and said receiver shall, in the management and operation of the said railroad company, employ and appoint all necessary officers, agents and employees, and make and enforce all necessary rules and regulations, and shall keep all necessary and proper accounts of expenses and disbursements in managing and operating said railroad. Said receiver shall, every *two* weeks, render an account of the disbursements and expenditures, and of his transactions as receiver, which account is to be filed in this cause; and he shall commence, and, as soon as can be done, complete, and file in this cause, an inventory of all property taken possession of by him as such receiver. But before acting as such receiver, the said *John M. Bailey* shall execute bond, with good security, before the clerk of said *circuit* court of *Washington* county, in the penalty of $*10,000*, conditioned for the faithful discharge of his duties as such receiver according to law, and according to this order. This order appointing a receiver to remain in force until further order of court or judge in vacation. *D. W. Bolen*,

Judge of the *15th* Judicial Circuit of *Va.*

Enter this order. To Clerk *circuit* court of *Washington* county.

D. W. Bolen,

Judge of the *15th* Judicial Circuit of *Va.*

August 6, 1890."

At the time the exhibit was filed, there was a motion pending to dissolve the injunction and vacate the order.

1. Precedents.— In Alexander *v.* Relfe, 74 Mo. 495, part of the decree was as follows:

"It is further ordered, adjudged and decreed that the said *Columbia Life Insurance Company* be, and the same is hereby dissolved, and *Lazelle E. Alexander*, who was, the *7th* day of *August*, 1877, appointed receiver by this court in this cause, be and he is hereby continued as such receiver of all the assets and property, real, personal and mixed, and of all the rights, claims and choses in action of the said *Columbia Life Insurance Company*, or to which said corporation, or its stock and policy holders through said corporation, have or had any right, title or interest in law or equity, at the date of the filing of petition in this cause, to-wit: *February 22nd*, 1877; and it is further ordered, adjudged and decreed that all the right, title and interest of the *Columbia Life Insurance Company*, or its stock and policy holders, through said corporation, to any and all real or mixed estate and to all personal property, wherever the same may be, and to all rights, claims and choses in action, wherever or in whatever manner existing, as the same existed, belonged to or could be claimed or were held by said *Columbia Life Insurance Company*, at the date of the filing of the petition in this cause, be and the same are hereby, and the title thereto, fully vested in the said *Lazelle E. Alexander*, as the receiver and officer of this court, and his legal successors in said office, in trust for the use and benefit of the creditors, stockholders and policy holders of the said *Columbia Life Insurance Company*, as the same may hereafter be respectively adjudged to be entitled thereto by this court. And the said *Lazelle E. Alexander* is hereby empowered and authorized as such receiver to demand, receipt for, and take possession of all assets and real, personal and mixed estate, moneys, rights and choses in action, books, papers and

Form No. 17171.[1]

(Precedent in Chicago Steel Works *v.* Illinois Steel Co., 153 Ill. 11.)[2]

[(*Title of court and cause as in Form No. 11800.*)][3]

This cause coming on to be heard upon motion of the *Illinois Steel Company*, appearing by its solicitor, and upon the verified bill of complaint filed herein, and it appearing to the court that due notice of this application for receiver and injunction has been served upon the said defendant, the *Chicago Steel Works*, and the court being fully advised in the premises, finds that the said defendant, the *Chicago Steel Works*, is a corporation organized under the general incorporation law of the state of *Illinois*, as alleged in said bill of complaint; that it is now indebted to the complainant in this cause in the sum of about *twenty thousand* ($*20,000*) dollars, of which about *ten thousand* ($*10,000*) is now due and unpaid; that the said *Chicago Steel Works* has ceased doing business, leaving the said indebtedness to the complainant, and other indebtedness to other parties, in large amounts, unpaid. It is therefore ordered by the court, that the *Chicago Title and Trust Company* be, and it hereby is, appointed receiver of the property and assets of the said *Chicago Steel Works*, with full power and authority to close up its affairs, and with the usual and customary powers of a receiver in a court of chancery. And it is hereby further ordered, adjudged and decreed, that the affairs of the said corporation be forthwith closed up by the said receiver, with all due and convenient speed. And it is further adjudged, that this cause shall be held by the court for the entering of such orders as may be necessary, from time to time, with leave to the parties herein, and said receiver, to apply to the court, from time to time, for such orders and directions as may be necessary in the premises.

Form No. 17172.[4]

(Precedent in Hayes *v.* Brotzman, 46 Md. 520.)[5]

evidences of indebtedness of every kind whatsoever of said *Columbia Life Insurance Company*, as fully as the same existed or could be claimed by said company at the date of the filing of the petition herein; and said receiver is hereby empowered and authorized to sue for and recover, in any court of competent jurisdiction, all property, real, personal and mixed, assets and moneys due, books, papers and evidences of indebtedness, as fully as said corporation might or could have done in the full exercise of its corporate powers, or as might or could be done by its policy holders, stockholders or creditors, claiming by or through said corporation."

No objection was made to this decree.

1. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 32, par. 25.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1. p. 697.

2. A motion to vacate this order was overruled, and a writ of error sued out for the purpose of reviewing this order and the order overruling the motion to vacate. on the ground principally that a simple contract creditor who has not reduced his claim to a judgment cannot file a bill under section 25 of the corporation act, was dismissed for want of jurisdiction.

3. The matter to be supplied within [ ] will not be found in the reported case.

4. *Maryland.*— Pub. Gen. Laws (1888), art. 23, § 268.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, p. 697.

5. No objection was made to the order in this case. A subsequent order was passed substituting another receiver,

[(*Title of court and cause as in Form No. 17184.*)][1]

The bill and answer in the above cause having been read and considered, and the same submitted for decree, it is thereupon on this, the *18th* day of *August*, A. D. 1875, by the *Circuit* Court of *Baltimore City*, adjudged, ordered and decreed, that *J. Thomas Scharf* be, and he is hereby appointed receiver of the *South Ann Street Perpetual Savings Association of Baltimore City*, and that the said association turn over to the said receiver all its books, papers, promissory notes, writing obligations, choses in action, claims, demands, property and assets, and that the said receiver shall proceed to wind up the affairs of the said association — the ulterior object of this decree being that the property and assets of the said defendant shall be equitably distributed among the creditors of the said defendant.

And it is further ordered, that *J. Thomas Scharf*, the receiver aforesaid, give notice to all creditors of the said defendant to file their claims in this cause, and upon the proof of the same that the said creditors be allowed their distributive portion of the assets of the said defendant.

And it is further ordered, that the said *J. Thomas Scharf*, receiver as aforesaid, shall prosecute and defend all suits at law that may now be pending, or may be hereafter instituted, in which the said defendant may be a party.

And it is further ordered, that the said *J. Thomas Scharf*, the receiver aforesaid, before he enters upon the discharge of the duties of the said receiver, shall give the usual bond in the penalty of *five thousand* dollars, for the faithful performance of his duties as said receiver.

[(*Signature as in Form No. 17184.*)][1]

Form No. 17173.[2]

(*Title of court and cause as in Form No. 17164.*)

Upon opening the matter this day to the court, by *Lindly M. Garrison*, of counsel with the complainants, in the presence of *Flavel McGee*, of counsel for *Clarence H. Venner* and other of the directors who were permitted to interpose for the defendant, by order of the chancellor, and due proof being made of the service of the order to show cause heretofore granted herein, and it appearing to the court that the said defendant corporation is insolvent, it is on this *twentieth* day of *July*, A. D. 1892, ordered that the said order to show cause be made absolute, and that an injunction do issue against the said defendant according to the prayer of the said bill. And it is further ordered that *E. Hyde Rust*, Esq., of *Jersey City*, be and he is hereby appointed receiver with full power to demand, sue for, collect and receive and take into his possession, all the goods and chattels,

but with the same authority and powers.

1. The matter to be supplied within [] will not be found in the reported case.

2. *New Jersey.* — Gen. Stat. (1895), p. 920, § 72.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, p. 697.

This form, which was a decree of the court of chancery of the state of New Jersey, is set out in one of the pleadings in American Water Works Co. *v.* Farmers L. & T., Co. 20 Colo. 203.

rights and credits, money and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description belonging to the said *The American Water Works Company*, and to perform all the duties imposed upon him and required by law, and especially by an act entitled "An Act Concerning Corporations," approved April 7, 1875, and the acts supplementary thereto and amendatory thereof.

And it is further ordered that the said *E. Hyde Rust*, Esq., before entering upon his duties, take the oath prescribed by law and give bond to the chancellor for the sum of *twenty thousand* dollars, conditioned for the faithful performance of his duties, to be approved as to form and security therefor by *John W. Heck*, Esq., one of the masters of this court.

Alex. T. McGill, Chancellor.

bbb. Against Officers of Corporation for Misconduct.

Form No. 17174.[1]

At a *Special* Term of the *Supreme* Court, held at the *County Court House*, in the city of *Brooklyn*, on the *26th* day of *June*, *1893*.

Present — Hon. *Calvin E. Pratt*, Justice.

Paul Halpin,
against
The Mutual Brewing Company, *Matthew Coleman*, *Thomas D. Coleman*, *Patrick Coleman*, *Michael T. Coleman*, *The Coleman Brewing Company*, *Frederick Eder*, *Edward Joyce*, *John N. Hayward*, *Christian F. Tietjen*, trustee of *John N. Hayward*, *T. D. Coleman & Brother*, *Dennis Coleman*, *Louis F. Duesing* and *George F. Mitchell*.

On reading and filing the summons and complaint in this action, the affidavits of (*naming affiants*) and the order to show cause why an injunction should not issue and a receiver be appointed, and the consent of *The Albany City National Bank*, the owners of *five hundred* shares of the capital stock of *The Mutual Brewing Company*, and of the plaintiff, *Paul Halpin*, and *Edward Duffy*, the owners of *two hundred and fifty* shares of the capital stock of *The Mutual Brewing Company*, and the affidavits of *Frederick Eder* in opposition thereto, and after hearing *Peter A. Hendrick*, Esq., on the part of the plaintiff in support of the motion, *A. J. Dittenhoefer*, attorney for *John N. Hayward*, the owner of *one hundred and twenty-five* shares of the capital stock of *The Mutual Brewing Company*, appearing and consenting to the appointment of a receiver, Messrs. *Guggenheimer &*

There was no objection made to the form.

1. *New York.* — Code Civ. Proc., §§ 1781, 1782.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, p. 697.

This is the form of order appointing a receiver in the case of Halpin *v.* Mutual Brewing Co., 91 Hun (N. Y.) 220, and is copied from the records. It was said by the court "that the validity or propriety of the appointment is not assailed."

Untermeyer, attorneys for *W. H. Russell*, the judgment creditor, appearing and consenting to the appointment of a receiver, and after hearing *E. H. Benn*, of counsel for the defendant *Louis W. Duesing*, and *Frederick Eder*, of counsel for the defendant *The Mutual Brewing Company*, and another person, and it appearing that the defendant, *The Mutual Brewing Company*, is insolvent, and that it is necessary for the protection of its property, and the rights of its creditors and stockholders that a receiver be appointed, and that its creditors should be enjoined from bringing any actions against it, and it appearing that the summons and complaint, affidavits and order to show cause, were served upon the defendants *The Mutual Brewing Company*, *Frederick Eder*, *Louis W. Duesing*, *John N. Hayward* and *Christian F. Tietjen*, trustee, etc., and upon the attorney-general of the state of *New York*.

Now on motion of *Durnin & Hendrick*, attorneys for the plaintiff, it is

Ordered that *Edward Duffy*, Esquire, be and he is hereby appointed receiver of the property and assets of the defendant, *The Mutual Brewing Company*, its stocks, bonds, and property, both real and personal, contracts, things in action and effects of every kind and nature, with the usual powers and duties of receivers, as provided by the Code of Civil Procedure and in the practice of this court, and the said receiver be and he is hereby authorized to conduct and carry on the business, and incur liability therefor, and it is

Further ordered, that such receiver, before entering upon the discharge of his duties as herein provided, execute and file with the clerk of the county of *Queens* a bond to the people of *New York* in the penal sum of *ten thousand* dollars, with two sufficient sureties to be approved by this court. And it is

Further ordered, that the receiver deposit with *The Peoples Trust Company* of *Brooklyn, N. Y.*, any sum of money in his hands in excess of *ten thousand* dollars, which is to be kept by him for immediate disbursements in the conduct of his trust. It is

Further ordered that the president, officers, agents and servants of the defendant, *The Mutual Brewing Company*, be and each of them is hereby enjoined and restrained from interfering with the property and assets of the defendant, *The Mutual Brewing Company*, or the conduct of its business, and the said president, officers, agents and servants of the defendant, *The Mutual Brewing Company*, be and they are each hereby directed to transfer and turn over to said receiver all books of account, property and assets of the defendant, *The Mutual Brewing Company*, of every kind and nature now in their hands or under their control. It is

Further ordered that the creditors of the said corporation and all persons whosoever, having notice of this order, be and they are hereby enjoined from bringing any action against the said defendant, *The Mutual Brewing Company*, for the recovery of any sum of money, or from taking any further proceedings in such an action heretofore commenced, or any further proceedings on any judgment recovered against said defendant, *The Mutual Brewing Company*, or any execution issued thereon. It is

Further ordered that said receiver is authorized to conduct and carry on the business of said defendant, *The Mutual Brewing Company*, as herein provided, until further order of this court, and that the said receiver be and he is hereby authorized to apply to the court for any other instructions at any time as he may deem proper. It is

Further ordered, that the injunction heretofore granted restraining the sheriff of the county of *Queens* from proceeding under the executions issued to him against the defendant, *The Mutual Brewing Company*, be and the same is hereby continued until further order of this court. It is

Further ordered that *Christian F. Tietjen*, trustee of *John N. Hayward*, and *T. D. Coleman & Brothers*, be and he is hereby restrained from foreclosing the chattel mortgage made to him as such trustee by the defendant, *The Mutual Brewing Company*.

Order granted *June 26th*, 1893.

John Cottier, Clerk.
C. E. P., J. S. C.

Enter:
Enter in *Queens* County.
Filed *June 26th*, 1893.
J. H. Sutphin, Clerk.

(*ee*) *In Proceedings for Sale of Property to Satisfy Note which Defendant Agreed to Save Plaintiff Harmless From.*

Form No. 17175.

(Precedent in Howard *v.* Stephenson, 33 W. Va. 127.)[1]

[*Hiram Stephenson*, complainant, against *Henrietta Hess*, *Adolph Hess*, *Rudolph Rothschild*, and *H. R. Howard*, special receiver, defendants. } In Chancery.][2]

Upon motion of the plaintiff, and for reasons appearing, an injunction is granted, as prayed for in plaintiff's bill, prohibiting, enjoining, and restraining the said defendant *Henrietta Hess*, her agents and employees, from removing, controlling, managing, selling, or otherwise disposing of said property described in plaintiff's bill, or any part thereof, as now in the store-rooms occupied by said *Henrietta Hess*, and from disposing of any of said notes and accounts referred to in said bill as owned by her; but this order of injunction is not to take effect until the said *Hiram Stephenson*, or some one for him, give bond, with good security, in the penalty of $200.00, before the clerk of the *circuit* court of *Mason* county, conditional to pay all costs and damages that may accrue to any person by reason of the granting of this injunction, should the same be hereafter dissolved. And upon the further motion of the plaintiff, and for reasons appearing, it is considered that *J. L. Whitten* be, and is hereby, appointed a special

1. This form is the order set out as an exhibit in the case of Howard *v.* Stephenson, 33 W. Va. 116. No objection was raised to it.

See, generally, *supra*, note 1, p. 673.

2. The matter enclosed by [ ] will not be found in the reported case.

receiver in this case, with directions to at once take exclusive charge, possession, management, and control of the said property and mercantile business of the defendant *Henrietta Hess*, in said mercantile business and books of said business, notes, and accounts in said bill set out, and proceed therewith as prayed for in said bill. And it is further ordered that the said *Henrietta Hess*, her agents and employees, shall turn over and surrender at once to the said *J. L. Whitten*, special receiver as aforesaid, all said property, books, notes, and accounts; but said *J. L. Whitten*, before proceeding to act under this order, shall give bond, with good security, in the penalty of $*1,000.00*, before the clerk of the *Circuit* Court of *Mason* county, conditioned for the faithful discharge of his duties as such receiver, such security to be approved by the clerk of said court.

F. A. Guthrie, Judge *7th* judicial circuit, *West Virginia*.

(*ff*) *In Supplementary Proceedings.*

Form No. 17176.[1]

State of *Minnesota*, County of *Ramsey*. } *District* Court, *Second* Judicial District.

John Doe, plaintiff, against *Richard Roe*, defendant. }

Whereas, a judgment was duly rendered and entered in the above entitled action, against said defendant, in the *District* Court of *Ramsey* county, *Minnesota*, on the *tenth* day of *May*, 1899, for the sum of *one thousand* dollars, and a transcript of said judgment was duly filed in the office of the clerk of said *District* Court for said county of *Ramsey* and said judgment docketed in said court, and an execution against the property of *Richard Roe*, said judgment debtor, has been duly issued to the sheriff of the proper county, and returned unsatisfied;

And whereas, said *Richard Roe*, judgment debtor, now resides in said *Ramsey* county, *Minnesota*, and has been examined on oath concerning his property before *Josiah Crosby*, Esq., the referee appointed pursuant to an order heretofore made herein, the report of such examination having been duly filed in this court,

Now, on motion of *Jeremiah Mason*, attorney for said plaintiff,

It is ordered, that *Josiah Crosby*, Esq., of said county, be and he hereby is appointed receiver of all the debts, property, equitable interests, rights and things in action of said judgment debtor not exempt from execution; that said receiver, before he enter upon the execution of his trust, execute to me and file with the clerk of this court a bond in the sum of *two thousand* dollars, with sufficient sureties, to be approved by me, conditioned that he will faithfully discharge the duties of such trust; and that the said receiver, upon filing such bond, be invested with all rights and powers as receiver, according to law.

Dated *June 10*, 1899.

John Marshall, District Judge.

1. *Minnesota*. — Stat. (1894), § 5492. See also list of statutes cited *supra*, note 1, p. 673. note 1, p. 591; and, generally, *supra*,

Form No. 17177.[1]

County Court, *Kings* County.

In the matter of the examination of *David Camerick*, a judgment debtor, in proceedings supplementary to execution, issued against him upon a judgment against him in favor of *Isaac W. Rosenzweig*.

An order for the examination of *David Camerick*, the judgment debtor herein, having heretofore been duly made returnable herein, and said examination having been duly had, and notice of this application for the appointment of a receiver herein having been duly served upon said judgment debtor and upon his attorney; and it appearing that no other proceedings supplementary to execution are now pending against the said judgment debtor, nor is any action pending against him under sections *1871–1879* of the Code of Civil Procedure;

Now, on reading the affidavit and order of examination herein, together with such examination, duly filed herein on the *14th* day of *May*, *1898*; and said notice of application with due proof of due service thereof, and on motion of *Julius Henry Cohen*, attorney for the judgment creditor,

I do hereby order that *Frank J. Doyle*, Esq., of the city of *New York*, be and he hereby is appointed receiver of all the debts, property, equitable interests, rights and things in action, of the said judgment debtor, that such receiver, before he enters upon the execution of his trust, execute a bond as prescribed by section *715* of the Code of Civil Procedure, in the penalty of *two hundred and fifty* dollars, to be approved by me, and file the same in the office of the clerk of the county of *Kings*.

I also order that the judgment creditor recover *thirty* dollars costs, and that said costs be paid to him or his attorney out of the funds of the said judgment debtor, that come to the hands of the receiver. And the said *Camerick* is hereby restrained from transferring or disposing of his property, or in any manner interfering therewith, until further order in the premises.

I do further order that said *David Camerick*, upon being served with a certified copy of this order, and of notice of filing of the bond prescribed by this order, deliver to the said receiver all property and money now in his possession, or under his control, belonging to him and not exempt by section *2463* of the Code of Civil Procedure.

Dated *New York*, *June 4*, *1898*.

Wm. B. Hurd, Jr.,
County Judge, *Kings* Co.

Form No. 17178.[2]

(*Title of court and cause as in Form No. 14455.*)

1. *New York.*—Code Civ. Proc., §§ 715, 2464.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, p. 673.

This order appointing a receiver is a part of the record in Matter of Camerick, 34 N. Y. App. Div. 31. An order adjudging the judgment debtor in contempt, for failure to comply with the order directing him to turn over his store and business to the receiver, was affirmed in the appellate division of the supreme court.

2. *North Carolina.*—Clark's Code Civ. Proc. (1900), § 379.

The above entitled cause coming on for further hearing and orders, pursuant to the opinion and judgment of the *Supreme* Court upon the appeal heretofore taken, it is now, on motion of plaintiffs' counsel, the defendant's counsel being present, and resisting the same, ordered and adjudged, that a receiver be appointed of the property of the defendant, *John Wilkes*, wherever situate, and that *E. K. P. Osborne*, of *Charlotte*, *North Carolina*, be and he is hereby appointed a receiver as aforesaid, and that he give bond in the sum of *five thousand* dollars, payable to the defendant, conditioned for the faithful performance of his duties as such, it appearing to the Court that there are no other supplemental proceedings instituted against the defendant.

It is further ordered that the said defendant shall make no transfer or other disposition of his property, other than his property which may be exempt from execution as homestead and personal property exemption, or any interference therewith.

It is further ordered, that said receiver be allowed to bring and prosecute such action or actions in the proper Court or Courts, in the name of the plaintiffs herein, for the recovery of the property of the defendant, real and personal, wherever situate, liable for the payment of plaintiffs' judgment, as he may be advised by his counsel in that behalf.

It is further ordered, that the defendant shall, whenever required in these proceedings, produce for examination the books of the *Mecklenburg Iron Works*, kept by or under the direction of *John Wilkes* or other persons for *Jane Wilkes*, his wife.

W. J. Montgomery, Judge *Superior* Court.

Form No. 17179.[1]

Circuit Court, *Walworth* County.

John Doe, plaintiff, against *Richard Roe*, defendant. } Order Appointing Receiver.

Supplementary proceedings having been instituted upon the judgment in the above entitled action against *Richard Roe*, judgment debtor, by an order heretofore made herein by me, judge of said *Circuit* Court, and the said *Richard Roe*, having been examined therein, under oath, concerning his property;

Now, on filing the affidavit and order of examination herein, and the evidence taken therein, and on motion of *Jeremiah Mason*, attorney for the above named plaintiff, and after hearing *Oliver Ellsworth*, attorney for the above named defendant, in opposition thereto,

It is hereby ordered that *Josiah Crosby*, of said county of *Walworth* and state of *Wisconsin*, be and he hereby is appointed receiver of all the debts, property, equitable interests, rights and things in action

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, p. 673.

This form is that part of the amended order in the case of Coates *v.* Wilkes, 94 N. Car. 174, which was affirmed on appeal by the supreme court. The remainder of the order, which is set out in the case, was held bad.

1. *Wisconsin.* — Stat. (1898), § 3036.

See, generally, *supra*, note 1, p. 673.

of the said judgment debtor; that such receiver, before he enter upon the execution of his trust, execute to the people of the state of *Wisconsin* a bond, with sufficient sureties, to be approved by me, in the penalty of *two thousand* dollars, conditioned that he will faithfully discharge the duties of such trust, and file the said bond with the clerk of the *Circuit* Court of said county, in which court said judgment was obtained; and that the said receiver, upon filing such bond, be invested with all the rights and powers as receiver, according to law.

And it is further ordered that the said plaintiff, *John Doe*, recover *forty* dollars costs, and *twenty* dollars disbursements in these proceedings, to be paid to said plaintiff, or his attorney, out of the funds of said judgment debtor that come into the hands of said receiver.

And it is hereby further ordered that the restraining order hereinbefore issued be continued, and that said judgment debtor, *Richard Roe*, be and he hereby is enjoined from transferring, disposing of, concealing or incumbering, or in any manner interfering with any of his property not by law exempt from execution until further order in the premises.

And it is hereby further ordered that *Richard Roe*, the said judgment debtor, on being notified that said receiver has completed his appointment, deliver to the latter all moneys and all other property now in his possession or under his control, belonging to him and not by law exempt from execution, and which said receiver is authorized to take under and by virtue of chapter *131* of the *Wisconsin* statutes of 1*898*.

Dated *June 10*, A. D. 1*899*.

John Marshall, *Circuit* Judge.

bb. Receiver De Bonis Non.

Form No. 17180.[1]

(*Title of court and cause as in Form No. 11887.*)

The petition of *Missouri*, *Kansas & Texas Railway Company* asking the appointment of a receiver de bonis non as successor to *George A. Eddy* and *H. C. Cross*, former receivers, coming on to be heard, and the court being fully advised in the premises, and it appearing that since the entering of the decree of *June 8*, 1*891*, and the order of *June 17*, 1*892*, in this cause, the said *George A. Eddy* and *H. C. Cross* have departed this life, and that by the terms of the said decree of *June 8*, 1*891*, discharging the receivers and ordering the property of the *Missouri*, *Kansas & Texas Railway Company* to be turned over to said Company, it was provided as follows:

"That nothing in this decree contained is intended to affect, or shall be construed as affecting, the status of any pending or undetermined litigation in which said receivers appear as parties. Such liti-

1. This order was set out as evidence in Hutchings *v.* Eddy, 6 Kan. App. 490. It was made by a judge of the circuit court of the United States for the district of Kansas. No objection was raised to its form. See, generally, *supra*, note 1, p. 673.

gation may continue to determination in the name of the receivers, but for the use of the *Missouri, Kansas & Texas Railway Company*, and at its cost and expense, and with the right to that Company, should it be so advised, to appear and be substituted in any such litigation."

And it further appearing that there are pending and undetermined suits in the State and Federal courts of the states of *Missouri, Kansas* and *Texas* and in the courts of the *Indian Territory*, and in the *Supreme* Court *of the United States*, wherein said *Geo. A. Eddy* and *H. C. Cross*, receivers, are parties:

Wherefore, it is ordered, adjudged and decreed that *Henry C. Rouse* be and is hereby appointed receiver in this cause, as successor to the receivership of said *Geo. A. Eddy* and *H. C. Cross*, with full power and authority to be substituted as a party in all the pending and undetermined suits wherein said receivers are parties, and with the same power to prosecute or defend said suits that existed in said *Geo. A. Eddy* and *H. C. Cross*, receivers, by their original order of appointment as modified and limited by the decrees of *June 8*, 1891, and *June 17*, 1892, and such litigation may continue to determination in the name of *Henry C. Rouse*, receiver, but for the use of the *Missouri, Kansas & Texas Railway Company*, and at its cost and expense, and with the right to that Company, should it be so advised, to appear and be substituted in any such litigation.

Amos M. Thayer, Circuit Judge.

cc. TEMPORARY RECEIVER.

(*aa*) *In General.*

Form No. 17181.[1]

(Precedent in Screven *v.* Clark, 48 Ga. 42.)[2]

Rufus B. Bullock, Governor, who sues for the interest of the State of *Georgia, et al.*, vs. *Jacob Dart, et al.*

Bill, etc., in *Glynn Superior* Court.

At Chambers, *Blackshear, Ga., Oct. 30th*, 1871.

It appearing to the Court that since the filing of complainant's bill in the foregoing cause, *John L. Screven*, the receiver appointed by the Governor of *Georgia*, has accepted said trust:

It is ordered that said *John L. Screven* be, and he is hereby appointed, temporary receiver of the *Brunswick and Albany Railroad Company*, and of all its property of every kind. And he is hereby ordered to collect immediately all said property together, and hold the same subject to the further order of the Court. Granted by me, at Chambers, this *30th* day of *November*, 1871.

William M. Sessions, J. S. C., B. C.

1. *Georgia.* — 2 Code (1895), § 4900 *et seq.*

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, p. 673.

2. This order was introduced in the case as evidence to show the authority of the receiver to institute the suit. No objection was made to the validity of the appointment of a receiver under this order, but it was held that the order did not authorize him to institute suit.

(*bb*) *And to Show Cause Why Permanent Receiver should Not be Appointed.*

Form No. 17182.[1]

State of *Tennessee*:

To the clerk and master of the *Chancery* Court at *Morristown*:

Upon the presentation of the foregoing bill and on consideration of its averments it is ordered:

1. That the temporary restraining order prayed for be granted upon complainants executing bond to be approved by the clerk, conditional, as in ordinary injunction cases, in the penalty of *ten thousand* dollars ($*10,000.00*).

2. That the prayer for a temporary receiver of the *Morristown and Cumberland Gap Railroad Company* be granted, and *James T. Shields, Jr.*, is hereby appointed such temporary receiver, and he shall, before entering upon the discharge of his duties, file with the clerk and master a good and sufficient bond, to be approved by the master, in the penalty of *twenty thousand* dollars ($*20,000.00*).

3. Immediately after his qualification said receiver is directed to take possession of said railroad and all other property belonging thereto or in possession of said company by lease or otherwise, and shall accurately inventory same and file a copy of said inventory with the master. Said receiver is directed to operate said road and to take charge of its tolls and incomes and to continue and preserve the same in like condition as at present, if practicable; and to that end he is directed to employ or continue the employment, as justice may demand, all necessary agents and employees whose services are essential to the continued operation of the road or the preservation of its property; and to that end he is authorized to contract, in his official capacity as receiver, for the payment of such reasonable sums as may be necessary to defray the expenses of such services.

4. It is further ordered that a copy of this order be served upon the defendant, the *M. & C. G. R. R. Company*, along with other process, and that said company be and appear before the Hon. *John C. Smith*, presiding chancellor of said division, on the *second Thursday*, being the *10th* day of *November*, 18*92*, at *10* o'clock *A.* M., at chambers, at the court-house, in *Rutledge, Tenn.*, and then and there show any reason which may be made to appear to the court why a permanent receiver shall not be appointed of said railroad company in this cause, and why the temporary restraining order granted herein shall not be made permanent.

1. *Tennessee.* — Code (1896), §§ 5750 *et seq.*, 6268.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, p. 673.

This is the form of order appointing a temporary receiver on a bill brought in the name of sundry creditors of a railroad company against it and other parties, setting forth certain judgments in favor of the complainants against the railroad company, its insolvency, the existence of a multiplicity of unpaid claims, and a prayer for the appointment of a receiver. It is set out as part of the statement of the case in Shields *v.* Coleman, 157 U. S. 168, where the validity of an order of the circuit court of the United States appointing another receiver was in question. It was held that the federal court had no power to appoint a receiver in place of the receiver appointed by the state court in this order, and, further, that the validity of this order was recognized by the chancellor of the state

5. In the event that it shall become necessary to issue a writ of possession to put said receiver in the quiet and peaceable possession of all the property of said corporation, it is ordered that the master issue writs of possession, directed to the sheriffs of *Hamblen*, *Grainger*, and *Knox* counties, for that purpose, commanding said sheriffs to place said receiver in the possession of that portion of said company's property which may be in their several counties.

Given under my hand this *October 28*, 1892.

Jos. W. Sneed, Judge.

(*cc*) *Of Mortgaged Premises.*

Form No. 17183.[1]

At a *Special* Term of the *Supreme* Court of the state of *New York*, held in and for the county of *Kings*, at the city of *Brooklyn*, on the *20th* day of *October*, 1896.

Present: Hon. *Nathaniel H. Clement*, J.

Citizens' Savings Bank, plaintiff, against *Marvelle C. Weber*, and others, defendants. } Action No. *5*. Order appointing temporary receiver.

On the amended summons and complaint herein, the petition of the plaintiff for the appointment of *Howard B. Snell*, as temporary receiver of the rents and profits of the mortgaged premises herein, verified *October 16th*, 1896, the affidavit of *Henry Merckle*, verified *October 17*, 1896, the affidavit of *David A. Manson*, verified *October 16*, 1896, the affidavit of *George E. Lovett*, verified *September 4th*, 1896, the consent of said *Howard B. Snell* to act as such temporary receiver, all hereto annexed, and upon the order granted herein, on *October 16th*, 1896, for the service of the amended summons herein, upon the defendant, *Jennie C. Wilder*, by publication thereof, and upon all papers and proceedings heretofore had herein, and the order to show cause for this motion, dated *October 17th*, 1896, and proof of the due service thereof; after hearing Mr. *Henry Merckle*, of counsel for plaintiff, in support of the motion, and no one appearing in opposition,

It is ordered, that *Howard B. Snell*, of the city of *New York*, Counsellor at law, be, and he hereby is appointed temporary receiver of the mortgaged premises, herein known as No. *542 Putnam* Avenue, in said city, to receive and preserve said property, until the further order of this court, with the usual powers of such a receiver.

And it is further ordered, that before entering upon the duties of his trust, the said receiver execute to the People of the state of *New York*, and file with the clerk of this court, his bond, with sufficient

of Tennessee and must be assumed to be valid.

1. *New York.* — Code Civ. Proc., § 713.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, p. 673.

This is the form of order appointing a temporary receiver in the case of Citizens' Sav. Bank *v.* Wilder, 11 N. Y. App. Div. 63, and is copied from the records. It was held that the appointment of the temporary receiver appeared to have been in accordance with the provisions of the mortgage and was regular in all respects.

sureties to be approved by a justice of this court, in the penal sum of *one hundred and fifty* dollars, conditioned for the faithful performance of his duties as such receiver.

Enter: *N. H. C.*

(*b*) *On Consent or Stipulation.*[1]

aa. In General.

Form No. 17184.[2]

Citizens National Bank of Baltimore vs. *Chesapeake Mutual Loan and Building Association of Baltimore City, et al.* } In the *Circuit* Court of *Baltimore City.* (*November* Term, 1874.)

By and with the consent of all parties it is, this *first* day of *December*, 1874, adjudged, ordered and decreed, that *Robert D. Morrison*, *George J. Appold*, *Samuel Snowden* and *Joseph Friedenwald* be, and they are hereby appointed receivers, with the power and authority to wind up the affairs of the said "*Franklin Land and Loan Company*," of *Baltimore City*, in order to make an equitable distribution of the assets of said company amongst its creditors and shareholders.

And it is further ordered, that the said receivers give notice to all persons having claims against the said "*Franklin Land and Loan Company*," of *Baltimore City*, to file their claims, properly authenticated, with the Clerk of this Court on or before the *sixth* day of *February*, 1875, in *two* daily newspapers in the City of *Baltimore*, once a week, for *three* successive weeks, before the *second* day of *January next.*

And it is further ordered, that *Robert D. Morrison*, Esquire, and *George J. Appold*, Esquire, the temporary receivers, shall yield up and deliver to the said receivers all the books, papers, property, assets and effects, of the said corporation defendant, in their possession, on being reimbursed and indemnified for all the moneys expended, and pecuniary responsibilities incurred by them as such receivers.

And it is further ordered, that the said receivers shall (subject to the order of this Court) have the power to sell the property of said corporation defendant, and make all collections of outstanding indebtedness, and shall have the power to institute all such proceedings at law and in equity, as may be necessary for the purpose of enforcing the rights of said defendant corporation, subject to the direction of this Court.

And it is further ordered, that before the said *Robert D. Morrison*, *George J. Appold*, *Samuel Snowden*, and *Joseph Friedenwald* proceed to act as receivers by virtue of this decree, they shall each give bond to the State of *Maryland* in the penalty of *one hundred thousand* dollars, with surety or sureties to be approved by this Court, and conditioned

1. **For forms relating to stipulation, generally,** see the title Stipulations.

2. *Maryland.*—Pub. Gen. Laws (1888), art. 23, § 268.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, p. 673.

This is the form of decree or order introduced in evidence in the case of Frank *v.* Morrison, 58 Md. 423, and is

for the faithful performance of the trust reposed in him by this decree, or which may be reposed in him by any future decree or order in the premises.

Campbell W. Pinkney.

bb. In Partnership Proceedings.

(*aa*) *In General.*

Form No. 17185.[1]

(Precedent in Russell *v.* White, 63 Mich. 411.)[2]

[(*Title of court and cause as in Form No. 12124.*)][3]

This cause came on to be heard on motion for the appointment of a receiver therein of all the partnership assets of the firm of *G. M. White & Co.*, and thereupon, after reading the affidavits and the consent indorsed on such motion, it is ordered that *Levi W. Lee*, of *Coldwater*, *Michigan*, be appointed receiver of the partnership assets of said firm of *G. M. White & Co.*, and that each of the said partners, *G. M. White* and *Benton T. Russell*, surrender to the said receiver all moneys and property in their hands belonging to said firm of *G. M. White & Co.*, and all books of account, papers, vouchers, and instruments in any way relating to said business.

And it is further ordered that said receiver file his bond, with one sufficient surety, to be approved by the register of said court, in the penal sum of $*3,500*, for the faithful performance of such trust.

And it is further ordered that the said receiver take immediate possession of said assets, and that, within *twelve* days from the date of this order, he sell at public sale the stock of groceries and merchandise coming to his hands, as a whole, and not in parcels, he being at liberty, however, to so continue such business at the usual retail prices until the day of such sale; that he shall give *one* week's notice of such sale, by publishing in one or more newspapers published in the city of *Coldwater*, in said county, and by posting notices of such sale in *three* or more public places within the limits of said city.

It is further ordered that said receiver be at liberty to take security for the payment of the purchase price of said stock of merchandise, such as shall be sufficient to enable him to produce the money when required by this court.

It is further ordered that he proceed at once to collect the accounts due said firm, and convert all their assets into cash, and that he report the same to this court, as he may be hereafter requested.

[(*Signature as in Form No. 12124.*)][3]

there set out. No objection was made to it.

1. *Michigan.* — Comp. Laws (1897), § 446.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, p. 673.

2. This order was by reason of a stipulation of the parties, in which they consented and agreed to it and its provisions.

3. The matter to be supplied within [ ] will not be found in the reported case.

(*bb*) *And Appointing Referee.*

Form No. 17186.

(Precedent in Grimes *v.* Brown, 113 N. Car. 154.)[1]

[(*Title of court and cause as in Form No. 14465.*)][2]

This cause coming on to be heard on motion of plaintiff for the appointment of a receiver of the property described in the complaint, and for an order restraining the defendant *H. Brown* from selling the property embraced in the mortgage made to him by the plaintiff and wife, and all parties consenting hereto, it is adjudged and considered that *H. Brown* be and he is hereby appointed receiver herein to take charge and possession of all the property, real and personal, belonging to the late firm of *Brown & Grimes*, including all money or local accounts due the said copartnership, and assets of every description, and hold the same according to the terms of this order. It is further ordered that the said receiver proceed at once to collect all the notes and accounts due said firm, and that on the *6th* of *March*, 1893, at the court house door in *Williamston*, *Martin* County, the said receiver will sell all the property, both real and personal, belonging to said copartnership, upon the following terms, to-wit, the purchase-price to be paid in cash, less an amount equal to the sum due on the mortgage of *Ward* and *Grimes* to the company of *Baltimore*, *Md.*, which sum shall be secured by note, to be approved by the receiver and payable according to the terms of said mortgage. The said receiver is authorized to operate said mill, if in his opinion the best interests of said firm will be promoted thereby.

It is further ordered that *H. Brown* be appointed referee to state the account and determine all matters between said *G. E. Brown* and the plaintiff, growing out of their copartnership dealings, and to pay out the proceeds of said property and collections according to the rights of the parties, as determined by the said referee. The receiver shall execute deeds to the purchasers for the property sold by him upon the payment of the purchase-money. The receiver and referee shall report his action in the premises to the next term of the *Superior* Court of *Martin* county, to be entered as the judgment of the Court in the action. The receiver is required to file bond in the sum of *two thousand* dollars, to be approved by the Clerk of the *Superior* Court of *Martin* county. The receiver shall advertise said sale at the court-house door and *three* other public places in *Martin* county.

Geo. A. Shuford, Judge *Superior* Court.

cc. In Proceedings for Sale of Property to Satisfy Mortgage Debt.

Form No. 17187.

(Precedent in Hooper *v.* Winston, 24 Ill. 357.)[3]

1. This order appointing a receiver and referee was by consent of the parties. It was held to have all the elements of a submission to arbitration under an order of the court.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. The order in this case was made under a stipulation of parties. No objection was made to it.

See, generally, *supra*, note 1, p. 673.

[(*Title of court as in Form No. 12120.*)][1]

Frederick H. Winston, Trustee,
vs.
Ashley Gilbert et al.
} Chancery.

And now, at this day, coming on to be heard, the written stipulation heretofore filed in this cause, and signed by the attorneys and agents of the parties, complainant and defendants, and the motion of the complainant's solicitors for the appointment of a receiver, to sell and dispose of the property mentioned in the proceedings in said cause, according to the terms set forth in said written stipulation: It is thereupon ordered by the court, that *Ezekiel R. Hooper* be, and he is hereby appointed receiver, to sell and dispose of said property in the proceedings in said cause mentioned, and to dispose of and appropriate the proceeds thereof in the manner, and upon the terms prescribed in the said written stipulation. It is also ordered that the said *Ezekiel R. Hooper*, as receiver, give bond with surety or sureties to be approved by this court, for the faithful performance of the trust reposed in him by this decree or any future decree or order in the premises.

f. Notice of Appeal from Order or Decree.[2]

(1) Appointing Receiver.

Form No. 17188.[3]

Supreme Court, *Queens* County.

Reuben W. Ross
against
Florence G. Vernam and others.

Sirs: You will please take notice that the defendants, *William S. Rogers*, *Eva J. Rogers*, *Ella R. Downes* and *Estelle M. Ross* hereby appeal to the Appellate Division of the *Supreme* Court, for the *Second* Department, from the order of this court entered in the office of the clerk of *Queens* county, on the *2d* day of *May*, 1896, appointing a receiver for the benefit of the plaintiff in this action of the rents, issues and profits of the premises described in the complaint.

Dated *New York*, *May 7th*, 1896.

Yours, etc.,
Stickney, *Spencer & Ordway*, Attorney for Appellants,
35 Nassau street, *New York City*.
(*Address as in Form No. 17189.*)

(2) Denying Application for Appointment of Receiver.

1. The matter to be supplied within [] will not be found in the reported case.

2. **For forms relating to appeals, generally**, see the title Appeals, vol. 1, p. 890.

3. *New York.* — Code Civ. Proc., §§ 714, 1300.

This is the form of notice of appeal in the case of Ross *v.* Vernam, 6 N. Y. App. Div. 246, and is copied from the records. No objection was made to this form, but the order appointing a receiver was affirmed.

Form No. 17189.[1]

Supreme Court, County of *Kings*.

Mary E. Veerhoff, as Executrix of the Last Will and Testament of *Ernst H. Veerhoff*, deceased, plaintiff,
against
Mary E. Miller and *George M. Miller*, her husband; *Marion Thompson*, *Henry J. Platt*, *Thomas O'Mahony*, *Ernest Tieman*, *Joseph E. McGivern*, *Joseph Butcher* and *Frederick Cordes*, defendants.
} Notice of appeal.

Gentlemen, — Please take notice that the plaintiff hereby appeals to the Appellate Division of the *Supreme* Court, in the *Second* Department, from an order duly made herein at a *Special* Term of the *Supreme* Court on the *6th* day of *April*, 1898, and duly entered in the office of the clerk of the county of *Kings* on the same day, denying the motion for the appointment of a receiver of the rents of the premises described in the complaint herein, and from each and every part thereof.

Dated *April 14*, 1898. Yours, etc.,
Samuel Cohn, Attorney for Plaintiff-Appellant.

To *John J. Crawford*, Esq.,
Attorney for Defendant-Respondent *Marion Thompson*; and
County Clerk of the County of *Kings*.

g. Consent of Receiver to Act.

Form No. 17190.[2]

Supreme Court, *Kings* County.

Citizens' Savings Bank, plaintiff,
against
Marvelle C. Webber, and others, defendants.
} Action No. 5.

I, *Howard B. Snell*, of the city of *New York*, Counsellor-at-Law, hereby consent to act as temporary receiver herein.

Dated *October 16th*, 1896. *Howard B. Snell.*

h. Bond of Receiver.[3]

1. *New York.* — Code Civ. Proc., §§ 714, 1300.

This is the form of notice in the case of Veerhoff *v.* Miller, 30 N. Y. App. Div. 355, and is copied from the records. On appeal, the order denying motion for appointment of receiver was reversed.

2. *New York.* — Code Civ. Proc., § 714.

See also list of statutes cited *supra*, note 1, p. 591.

This is the form of consent in the case of Citizens' Sav. Bank *v.* Wilder, 11 N. Y. App. Div. 63, and is copied from the records in that case. It was not objected to.

3. **Necessity of Bond** — *In General.* — In chancery practice, a receiver is not permitted to take charge of property, the subject of litigation, without first having given security. Tomlinson *v.* Ward, 2 Conn. 396; Williamson *v.* Wilson, 1 Bland (Md.) 418.

Under Statute. — In many states, it is provided by statute that the receiver, before entering upon his duties, shall execute a bond. Ala. Civ. Code (1896), § 801; Sand. & H. Dig. Ark. (1894), § 5964; Cal. Code Civ. Proc. (1897), § 567;

(1) In General.

Form No. 17191.[1]

Know all men by these presents, that we, *Josiah Crosby*, principal, and *Amos Springall* and *David Mudgett*, all sureties of the city of

Mills' Anno. Code Colo. (1896), § 165; 2 Ga. Code (1895), § 4907; Idaho Rev. Stat. (1887), § 4332; Horner's Stat. Ind. (1896), § 1224; Iowa Code (1897), § 3823; Kan. Gen. Stat. (1897), c. 95, § 266; Miss. Anno. Code (1892), § 579; Mo. Rev. Stat. (1899), § 754; Mont. Code Civ. Proc. (1895), § 954; Neb. Comp. Stat. (1899), § 5840; N. Y. Code Civ. Proc., § 715; Clark's Code Civ. Proc. N. Car. (1900), § 383; N. Dak. Rev. Codes (1895), § 5405; Bates' Anno. Stat. Ohio (1897), § 5589; Okla. Stat. (1893), § 4146; Hill's Anno. Laws Oregon (1892), § 1062; Tenn. Code (1896), § 6269; Tex. Rev. Stat. (1895), art. 1469; Utah Rev. Stat. (1898), § 3117; Ballinger's Anno. Codes & Stat. Wash. (1897), § 5457; Wyo. Rev. Stat. (1887), § 2937.

Requisites of Bond, Generally. — In most jurisdictions, the requisites of the bond are contained in the statutes. See statutes cited *supra*, note 1, p. 591.

Number of Sureties. — In most states, the number of sureties to a receiver's bond is regulated by statute. Ariz. Rev. Stat. (1901), § 1537; Idaho Rev. Stat. (1887), § 4332; Horner's Stat. Ind. (1896), § 1224; Kan. Gen. Stat. (1897), c. 95, § 266; Mont. Code Civ. Proc. (1895), § 954; N. Y. Code Civ. Proc., § 715; Clark's Code Civ. Proc. N. Car. (1900), § 383; N. Dak. Rev. Codes (1895), § 5405, Okla. Stat. (1893), § 4146; Hill's Anno. Laws Oregon (1892), § 1062; Tex. Rev. Stat. (1895), art. 1469; Utah Rev. Stat. (1898), § 3117; Ballinger's Anno. Codes & Stat. Wash. (1897), § 5457. In some jurisdictions, however, it is provided that the bond shall be with such sureties as shall be approved by the court. Iowa Code (1897), § 3823; Miss. Anno. Code (1892), § 579: Wyo. Rev. Stat. (1887), § 2937.

Penalty of Bond. — The penalty of the bond is usually fixed by the court, judge or referee appointing the receiver. Ariz. Rev. Stat. (1901), § 1537; Mills' Anno. Code Colo. (1896), § 165; 2 Ga. Code (1895), § 4907; Idaho Rev. Stat. (1887), § 4332; Horner's Stat. Ind. (1896), § 1224; Kan. Gen. Stat. (1897), c. 95, § 266; Miss. Anno. Code (1892), § 579; Mont. Code Civ. Proc. (1895), § 954; N. Y. Code Civ. Proc., § 715; Clark's Code Civ. Proc. N. Car. (1900), § 383; N. Dak. Rev. Codes (1895), § 5405; Okla. Stat. (1893), § 4146; Hill's Anno. Laws Oregon (1892), § 1062; Tex. Rev. Stat. (1895), art. 1469; Utah Rev. Stat. (1898), § 3117; Ballinger's Anno. Codes & Stat. Wash. (1897), § 5457; Wyo. Rev. Stat. (1887), § 2937.

Condition of Bond. — The condition of the bond must be that the receiver will faithfully discharge the duties of his trust. Ariz. Rev. Stat. (1901), § 1537; Cal. Code Civ. Proc. (1897), § 567; 2 Ga. Code (1895), § 4907; Idaho Rev. Stat. (1887), § 4332; Horner's Stat. Ind. (1896), § 1224; Iowa Code (1897), § 3823; Kan. Gen. Stat. (1897), c. 95, § 266; Miss. Anno. Code (1892), § 579; Mont. Code Civ. Proc. (1895), § 954; N. Y. Code Civ. Proc., § 715; Clark's Code Civ. Proc., N. Car. (1900), § 383; N. Dak. Rev. Codes (1895), § 5405; Bates' Anno. Stat. (1897), § 5589; Okla. Stat. (1893), § 4146; Hill's Anno. Laws Oregon (1892), § 1062; Tenn. Code (1896), § 6269; Tex. Rev. Stat. (1895), art. 1469; Utah Rev. Stat. (1898), § 3117; Ballinger's Anno. Codes & Stat. Wash. (1897), § 5457; Wyo. Rev. Stat. (1887), § 2937. And that he will obey the orders of the court. Ariz. Rev. Stat. (1901), § 1537; Cal. Code Civ. Proc. (1897), § 567; Idaho Rev. Stat. (1887), § 4332; Horner's Stat. Ind. (1896), § 1224; Iowa Code (1897), § 3823; Kan. Gen. Stat. (1897), c. 95, § 266; Mont. Code Civ. Proc. (1895), § 954; N. Dak. Rev. Codes (1895), § 5405; Bates' Anno. Stat. Ohio (1897), § 5589; Okla. Stat. (1893), § 4146; Hill's Anno. Laws Oregon (1892), § 1062; Tex. Rev. Stat. (1895), art. 1469; Utah Rev. Stat. (1898), § 3117; Ballinger's Anno. Codes & Stat. Wash. (1897), § 5457; Wyo. Rev. Stat. (1887), § 2937.

In *Arkansas*, the condition of the bond should be that the receiver will faithfully discharge the duties incumbent on him and faithfully account for and pay into court at such times as the court or law may prescribe, or according to the order of the court, all moneys or assets which shall come to his hands as such receiver in the case. Sand. & H. Dig. (1894), § 5964.

1. See, generally, *supra*, note 3, p. 715.

Baltimore, and state of *Maryland*, are held and firmly bound unto the state of *Maryland*, in the full and just sum of *one thousand* dollars, current money, to be paid to the said state of *Maryland*, or its certain attorney; to which payment, well and truly to be made and done, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this *tenth* day of *May*, in the year of our Lord one thousand eight hundred and *eighty-nine*.

Whereas, by an order of the *Circuit* Court of *Baltimore City*, bearing date on the *tenth* day of *May*, eighteen hundred and *eighty-nine*, and passed in a cause in the said court, wherein *Richard Roe* is complainant and *John Doe* is defendant, the above bounden *Josiah Crosby* has been appointed receiver of (*Here state of what he has been appointed receiver*).

Now the condition of the above obligation is such, that if the above bounden *Josiah Crosby* do and shall well and faithfully perform the trust reposed in him by said order, or that may be reposed in him by any future order or decree in the premises, then the above obligation to be void, otherwise to remain in full force and virtue in law.

Signed, sealed and delivered in the presence of *F. D. Dearth.* } *Josiah Crosby.* (SEAL) *Amos Springall.* (SEAL) *David Mudgett.* (SEAL)

(*Justification of sureties as in Form No. 12484.*)

Form No. 17192.[1]

Know all men by these presents, that we, *Thomas Jones*, of *Auburn*, *N. Y.*, as principal, and *Benjamin M. Wilcox*, of *Auburn*, *N. Y.*, by occupation a clerk, *Emmet Rhodes*, of *Auburn*, *N. Y.*, by occupation an insurance agent, as sureties, are held and firmly bound unto the people of the state of *New York* in the penal sum of *five thousand* dollars (*$5,000.00*) lawful money of the United States of America, to be paid to the said people of the state of *New York*; for which payment, well and truly to be made, we and each of us bind ourselves respectively and our respective heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the *24th* day of *February*, A. D. 1891.

Whereas, By an order of the *Supreme* Court, bearing date the *23rd* day of *February*, 1891, made at a *Special* Term thereof, held on the same day, at *Rochester*, *N. Y.*, in a case wherein "*The National Bank of Auburn*" is plaintiff, and the "*Rheubottom & Teall Manufacturing Company*" is defendant, the above bounden *Thomas Jones* was appointed receiver of the said "*The Rheubottom & Teall Manufacturing Company*," its stocks, bonds, real and personal property, franchises,

1. *New York.*—Code Civ. Proc., § 715. See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 3, p. 715.

This is the form of receiver's bond in the case of National Bank of Auburn *v.* Rheubottom *v.* Teall Mfg. Co., wherein Thomas Jones was appointed receiver. The form is copied from the records in the case of Jones *v.* Blun, 145 N. Y. 333. No objection was made to the form of the bond.

contracts, things in action and effects of every kind and nature, during the pendency of such action.

Now, the condition of this obligation is such that if the above bounden *Thomas Jones* shall faithfully discharge his duties as such receiver, and shall duly account for all moneys received by him, then this obligation shall be void, otherwise to remain in full force.

Thomas Jones. (SEAL)
B. M. Wilcox. (SEAL)
Emmet Rhodes. (SEAL)

(*Acknowledgment and justification of sureties.*)

(2) In Mortgage Foreclosure Proceedings.

Form No. 17193.[1]

Know all men by these presents, that we, *Josiah Crosby*, principal, and *Amos Springall* and *David Mudgett*, sureties, are held and firmly bound unto the chancellor of the state of *New Jersey* in the sum of *one thousand* dollars lawful money of the United States of America, to be paid to the said chancellor of the state of *New Jersey*, his successors and assigns; for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the *tenth* day of *May*, one thousand eight hundred and *ninety-nine*.

The condition of the above obligation is such, that if the above bounden *Josiah Crosby*, who has been appointed receiver of the rents, issues and profits of certain mortgaged premises described in the bill filed in a certain cause now depending in the Court *of Chancery* of *New Jersey*, wherein *David Forshay* is complainant and *John Doe* and others are defendants, does and shall, duly and faithfully account for and pay what he shall so receive of said rents, issues and profits, as the said Court *of Chancery* shall direct, and shall in all things well and truly fulfill and discharge the duties of his said office of receiver, then the above obligation shall be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of *Samuel Ireland.*

Josiah Crosby. (SEAL)
Amos Springall. (SEAL)
David Mudgett. (SEAL)

(3) In Supplementary Proceedings.

Form No. 17194.[1]

Circuit Court, *Milwaukee* County.

Richard Roe, plaintiff,
against
John Doe, defendant.

Know all men by these presents, that we, *Samuel Ireland*, principal, and *William D. Dearth*, surety, both of the city of *Milwaukee*, in the

1. See, generally, *supra*, note 3, p. 715.

county of *Milwaukee* and state of *Wisconsin*, are held and firmly bound unto *Calvin Clark*, as clerk of the *Circuit* Court of *Milwaukee* county, and to his successors in office, in the sum of *one thousand* dollars lawful money of the United States, to be paid to the said *Calvin Clark* or his successor in office, for which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this *tenth* day of *May*, A. D. 1899.

Whereas, in certain proceedings supplementary to execution on a judgment of the *Circuit* Court of *Milwaukee* county, state of *Wisconsin*, had before Hon. *John Marshall*, a *circuit* judge in and for said county, wherein one *Richard Roe* is the judgment creditor and *John Doe* is the judgment debtor, the above bounden *Samuel Ireland* was, on the *tenth* day of *May*, A. D. 1899, by the said Hon. *John Marshall*, duly appointed receiver of the property of the said *John Doe*.

Now, therefore, the condition of this obligation is such, that if the above bounden *Samuel Ireland* shall well and truly, and according to law and the rules and practice of this court, perform and discharge the duties of his appointment as such receiver, and shall account for and pay over to the persons entitled thereto all money or other property of the said judgment debtor which shall come into his possession or under his control as such receiver, then this obligation to be void and of no effect; otherwise to be and remain of full force and virtue.

In witness whereof, we have hereunto set our hands and seals this *tenth* day of *May*, A. D. 1899.

Signed, sealed and delivered in presence of *David Mudgett*. } *Samuel Ireland.* (SEAL) *William D. Dearth.* (SEAL)

State of *Wisconsin*, } ss.
Milwaukee County. }

William D. Dearth, being duly sworn, says that he is a freeholder in *Milwaukee* county in the state of *Wisconsin*, and is worth *two thousand* dollars, over and above all his debts, liabilities and exemptions, in property situate within said state.

William D. Dearth.

(*Jurat as in Form No. 877.*)

i. Certificate or Notice of Appointment.

(1) By Clerk.

Form No. 17195.[1]

State of *Iowa*, } ss.
County of *Harrison*. }

I, *Calvin Clark*, clerk of the *District* Court of said county, hereby certify that *Josiah Crosby*, was on the *tenth* day of *January*, 1901, duly appointed as receiver of (*Here state of what he was appointed*

1. *Iowa*. — Code (1897), § 3822. See also list of statutes cited *supra*, note 1, p. 591.

receiver) by said court, and that he duly qualified as such and is now acting in said capacity.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, this *tenth* day of *January*, 1901.

(SEAL) *Calvin Clark*, Clerk.

(2) By Receiver.

(*a*) *In General.*

Form No. 17196.[1]

Circuit Court, *Milwaukee* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

To *Richard Roe*:

Please take notice that on the *tenth* day of *May*, A. D. 1901, the undersigned was appointed receiver of all the goods and property of all kinds whatsoever belonging to the above named defendant, *Richard Roe*, by the Hon. *John Marshall*, judge of the *Circuit* Court of *Milwaukee* county aforesaid, in proceedings then pending in said court, and that the undersigned has filed his bond as required by the statutes of *Wisconsin*, and the terms of his appointment, and in all respects has duly qualified as such receiver. Yours, etc.,

Joseph Crosby, Receiver.

(*b*) *With Demand for Possession.*

aa. Of All Property in Hands of Defendant.

Form No. 17197.[2]

(*Attach to order of appointment.*)

To *William J. Fitzpatrick*, *Charles H. Moses*, *Henry B. Fanton* and *William L. Dowling*:

You will please take notice that I have been appointed receiver of the property of *William J. Fitzpatrick* by order of the court, a copy of which is hereto attached, that I have qualified as such receiver by giving the bond required by such order, that my receivership dates back to *April 12*, 1894, the date of the order for the examination of the said *William J. Fitzpatrick* in Supplementary Proceedings, and you are hereby required to deliver to me as such receiver, all property in your possession belonging to, or which did on *April 12*, 1894, belong to said *William J. Fitzpatrick*, and pay over to me any and all moneys due to him or which were due to him on *April 12*, 1894.

Dated *August 30*, 1898. *Frank H. Parsons*,
Receiver, *69 Wall* street, *N. Y.* City.

1. *Wisconsin.* — Stat. (1898), § 2787. See also list of statutes cited *supra*, note 1, p. 591.

2. *New York.*—Code Civ. Proc., § 714. See also list of statutes cited *supra*, note 1, p. 591. This is the form of notice in the case of Fitzpatrick *v.* Moses, 34 N. Y. App.

bb. Of Premises.

Form No. 17198.[1]

(*Attach to order of appointment.*)

Please to take notice that I have this day filed my bond, which has been approved by one of the justices of within named court as required by within order, and have qualified as temporary receiver of the premises No. *542 Putnam* Avenue, *Brooklyn*; I am entitled to the immediate possession of said premises and hereby demand that you surrender to me the possession thereof forthwith.

Dated *October 21st*, 1896.

Howard B. Snell, Temporary Receiver,
149 Broadway, N. Y.

To the defendants, *Jennie C. Wilder* and *Mary A. Wilder*; and *Henry A. Wernberg*, Esq., attorney for defendant, *Mary A. Wilder*.

j. Deed of Assignment to Receiver.

Form No. 17199.[2]

This indenture, made this *tenth* day of *September*, in the year one thousand eight hundred and *ninety-nine*, between *John Doe*, of *Albany*, in the county of *Albany* and state of *New York*, of the first part, and *Josiah Crosby*, of said city of *Albany*, in the county of *Albany* and state of *New York*, counsellor at law, receiver of the estate and effects hereinafter referred to, appointed by the *Supreme* Court of the state of *New York* in and for said county of *Albany*, of the second part.

Whereas, in and by an order of the *Supreme* Court of the state of *New York*, made at a *special* term of said court, held at the court-house in the city of *Albany* on the *third* day of *September*, one thousand eight hundred and *ninety-nine*, in a certain cause in said court pending wherein *Richard Roe* is plaintiff and *John Doe* is defendant, it was ordered that it be referred to *Calvin Clark* as referee to appoint a receiver of the money, property, things in action and effects of the above named defendant, *John Doe*, the party of the first part, at the time of the commencement of said action, to wit, on the *first* day of *January*, one thousand eight hundred and *ninety-nine*, with the usual powers and authority of receivers, and to take from such receiver the requisite security for the faithful performance of the duties of his trust; and it was further ordered that the above named defendant, the party of the first part, assign, transfer and deliver to such receiver, on oath, under the direction of the said referee, all the money, property, equitable interest, things in action and effects of

Div. 242, and is copied from the records. It was not objected to.

1. *New York.*—Code Civ. Proc., § 714.
See also list of statutes cited *supra*, note 1, p. 591.
This is the form of notice in the case of Citizens' Sav. Bank *v.* Wilder, 11 N. Y. App. Div. 63, and is copied from the records. It was not objected to.

2. *New York.* — Code Civ. Proc., § 1877.
See also list of statutes cited *supra*, note 1, p. 591.
This form of deed of assignment is based upon the deed of assignment set out as evidence in the case of Bowers *v.* Arnoux, 33 N. Y. Super. Ct. 530. That deed was not objected to.

said defendant, with all the books and papers relating thereto and the evidence thereof, and that the said defendant appear before the said referee from time to time and produce such books and papers and submit to such examination as said referee shall direct in relation to the said property, equitable interests, things in action and effects, as by reference to the said order granted in the said case will more fully appear.

And whereas the said party of the second part has been duly appointed such receiver and has given and filed the requisite security pursuant to law and the provisions of said order,

Now this indenture witnesseth that the said party of the first part, in obedience to the said order, and in consideration of the premises aforesaid and the sum of *one* dollar to him in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has conveyed, assigned, transferred and delivered over, and by these presents does convey, assign, transfer and deliver over unto the said party of the second part under the direction of the said referee testified by his approval endorsed thereon, all estate, real and personal, chattels real, moneys, outstanding debts, things in action, equitable interests, property and effects whatsoever and wheresoever of or belonging or due to the said party of the first part, or in which he had any estate, right, title or interest at the commencement of said action, to wit, on the *first* day of *January*, one thousand eight hundred and *ninety-nine*, excepting from the property conveyed by this instrument any and all property which is expressly exempted by law from levy and sale by virtue of an execution and any money, thing in action, or other property held in trust by the said party of the first part where such trust has been created by or the fund so held in trust has proceeded from a person other than the said party of the first part, and excepting also the earnings of the said party of the first part for his personal services rendered within *sixty* days next before the commencement of said action, to wit, the *first* day of *January*, one thousand eight hundred and *ninety-nine*, it having been made to appear by the oath of the said party of the first part (or *otherwise*) that such earnings are necessary for the use of a family wholly or partly supported by the said party of the first part, and also all deeds, writings, leases, muniments of title, books of account, papers, vouchers and other evidences whatsoever relating or appertaining thereto, to have and to hold the same unto him, the said party of the second part, as such receiver as aforesaid, and to his successors and assigns subject to the present and future order, direction and control of the said court.

And for the better and more effectual enabling the said party of the second part, his successors and assigns, to recover and receive all or any part of the estate, debts, property, choses in action and effects hereby conveyed, assigned and transferred, he, the said *John Doe*, has made and appointed and by these presents does make and appoint the said *Josiah Crosby*, party of the second part, his successors and assigns, the attorney and attorneys of him, the said party of the first

part, in his name or otherwise, to commence, continue, discontinue and again bring, perfect and carry out actions and suits against any person or corporation for or on account of all or any part of the said estate, property, book debts, choses in action or effects.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

John Doe. (SEAL)

(*Acknowledgment and proof.*)

k. Proceedings to Amend, Modify or Vacate Order Appointing Receiver.[1]

(1) Notice of Motion.[2]

Form No. 17200.[3]

North Carolina, } In the *Superior* Court.
Franklin County. }

John Doe, plaintiff,
against
Richard Roe, defendant.

To *John Doe*, the plaintiff above named:

You will take notice that upon the affidavits, copies of which are hereto annexed and served upon you, the undersigned will move the *Superior* Court of *Franklin* county, at the term of said court to be held at the court-house in *Louisburg*, in said county of *Franklin*, on the *tenth* day of *September*, 1899, at *ten* o'clock in the *fore*noon or as soon thereafter as counsel can be heard, for an order to vacate the order or decree in the above entitled cause, wherein you are plaintiff and the undersigned is defendant, made at the *June* term, 1899, of the *Superior* Court of *Franklin* county, appointing a receiver, etc., in said cause, and to vacate all other orders of this court made in said cause consequent on said appointment.

Dated *August 10*, 1899.

Richard Roe,
By *Jeremiah Mason*, his Attorney.

1. **Vacating Appointment.** — The appointment of a receiver is a matter resting largely in the sound discretion of the court to which the application is addressed, and if the court at a subsequent stage of the case becomes satisfied that the order of appointment was improperly made, it has the power to vacate such order. Copper Hill Min. Co. *v.* Spencer, 25 Cal. 11; Howard *v.* Lowell Mach. Co., 75 Ga. 325; Cohen *v.* Meyers, 42 Ga. 46; Crawford *v.* Ross, 39 Ga. 44; Central Nat. Bank *v.* Graham, 118 Mich. 488; Ecklund *v.* Willis, 42 Neb. 737; People *v.* Bushwick Chemical Co., (Supreme Ct. Gen. T.) 45 N. Y. St. Rep. 329; Whitney *v.* New York, etc., R. Co., 32 Hun (N. Y.) 164; Bruns *v.* Stewart Mfg. Co., 31 Hun (N. Y.) 195; Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637; Glines *v.* Supreme Sitting, etc., (Supreme Ct. Gen. T.) 50 N. Y. St. Rep. 281; Rowley *v.* Van Benthuysen, 16 Wend. (N. Y.) 369; Lottimer *v.* Lord, 4 E. D. Smith (N. Y.) 183; Cincinnati, etc., R. Co. *v.* Sloan, 31 Obio St. 1; Neeves *v.* Boos, 86 Wis. 313; Walters *v.* Anglo-American Mortg., etc., Co., 50 Fed. Rep. 316.

2. **For the formal parts** of a notice of motion in a particular jurisdiction see the title Motions, vol. 12, p. 938.

3. *North Carolina.* — Clark's Code Civ. Proc. (1900), § 379.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, this page.

(2) Motion.[1]

Form No. 17201.[2]

(Precedent in Chicago Steel Works *v.* Illinois Steel Co., 153 Ill. 12.)[3]

[(*Title of court and cause as in Form No. 4311.*)][4]

And now comes said *Chicago Steel Works*, defendant in this cause, by its solicitor, and moves the court to vacate and set aside the findings, order and decree in said cause, entered against it, and for the appointment of a receiver, etc., at the *August* term of this court last past, to wit, on the *seventh* day of *September*, A. D. 1893, with all of the other orders of this court consequent thereon, to the end that said defendant may make its lawful defense in said cause unhampered thereby.

[(*Signature as in Form No. 4311.*)][4]

(3) Order Vacating Appointment.[5]

(*a*) *In General.*

Form No. 17202.[6]

(Precedent in State *v.* Ross, 118 Mo. 41.)[7]

E. G. Merriam
v.
St. Louis, Cape Girardeau & Ft. S. R'y Co., et al.

Separate motion of the *St. Louis, Cape Girardeau & Fort Smith Railway Company*, limiting its appearance in this court for the purpose of this motion, asking this court to vacate the order made by the judge of this court in vacation on *March 3*, 1893, appointing *Eli Klotz* receiver of the *St. Louis, Cape Girardeau & Fort Smith Railway Company*, for reasons filed, which motion being submitted and by the court taken up, heard and considered, is in all things sustained, said order is vacated and held for naught.

1. **Motion to Vacate.** — Proceedings to vacate an order or decree appointing a receiver are properly commenced by motion. L'Engle *v.* Florida Cent. R. Co., 14 Fla. 266; Howard *v.* Lowell Mach. Co., 75 Ga. 325; Crawford *v.* Ross, 39 Ga. 44; Ecklund *v.* Willis, 42 Neb. 737; Whitney *v.* New York, etc., R. Co., 32 Hun (N. Y.) 164; Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637; Glines *v.* Supreme Sitting, etc., (Supreme Ct. Gen. T.) 50 N. Y. St. Rep. 281; Walters *v.* Anglo-American Mortg., etc., Co., 50 Fed. Rep. 316.

For the formal parts of a motion in a particular jurisdiction see the title Motions, vol. 12, p. 938.

2. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 32, par. 25.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, this page.

3. The motion in this case was not granted. No objection was made to the form, however.

4. The matter to be supplied within [ ] will not be found in the reported case.

5. **For the formal parts** of an order in a particular jurisdiction see the title Orders, vol. 13, p. 356.

6. *Missouri.* — Rev. Stat. (1899), § 753.

See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, p. 723.

7. The form of this order was not objected to.

(*b*) *And Dissolving Injunction.*

Form No. 17203.[1]

(*Venue and title of court as in Form No. 9147.*)

John Doe against *The Western Railroad Company.* } Order vacating order granting an injunction and appointing a receiver.

This day appeared the plaintiff, *John Doe*, and the defendant, *The Western Railroad Company*, and thereupon the motion of the defendant, *The Western Railroad Company*, to vacate the order heretofore made in this action granting an injunction and appointing a receiver, was heard upon the petition of the plaintiff, the affidavits filed by the plaintiff, the affidavits filed by the defendant and other testimony, and was argued by counsel.

On consideration whereof the court doth find that the said order granting an injunction and appointing a receiver in this action ought not to have been made, and that the motion of the defendant to dissolve said injunction and also its motion to vacate the order appointing said receiver are each well taken and should be sustained.

It is therefore considered and ordered that the said injunction be and the same is hereby vacated. It is further considered and ordered that the said order appointing *Josiah Crosby* receiver in this action be and the same is hereby vacated and set aside, and the said *Josiah Crosby* is discharged from his receivership in this action, and he, the said *Josiah Crosby*, is hereby directed to refrain from exercising any further control over the railroad of said company, or any of its leased lines, or any of the property thereof, and the said *Josiah Crosby*, as receiver in this action, is hereby directed and ordered forthwith, upon delivery to him of a certified copy of this order, and upon the demand of *William H. Baldwin*, the president of the defendant, *The Western Railroad Company*, or any other officer of said corporation, to give and surrender to the said *The Western Railroad Company* and its said president and officers the possession of all the property of every kind and description whatsoever belonging to the said *The Western Railroad Company*, including all its books and papers received by and which the said *Josiah Crosby* as such receiver has in his possession or under his control, together with all other property of whatsoever kind or description which has come to his possession or under his control by virtue of the said receivership, under the pains and penalties provided by law for disobedience thereto; and all agents and servants of said receiver, in like manner and under the same penalty, are hereby ordered and commanded forthwith to surrender possession of all property of every kind pertaining to the said receivership, in their possession or under their control, to the said *The Western Railroad Company*.

And it is further ordered that the said *Josiah Crosby*, within *thirty* days from this date, file with the clerk of the *Court of Common Pleas*

1. *Ohio.* — Bates' Anno. Stat. (1897), § 5587. See also list of statutes cited *supra*, note 1, p. 591; and, generally, *supra*, note 1, p. 723.

of *Sandusky* county, *Ohio*, an account of the doings and transactions under the order appointing him receiver in this action, and that each of said parties have *thirty* days from the expiration of the said period of *thirty* days first mentioned within which to file exceptions to said account.

And it is further ordered that the clerk of said *Court of Common Pleas* of *Sandusky* county, *Ohio*, forthwith enter this order upon the journal of this court, and that he shall also, upon the demand of either of the parties hereto or their attorneys, make, deliver and certify under the seal of said court, a true copy of this order.

II. ATTORNMENT BY TENANT TO RECEIVER.

1. Order Directing Tenant to Attorn.[1]

Form No. 17204.[2]

(*Commencing as in Form No. 17164, and continuing down to* *.)

And it is further ordered that the said receiver be and he hereby is directed to demand, collect and receive from the tenant or tenants in possession of the aforesaid mortgaged premises, all rents now due and unpaid or hereafter to become due.

And it is further ordered that the tenants in the possession of the aforesaid mortgaged premises, and such other person or persons as may be in possession of said premises, do and they are hereby directed to attorn as such tenant or tenants to the said *John Hancock*, receiver as aforesaid, and to pay over to said receiver all rents of said mortgaged premises now due and unpaid or that may hereafter become due, until the further order of this court.

And it is further ordered (*concluding as in Form No. 17164*).

2. Proceedings to Vacate Order Directing Tenant to Attorn.

a. Notice of Motion to Vacate.[3]

Form No. 17205.[4]

Supreme Court.

James A. Whyte, as receiver, etc., plaintiff,
vs.
Mary A. Denike & ors., defendants.

Sirs: Take notice that on the judgment entered herein *January 18th*, 1900, and the order made herein *March 19*, 1900, and the affi-

1. **For the formal parts** of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

2. A separate order directing tenants to attorn may be issued upon the application of the receiver, or the direction may be embraced in the order appointing the receiver.

3. **For the formal parts** of a notice of motion in a particular jurisdiction see the title MOTIONS, vol. 12, p. 938.

4. This form is copied from the records in the case of Whyte *v.* Denike, 53 N. Y. App. Div. 425. The motion was granted.

davit which is hereto annexed, verified this day, I shall make application to this court, at a *Special* Term thereof to be held at the Chambers thereof at the court house in the county of *Kings* on the *12th* day of *April*, 1900, at *10.30 A.* M., for an order vacating and setting aside or modifying the said order of *March 19*, 1900, on the ground that the same was irregular and void as amending a judgment or decree of this court by adding a party thereto who was not a party to said action, and without notice, and for such other irregularities as appear on the face of said order, and for such other or further relief as may be proper in the premises.

Dated *April 3d*, 1900.

Yours, etc.,
H. J. Morris, Atty. for *Mary A. Denike*,
150 Nassau Street, Room *1421*, *N. Y. City.*

To *Menken Bros.*, Esqs., Attys. for Plaintiff.

b. Affidavit.[1]

Form No. 17206.[2]

Supreme Court.

James A. Whyte, as receiver, etc., plaintiff,
vs.
Mary A. Denike and ors. defendants.

County of *New York*, } ss.:
Borough of *Manhattan.* }

Henry J. Morris being sworn says: I am attorney and counsel for *Mary A. Denike*, one of the defendants in the above entitled action. Said action was brought to set aside a deed of premises, No. *211 Myrtle* Avenue, in the city of *Brooklyn*, made by *Charles W. Denike* to said *Mary A. Denike* in fraud of creditors.

A judgment was rendered in favor of the plaintiff as receiver in supplemental proceedings setting aside the said deed, on *January 18*, 1900.

That prior thereto and on or about the last week in *November*, 1899, the said *Mary A. Denike*, who was and then claimed to be the owner thereof, and was then in possession thereof, let and rented the same in good faith to one *Morris Zindell* for a period of *four* months from *December*, 1899, to *April*, 1900, at a rent of $*60.00* per month, but that in consequence of the business being so bad after the holidays, she agreed to accept the sum of $*55.00* in payment thereof for the months *February* and *March*, 1900.

That the said tenant failed to pay the rent for the month of *March*, except the sum of $*5*, on account; that during all the time from the entry of said judgment, the said receiver took no proceedings to obtain possession of said premises or to sell the title of said *Charles W. Denike*, but on the *20th* of *March*, 1900, the said receiver served

1. **For the formal parts** of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

2. This form is copied from the records in the case of Whyte *v.* Denike, 53 N. Y. App. Div. 425. The motion was granted.

upon the said tenant a copy of an order entered on *March 19*, 1900, without notice, directing the said tenant to attorn to said receiver as the landlord of said premises, and the said receiver demanded from him the balance of said rent, which had become due on *March 1st*, 1900, and the said tenant paid to him the same, after I had advised him that the order served *March 20th* did not affect the amount due by him from *March 1st*.

All these facts I have ascertained from the written documents herein, and which will be produced or proven on the argument of this motion, and from the sworn statements of said tenant and from conversations had with him and with the agent of the said *Mary A. Denike*.

The said defendant in good faith appealed from said judgment on *February 19*, 1900, and served her proposed case on appeal *March 9*, 1900, and intends to bring the said bill on for a hearing at the next term of the Appellate Division of this court commencing *April 16th*, 1900.

H. J. Morris.

Sworn to before me this *third* day of *April*, 1900,
M. Knoblauch, Com. of Deeds, *New York City*.

c. Order Granting Motion to Vacate.[1]

Form No. 17207.[2]

At a *Special* Term of the *Supreme* Court, held at the Chambers thereof, in the County Court House in the County of *Kings*, Borough of *Brooklyn*, on the *3rd* day of *May*, 1900.

Present: Hon. *Samuel T. Maddox*, Justice.

James A. Whyte, as receiver, etc., plaintiff,
against
Mary A. Denike and others, defendants.

On the order made herein ex parte on the *19th* day of *March*, 1900, and the affidavit of *James A. Whyte*, annexed thereto, verified the *19th* day of *March*, 1900, and the notice of motion herein, dated the *3rd* day of *April*, 1900, and the affidavit of *H. G. Morris*, verified the *3rd* day of *April*, 1900, annexed thereto in favor of said motion, and the affidavit of *James A. Whyte*, verified the *11th* day of *April*, 1900, in opposition thereto, and after hearing *H. J. Morris* of counsel for *Mary A. Denike*, in support of this motion to set aside the same, and *Percival S. Menken*, in opposition thereto, and on motion of *H. J. Morris*, it is

Ordered that the said order of *March 19th*, 1900, be and the same is hereby vacated and set aside with $*10.00* costs to said defendant *Mary A. Denike*, to be credited by said plaintiff on the judgment herein against *Mary A. Denike*.

Enter: *S. T. M.*, J. *S.* C.

Granted *May 3*, 1900.
Peter P. Huberty, Clerk.

1. **For the formal parts** of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

2. This form is copied from the records in the case of Whyte *v.* Denike, 53 N. Y. App. Div. 425. The order was affirmed.

d. Notice of Appeal from Order.[1]

Form No. 17208.[2]

Supreme Court, *Kings* County.

James A. Whyte, as receiver of the property of *Charles W. Denike*,
against
Mary A. Denike and *Charles W. Denike*.

Take notice that the plaintiff, *James A. Whyte*, as receiver of the property of *Charles W. Denike*, hereby appeals to the Appellate Division of the *Supreme* Court, *Second* Department, from the order of Hon. *Samuel T. Maddox*, justice, entered herein in the office of the clerk of the County of *Kings* on the *3rd* day of *May*, 1900, granting the motion of the defendant, *Mary A. Denike*, to vacate and set aside the order heretofore made herein on *March 19*, 1900, directing one *Morris Zindeli*, tenant of *213 Myrtle* Avenue, to attorn to said *James A. Whyte*, as receiver of the property of *Charles W. Denike*, and to pay the rent of said premises to him, and from the whole and every part of said order.

Dated *New York*, *May 3*, 1900.

Yours, etc.,
Menken Brothers, Attorneys for Plaintiff-Applt.,
87 Nassau street, *New York City.*

To *H. J. Morris*, Esq.,
Attorney for Defendants-Respondents,
150 Nassau street, *New York City.*

To *Peter P. Huberty*, Esq.,
Clerk of County of *Kings*.

III. Proceedings to Obtain Possession of Property Subject to Receivership.

1. Notice of Motion.[3]

Form No. 17209.[4]

Supreme Court, *Kings* County.

Terrence F. Ferguson
against
Julius F. Bruckman et al.

Take Notice that on the pleadings herein, the order of this court made on the *2d* day of *July*, 1897, appointing *John Naumer*, Esq.,

1. **For the formal parts** of a notice in a particular jurisdiction see the title NOTICES, vol. 13, p. 212.

2. This is the form of notice of appeal in the case of Whyte *v.* Denike, 53 N. Y. App. Div. 425, and is copied from the records.

3. **For the formal parts** of a notice of motion in a particular jurisdiction see the title MOTIONS, vol. 12, p. 938.

4. This is substantially the form of notice of motion in the case of Ferguson *v.* Bruckman, 23 N. Y. App. Div. 182. An order granting the motion was reversed in the appellate division of the supreme court, for the reason that it appeared that Ferguson had disposed of the money collected before the proceedings to recover it were commenced. An allegation that the money collected was still in the hands of Ferguson has been inserted in this form.

receiver herein, the affidavit of *John Naumer*, verified *September 7th*, 1897, and the affidavit of *Julius F. Bruckman*, verified *September 7*, 1897, I shall move this court, at a *Special* Term thereof to be held at the *Kings* County Court-house, in the city of *Brooklyn*, on the *16th* day of *September*, 1897, at *10.30* o'clock in the *fore*noon, for an order directing the plaintiff, *Terrence F. Ferguson*, to pay over to the receiver herein the sum of *$919.37-100* cents, being the amount collected by said *Ferguson* of the outstanding accounts at the time of the dissolution of the late firm of *T. F. Ferguson* and Company [and still retained by him], and for such other and further relief as may be just.

Dated *Brooklyn*, *September 7*, 1897.

George W. Sickels, Attorney for Receiver,
168 Montague street, *Brooklyn*, *N. Y.*

To *Josiah T. Marean*, Plaintiff's Attorney.
Sidney V. Lowell, Attorney for Defendant *Bruckman*.

2. Affidavit.[1]

a. By Receiver.

Form No. 17210.[2]

Supreme Court, *Kings* County.

Citizens' Savings Bank, plaintiff,
against
Marvelle C. Webber and others, defendants. } Action No. *5.*

City and County of *New York*, ss.:

Howard B. Snell, being duly sworn, deposes and says: That he was duly appointed temporary receiver of the mortgaged premises herein, known as No. *542 Putnam* Avenue, *Brooklyn*, by order entered herein on *October 20th*, 1896, and has qualified as such receiver and is still acting as such; that deponent has endeavored to obtain possession of said premises as appears by the annexed affidavits of *Stanley French*, deputy sheriff, and *David A. Manson*, and deponent has been unable to do so. That deponent is informed and believes that the defendant *Jennie C. Wilder* is the present owner of said premises and in possession thereof; that the defendant *Mary A. Wilder* and one *Charles C. Bostwick* also resides in said house, either as boarders or tenants of said *Jennie C. Wilder*.

That on the *23d* day of *October*, 1896, deponent telephoned to the office of *Jerry A. Wernberg*, Esq., who appears as attorney in this action for the defendant *Mary A. Wilder*; that deponent was informed in answer to the call of the telephone that Mr. *Wernberg* was not in, and deponent had a conversation with some person representing

1. **For the formal parts** of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

2. This is the form of affidavit in the case of Citizens' Sav. Bank *v.* Wilder, 11 N. Y. App. Div. 63, and is copied from the records. The motion for an order directing defendants Jennie C. Wilder and Mary A. Wilder to vacate mortgaged premises and to surrender possession to receiver Snell, which this affidavit supported, was denied in the special term of the supreme court, but granted in the appellate division.

him; that deponent asked if his client would give up possession of said house and he replied, "they will give up nothing." He then stated that said *Mary A. Wilder* had no interest in the property, that she might be a boarder, that he did not represent *Jennie C. Wilder*; that deponent asked him if it would be necessary for him to have the sheriff put him in possession, and he replied "you can do as you please, that's your business."

That deponent desires an order directing the defendants *Jennie C. Wilder* and *Mary A. Wilder*, and said *Charles C. Bostwick*, to show cause why they should not forthwith vacate said premises and surrender to the deponent as such temporary receiver the possession thereof.

That deponent is informed and believes that said *Mary A. Wilder* is the mother of *Jennie C. Wilder*.

Howard B. Snell.

Sworn to before me this *26th* day of *October*, 1896.

Chas. H. Siebert,
Notary Public, *New York* County.

b. By Sheriff.

Form No. 17211.[1]

Supreme Court, *Kings* County.

Citizens' Savings Bank, plaintiff,
against
Marvelle C. Webber and others, defendants. } Action No. *5.*

County of *Kings*, }
City of *Brooklyn*, } ss.

Stanley French, being duly sworn, deposes and says: I am a deputy sheriff of said county, that in my capacity as such on the *23d* day of *October*, 1896, at the request and on behalf of *Howard B. Snell*, temporary receiver herein, I called at the residence of the defendant, *Jennie C. Wilder*, No. *542 Putnam* Avenue, in said city, for the purpose of serving a copy of the order appointing said receiver and notice endorsed thereon, copies of which are hereto annexed. I was told by the person who came to the door that *Jennie C. Wilder* was not at home, and he did not know when she would be. I asked him his name, and he said it was none of my business. I told him I was from the sheriff's office, that I had come to make demand for the possession of the premises in the interest of the temporary receiver, he simply laughed at me and said he did not care a d—— who I was or whom I represented; I told him I had an order of the *Supreme* Court, and he said to h—— with the order, he hadn't anything to do with it. I ascertained from the poll list of the district

1. This is the form of affidavit in the case of Citizens' Sav. Bank *v.* Wilder, 11 N. Y. App. Div. 63, and is copied from the records. The motion for an order directing defendants Jennie C. Wilder and Mary A. Wilder to vacate mortgaged premises and to surrender possession to receiver Snell, which this affidavit supported, was denied at the special term of the supreme court, but granted in the appellate division.

that his name was *Charles C. Bostwick*, and from inquiries from several persons in the neighborhood, who described him to me, I believe said person was *Charles C. Bostwick*, and that he is a brother of said *Jennie C. Wilder*, and that he was the only male person living in the house, and had lived there about two years. He would not take said order, and I put a certified copy thereof, with the notice endorsed thereon, between his coat and vest, and he allowed it to remain there, then he informed me that said *Jennie C. Wilder* was in *New York*, and he did not know when she would return.

Stanley French.

Sworn to before me this *26th* day of *October*, 1896.

Henry Kahlet, Notary Public, *Kings* County.

3. Order to Show Cause.[1]

Form No. 17212.[2]

Supreme Court, *Kings* County.

Citizens' Savings Bank, plaintiff,
against
Marvelle C. Webber and others, defendants. } Action No. *5.*

On the amended summons and complaint, the order of publication of said summons, the order appointing *Howard B. Snell* temporary receiver herein, the annexed affidavits of said *Howard B. Snell*, *Stanley French*, a deputy sheriff of the county of *Kings*, and *David A. Manson*, all verified *October 26th*, 1896, and all papers and proceedings heretofore had herein, let the defendants, *Jennie C. Wilder*, and *Mary A. Wilder*, and one *Charles C. Bostwick*, show cause at a *Special* Term of this court, to be held at the county court-house, in the city of *Brooklyn*, on the *fifth* (*5th*) day of *November*, 1896, at *ten thirty* o'clock in the *fore*noon of that day, or as soon thereafter as counsel can be heard, why they and each of them should not vacate the mortgaged premises herein, known as No. *542 Putnam* Avenue, in the city of *Brooklyn*, and surrender the possession thereof to said *Howard B. Snell*, as temporary receiver, and why said receiver should not have such other and further relief as may be just and proper.

And it is hereby further ordered that service of a copy of this order, and of the affidavits hereto annexed, on or before *November 2d*, 1896, shall be sufficient, and if such receiver is unable to serve said defendant, *Jennie C. Wilder*, personally, service of a copy of this order, and of a copy of the affidavits hereto annexed, by delivering to, and leaving at her residence with a person of proper age and discretion, if upon reasonable application admittance can be obtained, and such a person found who will receive them, or by affixing the same to the outer or other door of the said defendant's residence, and by depositing another copy of this order and said affidavits, properly enclosed

1. **For the formal parts** of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

2. This is the form of order to show cause in the case of Citizens' Sav. Bank *v.* Wilder, 11 N. Y. App. Div. 63, and is copied from the records. No objection was made to it.

in a post-paid wrapper, addressed to her at her residence, No. *542 Putnam* Avenue, *Brooklyn*, *New York*, in the post office of the city of *Brooklyn*, on or before *November 2d*, 1896, shall be sufficient.

Dated at Chambers, *October 26th*, 1896.

N. H. Clement, J. *S.* C.

4. Order for Delivery of Property.[1]

Form No. 17213.[2]

At a *Special* Term of the *Supreme* Court held at the Court-house, *Brooklyn*, *N. Y.*, on *September 16*, 1897.

Present — *Samuel T. Maddox*, Justice.

Terrence F. Ferguson against *Julius F. Bruckman.*

On the pleadings herein, the order of this court made *July 23*, 1897, appointing *John Naumer*, Esq., receiver, and on reading and filing the affidavit of *John Naumer*, verified *September 7*, 1897, and the affidavit of *Julius F. Bruckman*, verified *September 9*, 1897, in favor of the motion and affidavit of *Terrence F. Ferguson*, verified *September 15*, 1897, in opposition.

Now after hearing *George W. Sickels*, Esq., attorney of the receiver, for the motion, and *Josiah T. Marean*, Esq., opposed, and after due deliberation being had,

It is ordered that the plaintiff *Terrence F. Ferguson* deliver and pay over to the receiver herein the sum of *$919.37* assets of the firm of *T. F. Ferguson and Company* collected by said plaintiff [and still retained by him] within *ten* days from the service of this order.

Enter: *S. T. M.*, J. *S.* C.

Granted *Sept. 28*, 1897.

Jacob Worth, Clerk.

IV. Proceedings to Obtain Examination of Parties Withholding Possession of Property Subject to Receivership.

1. Notice of Motion.[3]

Form No. 17214.[4]

Supreme Court, *Westchester* County.

Mathushek Piano Manufacturing Company, plaintiff, against *James Pearce*, defendant.

Please take notice, that on the annexed affidavit of *James D. Moran*,

1. **For the formal parts** of an order in a particular jurisdiction see the title Orders, vol. 13, p. 356.

2. This is substantially the form of order in the case of Ferguson *v.* Bruckman, 23 N. Y. App. Div. 182. The order in that case was reversed in the appellate division for the reason that it appeared that Ferguson had disposed of the money collected by him before proceedings commenced. This form shows on its face that there had been no disposition of the property.

3. **For the formal parts** of a notice of motion in a particular jurisdiction see the title Motions, vol. 12, p. 938.

4. This is the form of notice of motion in the case of Mathushek Piano Mfg.

receiver, verified the *9th* day of *March*, 1894, I shall move this court, at a *Special* Term thereof, to be held at the county court-house in the village of *White Plains*, in the county of *Westchester*, on the *17th* day of *March*, 1894, at *ten* o'clock in the *fore*noon of that day, or as soon thereafter as counsel can be heard, for an order requiring the defendant to appear and be examined before one of the justices of this court, at the county court-house in the village of *White Plains*, in the county of *Westchester*, in order that the receiver may ascertain the names of the persons or parties to whom the pianos mentioned in the amended complaint herein have been leased or conditionally sold by the defendant, and also to ascertain the amounts due from such persons or parties therefor, and to ascertain the amounts collected by the defendant, and also requiring the defendant to produce on such examination his books of account and all contracts, writings and memoranda of every description relating to said pianos and said business, and for such other and further order and relief as may be just.

Dated *New York*, *March 9th*, 1894.

Yours, etc.,
William A. Abbott, Plaintiff's Attorney,
18 Broadway, *New York City*, *N. Y.*

To *J. M. Whitelegge*, Esq., Defendant's Attorney,
64 College Place, *New York City.*

2. Affidavit.[1]

Form No. 17215.[2]

(Precedent in Mathushek Piano Mfg. Co. *v.* Pearce, 79 Hun (N. Y.) 417.)

City and County of *New York*, ss.:

James H. Moran, being duly sworn, says:

I. That by an order made in this cause, dated on the *21st* day of *October*, 1893, which order was resettled *November 18th*, 1893, deponent was duly appointed receiver of all the pianos mentioned in the amended complaint in the possession of the defendant, *James Pearce*, and of all contracts for the sale of any of said pianos by instalments or conditionally, and of all leases of any of said pianos, and of all amounts collected by the defendant on such conditioned sales mentioned in the complaint, and leases, since the commencement of this action, and of all amounts uncollected on such sales or leases. And in and by said order it was further ordered that on demand the defendant deliver to the receiver all books, papers and accounts kept or caused to be kept by him since the commencement of this action, showing what disposition he has made of said pianos, and also deliver all of said contracts or leases made by him of said pianos; and that

Co. *v.* Pearce, 79 Hun (N. Y.) 417, and is copied from the records. An order was entered at a special term of the supreme court directing that defendant James Pearce appear before a referee therein, appointed for the purpose of examination. The order was affirmed at general term of the supreme court.

1. **For the formal parts** of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

2. The motion which this affidavit supported was granted and an order of examination made, which was affirmed on appeal.

he pay over to the said receiver on demand all of said amounts so received by him on account of sales or rentals of said pianos.

II. That thereupon this deponent duly qualified as such receiver, as required by said order.

III. That on the *11th* day of *November*, 1893, deponent, in company with Mr. *William A. Abbott*, counsel for the plaintiff, called on the defendant at the latter's place of business in the city of *Yonkers* and served the defendant with a certified copy of said order of *October 21*, 1893, and demanded of him the delivery of any pianos in his possession that were mentioned in or covered by said order, as well as of all contracts and leases referred to in said order, and also demanded payment of all amounts collected by the defendant on conditional sales of pianos since the commencement of this action. Deponent also, at said time and place, demanded of the defendant all books, papers and accounts kept or caused to be kept by him since the commencement of this action, showing what disposition he has made of said pianos, which, by said original order and as resettled, the defendant was required to deliver to deponent on demand. That, in response to the aforesaid demand by deponent on defendant, the defendant told deponent that his, the defendant's, business would suffer injury if he should deliver his books of account called for by said order, as they contained entries of other transactions, and promised deponent that he would draw off from said books a copy of all entries relating to the pianos in question in this action and send said copy to deponent, and that deponent could have access to the books and compare said copy with the books' entries. Deponent says that no such promised copy was ever received by him, and is informed that by advice of counsel the defendant refuses to furnish such copy.

That on or about *November 13th*, 1893, deponent received from defendant a check for $*36.00* only "for money received since *August 4th*," as stated in a letter of *November 13*, 1893, purporting to come from deponent, and defendant has failed to further comply with the demand made pursuant to said order to pay to deponent the moneys received by him since the commencement of said action on account of said pianos, and has failed to deliver to deponent the leases and contracts required by said order.

IV. That deponent, as such receiver, is desirous of collecting the money due upon the contracts for the sale of said pianos by instalments or conditionally and upon leases of any of said pianos, as well as of all amounts collected by the defendant on such conditional sales and leases since the commencement of this action, but is unable to do so without having in his possession the books, papers and accounts kept or caused to be kept by the defendant since the commencement of this action, showing what disposition he has made of said pianos, and showing what has been paid and what remains due on such of said pianos as have been leased or conditionally sold.

V. That it is necessary, in order to ascertain the names of the persons or parties to whom said pianos have been leased or conditionally sold by the defendant, and also to ascertain the amounts due from them therefor, and to ascertain the amounts collected by the defendant, to examine the defendant and his books of account and any con-

tracts for the sale of said pianos in his possession. And deponent desires an order requiring the defendant to appear and be examined for said purpose, and to produce on such examination his books of account and all contracts, writings and memoranda of every description relating to said pianos and said business.

James H. Moran.

Sworn to before me this *9th* day of *March*, 1894.

Arthur M. Silber, Notary Public,
City and Co. of *N. Y.*

3. Order that Defendant Appear Before Referee for Examination.[1]

Form No. 17216.[2]

At a *Special* Term of the *Supreme* Court of the State of *New York*, held at the County Court House, at *White Plains*, in the county of *Westchester*, on the *17th* day of *March*, 1894.

Present — Hon. *J. O. Dykman*, Justice.

Mathushek Piano Manufacturing Company, plaintiff,
against
James Pearce, defendant.

A motion having come on to be heard this day, in behalf of the plaintiff, for an order requiring the defendant to appear and be examined before one of the justices of this court at the county court house, in the village of *White Plains*, in the county of *Westchester*, in order that the receiver heretofore appointed herein may ascertain the names of the persons or parties to whom the pianos mentioned in the amended complaint herein have been leased or conditionally sold by the defendant, and also to ascertain the amounts collected by the defendant, and also requiring the defendant to produce, on such examination, his books of account, and all contracts, writings and memoranda of every description relating to said pianos and said business, and for such other and further order and relief as may be just.

On reading and filing notice of motion for such order and proof of due service of same on Mr. *J. H. Whitelegge*, attorney for the defendant, together with the affidavit of Mr. *James H. Moran*, said receiver, attached to said notice, and on reading and filing the affidavit of *James Pearce*, the defendant, in opposition, and after hearing Mr. *William A. Abbott*, attorney for plaintiff, in support of said motion, and Mr. *J. H. Whitelegge*, attorney for defendant, in opposition.

Ordered, that the defendant, *James Pearce*, appear before *Henry R. Barrett*, Esq., of *Bedford*, who is hereby appointed referee for the purpose of examining the said defendant, *James Pearce*, as to the names of the persons or parties to whom the pianos mentioned in

1. **For the formal parts** of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

2. This is the form of order directing examination in the case of Mathushek Piano Mfg. Co. *v.* Pearce, 79 Hun (N. Y.) 417, and is copied from the records. This order was affirmed on appeal.

the amended complaint were leased or conditionally sold by him, said defendant, and as to the amounts due from such persons or parties therefor, and as to the amounts collected by said defendant from such persons or parties for and on account of such pianos, and the defendant, *James Pearce*, is hereby ordered to appear and attend before said *Henry R. Barrett*, Esq., referee, at such time and place as said referee may duly designate, and at which time and place the said *James Pearce* may be duly notified and summoned and required to appear, and that he then and there submit to such examination and then and there produce before said referee his books of account and all contracts, writings and memoranda of every description relating to said pianos and said business. The referee may sit in *New York* City.

Enter: *J. O. D.*, J. *S.* C.

V. PROCEEDINGS TO PUNISH FOR CONTEMPT PERSON REFUSING TO DELIVER OVER POSSESSION OF PROPERTY SUBJECT TO RECEIVERSHIP.

1. Affidavit.[1]

Form No. 17217.[2]

County Court, *Kings* County.

In the matter of the examination of *David Camerick*, a judgment debtor, in proceedings supplementary to execution, issued upon a judgment against him, by *Joseph W. Rosenzweig*, a judgment creditor.

State of *New York*, }
County of *Kings*. } ss.

Frank J. Doyle being duly sworn, says:

I am attorney and counselor-at-law, having my office at number *189 Montague* street, in the borough of *Brooklyn* and city of *New York*. By an order made in this proceeding and on the *7th* day of *June*, 1898, duly filed and recorded in the office of the clerk of the county of *Kings*, I was appointed receiver "of all the debts, property, equitable interest, rights and things in action" of *David Camerick*, the judgment debtor herein; and upon the *11th* day of *June*, 1898, I duly qualified as such receiver by filing pursuant to said order, in the said office of said county clerk, a bond in the sum of *two hundred and fifty* dollars, which said bond was duly approved, before said filing, by the judge who made said receivership order.

The said receivership order contained the following provision:

"I do further order that said *David Camerick*, upon being served with a certified copy of this order, and notice of filing of the bond prescribed by this order, deliver to the said receiver all property and money now in his possession, or under his control

1. **For the formal parts** of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

2. This is the form of the affidavit in Matter of Camerick, 34 N. Y. App. Div. 31, and is copied from the records. There was an order adjudging Camerick in contempt for failure to turn over his store and business to the receiver, which order was affirmed on appeal.

belonging to him and not exempt by section *2463* of the Code of Civil Procedure."

On the said *11th* day of *June*, 1898, at about *four* o'clock in the *after*noon of said day, in company with *Julius Henry Cohen*, the attorney for the judgment creditor herein, *Henry Seiler* and *Joseph Stark*, whose affidavits are severally hereto annexed, I went to the dry-goods store of said *David Camerick*, at number *521 Myrtle* Avenue in the borough of *Brooklyn* and city of *New York*. Said store is a retail dry-goods store known as the "Red House," and contained, at the time of my entry on said day, a large stock of underwear, hosiery, shirts, neckwear, suspenders, jewelry, collars, cuffs, brushes, combs, pins, blacking, cotton, scarfs, mufflers, garters, and various other sundries, together with show cases, fixtures, desks, a stove, some chairs, and other fixtures necessary for the conduct of said business. A picture of said store is contained on exhibit "*D*," hereto annexed. I found the judgment debtor in possession of said store and its contents, openly conducting business, his clerks and himself openly selling goods over the counters and receiving cash therefor from customers.

Calling said judgment debtor aside, I handed him a duly certified copy of the said receivership order, together with a notice of the filing of my bond and demand. A copy of such notice and demand is hereto annexed, marked exhibit "*A*." Said judgment debtor read said order and notice, and then asked me what I was going to do about it. I told him that I was the receiver and that, pursuant to the order, I was going to take possession of his property. I demanded possession of the store, and he refused to give it to me. I demanded the goods of the store, and he refused to give them to me. He said the reason he refused to give me possession of the store and of its contents was that it contained various goods sold to him "on consignment." I asked him if there were in the store any goods not so sold "on consignment" and he admitted that there were such goods. I then demanded possession of those goods, but he refused to give them to me. He stated as his reason for so refusing that said unconsigned goods were entirely mixed up with the consigned goods, and it would take him over a day to separate and distinguish them. He took me into his private apartments, which adjoined the store, and exhibited to me a large number of bills, having stamped upon them "On Consignment," and being for hosiery, underwear and other merchandise, in sums, aggregating over a *thousand* dollars. Some of these bills, however, were for goods sold for cash. These, the debtor said, were for goods he was compelled to purchase to fill orders. I asked him what arrangement he had with the parties from whom he received these consigned goods, and he informed me that he sold the goods over the counter, together with his other goods, and paid the consignors from his receipts. He said that the consignors were pressing him for money and that only a few days before, one of them pressed him so hard that he was compelled to borrow *fifty* dollars to pay him on account of his bills. I asked him where the goods not sold "on consignment" were situated in his store, and he said they were "all over" his store. I thereupon again demanded possession of the store, with

all its contents, which he again refused, and stated that he was acting under the advice of his lawyer. Mr. *Seiler*, who remained with Mr. *Stark* in the store, while I and Mr. *Cohen* and the judgment debtor were in the adjoining apartment, informed me upon my return to the store, that he saw the wife of the judgment debtor abstract from the cash drawer in the desk what he believed to be bills, or bank notes. I thereupon demanded all the cash on hand of the judgment debtor, and going over to the cash drawer, he handed me $3.09, in pennies, nickels, dimes and quarters. He handed me no bills, and he told me that the $3.09 was all that was in the till. I asked him if any money had been taken from the drawer in my absence, and he said that there had not been. His wife denied to me that she had taken any bills from the drawer. The debtor showed me a slip of paper, which he kept in the drawer. This contained figures of sums, which he said, were drawn, either by himself or his wife, during the day, from the cash drawer, for household expenses.

I asked the judgment debtor, if, since the examination, he had sold any unconsigned goods, that is, goods to which the title had passed to him, and he admitted that he had. He could not say how much. I demanded the proceeds of these sales, but he refused to give them to me saying he did not have them.

I thereupon empowered *Joseph Stark* as my agent to remain in possession of said store, and gave him a written authorization, which is hereto annexed and marked "Exhibit *B*." I read said authorization to said judgment debtor, and in his presence, instructed said *Stark* as my agent to remain in possession of the store and its contents, and I furnished him with *two* padlocks with which to bolt and lock the place. The judgment debtor told me that if said *Stark* attempted to lock the store he would forcibly stop him, and that if the padlocks were actually put on the door, he would break them off.

As appears from the annexed affidavit of said *Stark*, despite my warning, said *Camerick* did forcibly prevent said *Stark* from closing said store and did forcibly eject him therefrom.

By reason of his refusal to identify the goods title to which was vested in him beyond question, the debtor prevented me from reaching said goods, or from distinguishing them from goods title to which he claimed still remained in the vendors; and by reason of his refusal to deliver said property to me, I was prevented from securing it and complying with the order of the court.

The expenses of the receivership, so far, are about $10.00.

Frank J. Doyle.

Sworn to before me this *19th* day of *June*, 1898.

Andrew F. Van Thun, Jr.,
Commissioner of Deeds for the city of *New York*,
residing in the Borough of *Brooklyn*.

2. Order to Show Cause.[1]

1. **For the formal parts** of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

Form No. 17218.[1]

County Court, *Kings* County.

In the matter of the examination of *David Camerick*, a judgment debtor in proceedings supplementary to execution issued upon a judgment against him by *Joseph W. Rosenzweig*, a judgment creditor.

Upon the annexed affidavit of *Frank J. Doyle*, verified the *18th* day of *June*, 1898, the affidavit of *Julius Henry Cohen*, verified the *17th* day of *June*, 1898, the affidavits of *Joseph Stark* and *Henry Seiler*, both verified the *15th* day of *June*, 1898, the exhibits thereto annexed, the examination of the judgment debtor herein verified by him on the *14th* day of *May*, 1898, together with the order appointing the receiver herein, both of which were filed in the office of the clerk of the county of *Kings* on the *7th* day of *June*, 1898.

I do hereby order and direct that *David Camerick*, the judgment debtor herein, show cause, at a term of this court to be held in the county court house in the county of *Kings*, borough of *Brooklyn* and city of *New York*, in room 7 of said court house, on the *22d* day of *June*, 1898, at *ten* o'clock in the *fore*noon or as soon thereafter as counsel may be heard, why an order should not be made herein, adjudging the said *Camerick* to be guilty of contempt of court in violating the order made herein on the *4th* day of *June*, 1898, and filed in the office of the clerk of the county of *Kings*, on the *7th* day of *June*, 1898, which said order, among other things, directed him to deliver all property and money now in his possession or under his control, to the receiver herein, and enjoined him from transferring or disposing of his property or in any manner interfering therewith; and why the judgment creditor herein should not have such other and further relief as to the court shall seem just; and sufficient cause therefor having been shown, service of this order on or before the *20th* day of *June*, 1898, together with copies of the annexed affidavits, shall be deemed sufficient service thereof.

Dated *New York*, *June 18th*, 1898.

Joseph Aspinwall, *County* Judge, *Kings* County.

3. Order Adjudging Defendant in Contempt.[2]

1. This is the order to show cause in Matter of Camerick, 34 N. Y. App. Div. 31, and is copied from the records. An order was entered adjudging Camerick in contempt for failure to turn over his store and business to the receiver, which order was affirmed on appeal.

2. **For the formal parts** of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

Insufficient Order. — In Tolleson *v.* Greene, 83 Ga. 499, is set out the following order of commitment:

"*People's Savings Bank* v. *The Mercantile Banking Company.*

In the matter of the petition of *C. S. Northen*, receiver, for order to turn over assets.

On hearing the above stated motion of said receiver and on considering the evidence, it is ordered that *J. R. Tolleson* and *James M. Richards* be and they are hereby committed to the common jail of *Fulton* county, there to remain until they comply with the order of the court heretofore made, with respect to the delivery of the assets of said defendant corporation to said receiver.

January 28, 1889.

Marshall J. Clarke, Judge."

In Tolleson *v.* People's Sav. Bank, 85 Ga. 171, it was held that this order

Form No. 17219.[1]

At a Term of the *County* Court, held in and for the County of *Kings*, at the County Court House in the said county on the *28th* day of *June*, 1898.

Present — Honorable *William B. Hurd*, Judge.

In the matter of the examination of *David Camerick*, a judgment debtor, in supplementary proceedings, etc.

Joseph W. Rosenzweig, the judgment creditor herein, having procured an order requiring *David Camerick*, the judgment debtor herein, to show cause why he should not be punished as for a contempt of court for wilfully violating the order made herein on the *4th* day of *June*, 1898, which said order, among other things, directed him to deliver all property or money now in his possession or under his control to the receiver herein and enjoined him from transferring or disposing of his property or in any manner interfering therewith; and why the judgment creditor should not have such other and further relief as the court should deem just; and on reading and filing the affidavits of *Frank J. Doyle*, the receiver herein, verified the *18th* day of *June*, 1898, of *Julius Henry Cohen*, verified the *17th* day of *June*, 1898, of *Joseph Stark* and *Henry Seiler*, both verified the *15th* day of *June*, 1898; the examination of the judgment debtor, and the order appointing such receiver, both filed on the *7th* day of *June*, 1898; the exhibits *A*, *B*, *C* and *D*, all thereto annexed, and said order to show cause granted thereon, dated said *18th* day of *June*, 1898, and the affidavit of service of *Joseph Stark* verified the *20th* day of *June*, 1898, all read in support of said motion, and the affidavits of *David Camerick* verified the *25th* day of *June*, 1898; of *Esther Camerick* verified the *22d* day of *June*, 1898, the affidavit of *Isaac Skornik*, verified the *22d* day of *June*, 1898; the exhibits *A*, *B*, *C*, *D*, *E*, *F*, *G*, *H*, *I*, *J*, *K*, *L*, *M*, *N*, *O*, *P*, *Q*, *R*, *S*, and *T*, all read in opposition to said motion; and after hearing *Julius Henry Cohen* of counsel for the judgment creditor in support of said motion and *Charles F. Brandt*, Esq., attorney for the judgment debtor in opposition thereto; and due deliberation having been had; on motion of *Julius Henry Cohen*, attorney for the judgment creditor herein, it is

Ordered and adjudged that *David Camerick*, the judgment debtor herein, is guilty of wilfully violating the order of this court made herein on the *4th* day of *June*, 1898, and filed in the office of the Clerk of the County of *Kings* on the *7th* day of *June*, 1898, and he is adjudged to be in contempt of court; and it is

Further ordered and adjudged that unless within *forty-eight* (*48*) hours after the entry of this order, the judgment debtor deliver up to the receiver herein, *Frank J. Doyle*, Esq., the possession of the store and dry-goods business situated at number *521 Myrtle* Avenue, in the borough of *Brooklyn* and county of *Kings*, together with all

was irregular in that it did not state the court or the amount of assets which the judge had found to be in Tolleson's possession. This should have been done in order that Tolleson and the receiver might know what Tolleson had to do to comply with the order and be discharged from custody.

1. This is the form of order in Matter of Camerick, 34 N. Y. App. Div. 31, adjudging Camerick in contempt for failure to turn over his store and busi-

the goods, wares and merchandise contained therein, the judgment creditor herein may apply ex parte, upon proof of such failure to comply for an order formally adjudging the said judgment debtor in contempt, or if the judgment creditor be so advised, to apply ex parte as aforesaid for an attachment of *two hundred and fifty* ($*250*) dollars; and it is

Further ordered and adjudged that unless said judgment debtor deliver up possession of said property as aforesaid, the motion to punish him as for a contempt of court is hereby granted with *ten* ($*10*) dollars costs and an order to that effect may be entered ex parte as herein provided; and it is

Further ordered and adjudged that if said judgment debtor delivers up possession of said property as aforesaid, the said motion to punish him as for a contempt is denied, upon payment to the attorney for the judgment creditor of *ten* ($*10*) dollars costs of this motion.

Enter: *W. B. Hurd, Jr.*
County Judge, *Kings* Co.

Granted *June 28*, 1*898*.
Wm. B. Wuest, Clerk.

4. Attachment for Contempt.

Form No. 17220.[1]

(Precedent in Cobb *v.* Black, 34 Ga. 163.)[2]

State of *Georgia*, } To all and singular the Sheriffs and Constables of
Stewart County. } said State.

You are hereby commanded to seize the body of *Jacob L. Cobb*, of *Randolph* county, this day duly convicted before me of contempt, in the disobedience to our order requiring him to turn over to the Receiver appointed by our order, in the bill now pending in said county of *Randolph*, in favor of *James Morris* vs. said *Cobb* and one *H. J. Sprayberry*, the property in dispute in said cause, as in said bill described; and him, the said *Cobb*, to convey to, and confine in the common jail of said county of *Randolph*, then and there to be kept without bail or main-prize, until he shall deliver to said Receiver, viz: *Caleb J. Emmerson*, the property still withheld by him, as set forth in the rule nisi for a contempt this day issued by us in said cause against said *Cobb*, and in said bill described.

Herein fail not, under the penalty of the law.

Witness my official signature, this *September 2d*, 18*64*.
John T. Clarke, J. *S.* C. P. C.

ness to the receiver, and is copied from the records. It was affirmed on appeal.

1. *Georgia*. — 2 Code (1895), §§ 3944, 4858, 4860, 4899.

2. The defendant Cobb was arrested and placed in jail. Thereupon a writ of habeas corpus was granted on a petition which stated that the jailer held the prisoner unlawfully, because the judge in the proceedings had not only transcended the powers conferred on him as a judge in vacation, but had exceeded the jurisdiction of even the superior court in term time, in the length of imprisonment imposed. On a hearing, there was a judgment remanding Cobb to the custody of the jailer, which was affirmed by the supreme court.

VI. Sale of Real Estate.[1]

1. Petition for Leave to Sell.[2]

Form No. 17221.[3]

(*Title of court and cause as in Form No. 17231.*)

To the *Supreme* Court of the State of *New York.*

The petition of *Nathan Hale*, receiver in the above cause, respectfully shows to this court:

That by order of this court, dated the *tenth* day of *June*, 1899, your petitioner was appointed receiver of (*specify the estate*), and that on said *tenth* day of *June* he gave the requisite bond with sureties, which said bond was duly approved and filed, and that he is now acting as such receiver.

That the defendant in this action, as it appears, is the owner of the following described real estate, to wit, (*describing premises, stating the interest of defendant, value, and the incumbrances, if any*).

That (*Here state reasons for asking for the sale*).

Your petitioner therefore prays that an order may be made by this court allowing him as such receiver to sell at public auction and convey all the right, title and interest of the said *Richard Roe*, the defendant above named of and in the aforesaid described real estate, and that the said *Richard Roe* be required, if the purchaser shall desire, to join in such deed, and for such other and further relief as may be just.

(*Signature and verification as in Form No. 17231.*)

2. Order Granting Leave to Sell.[4]

Form No. 17222.[5]

(*Title of court and cause as in Form No. 6957.*)

Upon reading and filing (*Here enumerate the motion papers*), and upon hearing *Jeremiah Mason*, Esq., attorney for said receiver, in support of said motion, and *Oliver Ellsworth*, Esq., attorney for the defendant, in opposition thereto, and after due deliberation being had thereon, it appears to the satisfaction of the court that there are no goods or chattels or choses in action of the said *Richard Roe*, out of which any money can be made by collection, suit or sale, and that the said land is the only available property of said defendant (*or state other facts justifying the sale*), now, on motion of *Jeremiah Mason*, Esq., attorney for said receiver, it is

1. **Power to Order Sale.** — The court has power to order the sale of property in the hands of receiver, when in the discretion of the court a sale is advisable. Syracuse Sav. Bank *v.* Syracuse, etc., R. Co., 88 N. Y. 110; Smith *v.* Danzig, (Supreme Ct. Spec. T.) 3 Civ. Proc. (N. Y.) 127.

2. **For the formal parts** of a petition in a particular jurisdiction see the title Petitions, vol. 13, p. 887.

3. See *supra*, note 1, this page.

4. **For the formal parts** of an order in a particular jurisdiction see the title Orders, vol. 13, p. 356.

5. See *supra*, note 1, this page.

Ordered that the said receiver be and he is hereby authorized to sell and dispose of for cash, either in one parcel or in subdivisions as to the said receiver shall appear most beneficial, the said lands described and specified in the said petition, at public sale, to the highest bidder on due public notice thereof, at such time or times as he shall deem most convenient and proper between the day of this order and the *twentieth* day of *October next.*

And it is further ordered that upon said sale being made, the said receiver make and execute to the purchaser or purchasers of said real estate good and sufficient deed or deeds to convey the interest of the said defendant *Richard Roe* therein, and the said *Richard Roe* is hereby directed to join with the receiver in such deed or deeds if required by the purchaser or purchasers at said sale.

And it is further ordered that the said receiver retain the proceeds of such sale or sales in his hands as receiver, to be accounted for and to abide the further order and decision of this court.

The following is the real estate hereby authorized to be sold, being situated in the county of *Albany*, in the state of *New York*, and bounded and described as follows: (*Here describe the land*).[1]

Enter: *J. M.*, J. *S.* C.

3. Notice of Sale.

Form No. 17223.[2]

Receivers' Sale.

Supreme Court, *New York* County.

Henry Lembeck, plaintiff,
against
Metropolitan Building Company, defendant.

In pursuance of the final judgment made and entered in this action, bearing date *August 14th*, 1899, and of an order duly made and entered therein, bearing date the *21st* day of *August*, 1899, we, the undersigned, receivers in said judgment and order named, will sell at public auction to the highest bidders on the premises, at *Morris Park, Jamaica, Queens* county, *New York*, on *Thursday*, the *16th* day of *November*, 1899, at *11* o'clock *A.* M., by *William M. Ryan*, auctioneer, the premises directed in said order to be sold, which are described as follows:

Two (*2*) lots on the *easterly* side of *Johnson* avenue, *Morris Park, Jamaica, Queens* county, *New York*, numbered *257* and *258*, in Block *six* (*6*) on map of *Morris Park, Queens* county, filed *October 19th*, 1885, in the office of the clerk of *Queens* county, and being distant *150* feet southerly from the southeast line of *Stewart* and *Johnson* avenues (*50x92*), subject to a mortgage of $*2,000*, *six* per cent. interest from *April 14th*, 1899; also to a mortgage of $*500*, *six* per cent. interest from *March 12th*, 1899; also to a mortgage of

1. **Description of Property.** — Property ordered sold should be specifically described. Dixon *v.* Rutherford, 26 Ga. 149.

2. See, generally, *supra*, note 1, p. 743.
This form is copied from the original papers in the case.

$1,500, *six* per cent. interest from *June 28th*, 1899, and subject to taxes and assessments amounting to $73.95 and interest.

Dated *October 20th*, 1899.

Edward H. Fallows,
Henry Puster,
Receivers.

Booraem, Hamilton & Beckett, Attorneys for Receivers,
100 Broadway, Borough of *Manhattan*,
New York City.

VII. COMPROMISE OF DOUBTFUL CLAIMS.

1. In General.[1]

Form No. 17224.[2]

In the *Circuit* Court *of the United States* for the *Eastern* District of *Michigan*.

To the Honorable *Henry H. Swan*, Judge of said Court.

Your petitioner, *Joseph L. Hudson*, as receiver of the *Third National Bank of Detroit*, respectfully represents unto your Honor,

That on the *31st* day of *January*, A. D. 1894, the said *Third National Bank of Detroit* was put into liquidation, and your petitioner was duly appointed the receiver thereof by the Comptroller of the Currency of the United States, under and in pursuance of the laws of the United States; that on or about the day aforesaid your petitioner accepted said office and entered upon the duties of the same, took possession of the books, records and assets of every description of said bank, and from thence hitherto has been and still is engaged in the collection of all debts, dues and claims belonging to said bank, and since then has been and still is discharging the duties of his said office.

That among the assets of the said bank so coming into the hands of your petitioner, as such receiver, is a certain promissory note for the sum of $7,500, date *June 18*, 1893, made by *Harry Winder*, of the said city of *Detroit*, and payable *ninety* days after date to the order of said bank by the name, style and description of *Frederick Marvin*, cashier.

That on the *5th* day of *October*, 1893, there was paid upon said note the sum of $2,000, and there now remains due and unpaid upon the same of principal and interest the sum of $5,700.

That as your petitioner is informed and believes, said *Harry Winder* is now and for one year last past has been wholly insolvent, and has no property subject to execution.

That one *Jerome Winder*, a brother of *Harry Winder*, offers to pay to your petitioner the sum of $1,000 in cash for an assignment of the said promissory note, which offer has been submitted to the Comp-

1. **For the formal parts** of a petition in a particular jurisdiction see the title PETITIONS, vol. 13, p. 887.

2. *United States.* — Rev. Stat. (1878), § 5234.
This form is copied from the records.

troller of the Currency of the United States, and has been by him referred to your Honor for approval or disapproval.

That in the opinion of your petitioner it is for the best interests of the creditors of said bank that such offer be accepted.

Your petitioner therefore prays that your Honor will enter an order anthorizing and directing him to accept of and receive from said *Jerome Winder* the sum of *$1,000* in cash, and in consideration thereof to assign and deliver unto said *Jerome Winder* said promissory note; and that your Honor will grant unto him such other and further power as shall be necessary in the premises.

And your petitioner will ever pray, etc.

Joseph L. Hudson, Recvr.

State of *Michigan*, County of *Wayne*, ss:

Joseph L. Hudson, being first duly sworn, says that he has read the above petition by him subscribed as receiver, and knows the contents thereof, and that the same is true in substance and in fact, as he verily believes.

(*Signature and jurat as in Form No. 844.*)

2. When Collaterals are Involved.

Form No. 17225.[1]

In the *Circuit* Court *of the United States.*

In the *Eastern* District of *Michigan.*

To the Honorable *Henry H. Swan*, Judge of the said court:

Your petitioner, *Joseph L. Hudson*, as receiver of the *Third National Bank of Detroit*, respectfully represents unto your Honor,

That on the *31st* day of *January*, A. D. 1894, the said *Third National Bank of Detroit*, was put into liquidation, and your petitioner was duly appointed the receiver thereof, by the Comptroller of the Currency of the United States, under, and in pursuance of the laws of the United States; that on or about the date aforesaid, your petitioner accepted said office, and entered upon the duties of the same, took possession of the books, records and assets, of every description, of said bank, and from thence hitherto has been, and still is engaged in the collection of all debts, dues and claims belonging to said bank, and since then has been and still is discharging the duties of his said office.

That when your petitioner accepted said office as aforesaid, there came into his possession among the assets of said bank the two promissory notes of one *Henry Winder*, both dated the *12th* day of *March*, 1891, due in *two* and *three* years from such date, respectively, and for the sum of *$10,000* and *$18,000*, respectively.

That your petitioner is informed and believes that some time in the year 1893, *Henry Winder & Company*, of which *Henry Winder* was the senior member, became insolvent, and discontinued its business, and your petitioner has since been unable to find said *Henry Winder*;

1. *United States.* — Rev. Stat. (1878), § 5234. This form is copied from the records in the case.

that prior to the insolvency of said bank, said promissory notes were considered of no value, and ever since the appointment of your petitioner, said notes have been considered worthless, and have been so scheduled; that as collateral to said indebtedness of said *Henry Winder* to said bank there was deposited with said bank the promissory note of one *William Johnson*, of the City of *Detroit*, dated *March 12th*, 1891, for the sum of $5,000, due in *four* months from the date thereof, to the order of *Henry Winder & Co.*, and by said firm indorsed in blank.

That among said assets your petitioner also found the promissory note of *Thomas Acklen & Co.*, dated *March 18th*, 1891, for the sum of $5,625, due in *four* months after the date thereof, to the order of *Henry Winder & Co.*, and by *Henry Winder & Co.* indorsed to said bank, which had been charged to profit and loss by the bank before its suspension, and has been in the hands of an attorney for collection for the past *two* years, who reports it uncollectible.

Your petitioner further states that he has made diligent inquiry as to the financial standing and responsibility of said *William Johnson*, and said firm of *Thomas Acklen & Co.*, and from such examination he is fully satisfied that neither said *William Johnson* nor said last named firm have any property in the county of *Wayne* of said state, or elsewhere subject to execution.

Your petitioner further says, that *William Johnson* has offered to him the sum of $500 in cash, for a surrender of the said two notes last named; that said offer has been submitted to the Comptroller of the Currency of the United States, and it is said by said Comptroller, referred to your Honor for approval or disapproval.

That in the opinion of your petitioner, though the amount so offered for said notes by said *William Johnson* is small, yet the creditors of the said bank will obtain more benefit from the acceptance of said offer than they will by putting said notes into judgment.

Your petitioner therefore prays for an order authorizing, empowering and directing him to accept of and from *William Johnson* the sum of $500 in cash, and in consideration thereof to surrender to said *William Johnson* the promissory notes last above described, and your petitioner will ever pray, etc.

Joseph L. Hudson, Receiver.

Warner, Codd & Warner, Attorneys for Petitioner.

VIII. Proceedings By and Against Receivers.

1. Obtaining Leave to Bring Action.

a. By Receiver.[1]

(1) Petition.[2]

1. **Leave to Sue.** — A receiver has no authority to bring a suit unless he is specially authorized so to do by the court. Screven *v.* Clark, 48 Ga. 41; Battle *v.* Davis, 66 N. Car. 252; King *v* Cutts, 24 Wis. 627.

2. **For the formal parts** of a petition in a particular jurisdiction see the title Petitions, vol. 13, p. 887.

Form No. 17226.[1]

(*Title of court and cause as in Form No. 6954.*)

To the *Supreme* Court of the state of *New York.*

The petition of *Nathan Hale* respectfully shows to the court,

I. That on the *tenth* day of *June*, 1899, at a *special* term of the *Supreme* Court of the state of *New York*, held at the court-house at *Albany*, in said county of *Albany*, upon an application made by *John Doe* in an action then pending in said court wherein *John Doe* was plaintiff and *Richard Roe* was defendant, your petitioner was by an order then duly made by said court appointed receiver of (*Here designate the estate*).

II. (*Here state briefly the cause of action as in an ordinary complaint.*)

III. That your petitioner is informed and believes that there is due from the said *Samuel Short* thereupon to the estate of which your petitioner is receiver, the sum of *one thousand* dollars (*or other relief, as the case may be*).

IV. That your petitioner has demanded of the said *Samuel Short* payment of the said sum, but the said *Samuel Short* refuses to pay the same (or *That your petitioner has requested the said Samuel Short to deliver the said property, but the said Samuel Short refuses so to do*).

V. That your petitioner, upon diligent inquiry, is informed and believes that the said *Samuel Short* is solvent and that the above demand may be collected from him by means of an action (or *That the said property is now in the possession of the said Samuel Short and may be recovered by proceedings of claim and delivery*; or state other facts showing that recovery might be had by action).

Wherefore your petitioner begs leave to bring an action as such receiver, in this court, against the said *Samuel Short*, to recover the said debt (or *to recover the said property*, or other relief as the case may be).

Dated this *tenth* day of *September*, 1899.

(*Signature and verification as in Form No. 17231.*)

(2) Order.[2]

Form No. 17227.

(Precedent in Ray *v.* Louisville First Nat. Bank, (Ky. 1901) 63 S. W. Rep. 766.)[3]

[(*Title of court and cause as in Form No. 3888.*)][4]

This day came *James S. Ray*, receiver herein, and, on his motion, permission is given him to bring and prosecute an action against the *First National Bank* of this city to recover such sums of money as, in his discretion, he may think said bank is chargeable with. This order is not a determination of the court that said bank is liable, or as to whether the right of action is in favor of the creditors, stockholders or said receiver; all such questions being reserved for determination in the particular suits themselves.

1. See, generally, *supra*, note 1, p. 747.

2. For the formal parts of an order in a particular jurisdiction see the title Orders, vol. 13, p. 356.

3. No objection was made to the form of this order.

4. The matter to be supplied within [] will not be found in the reported case.

Form No. 17228.[1]

(*Title of court and cause as in Form No. 6957.*)

Upon reading and filing the petition of *Nathan Hale*, the receiver in the above entitled action, asking leave to bring an action against *Samuel Short*, of the city of *Albany*, in said county of *Albany*, for a debt amounting to the sum of *one thousand* dollars due from the said *Samuel Short*, and the court deeming such petition to contain evidence sufficient to authorize the bringing of such action, now on motion of *Jeremiah Mason*, attorney for the receiver,

Ordered, that the said *Nathan Hale*, as such receiver, is hereby authorized and directed to commence and prosecute an action in one of the courts of record of the state of *New York*, and in such form as counsel may advise, against the said *Samuel Short*, to recover the aforesaid debt of *one thousand* dollars.

Enter: *J. M.*, J. *S.* C.

b. Against Receiver.[2]

(1) Petition.[3]

Form No. 17229.[4]

(*Title of court and cause as in Form No. 6954.*)

To the *Supreme* Court of the state of *New York*:

The petition of *John Doe* respectfully shows to the court,

I. That on the *tenth* day of *June*, 1899, at a *special* term of the *Supreme* Court of the state of *New York*, held at the court-house at *Albany*, in said county of *Albany*, upon the application of *Nathan Hale*, in an action then pending in said court wherein *Nathan Hale* was plaintiff and *Richard Roe* was defendant, *Andrew Jackson* was by an order then duly made by said court appointed receiver of (*Here designate the estate*).

II. (*Here state briefly the cause of action as in an ordinary complaint.*)

III. That the said receiver now claims some interest in said mortgaged premises (or *has possession of said property*).

IV. That your petitioner has demanded of the said receiver that he deliver the said property to your petitioner (*or state other demand as the case may be*), but the said receiver refuses so to do.

V. That your petitioner has fully and fairly stated his case to his counsel, *Jeremiah Mason*, who resides at No. *10 Main* street, in said city of *Albany*, and that as he is advised by said counsel after such statement and verily believes, he has a good, substantial and meritorious cause of action thereupon against said receiver.

Wherefore your petitioner prays that the said *Andrew Jackson*, as such receiver, be ordered to pay to your petitioner the amount so

1. See, generally, *supra*, note 1, p. 747.

2. **Leave to Sue Receiver.** — An action cannot be brought against a receiver without permission of the court. De Groot *v.* Jay, 30 Barb. (N. Y.) 483; Taylor *v.* Baldwin, (Supreme Ct.) 14 Abb. Pr. (N. Y.) 166; McParland *v.* Bain, 26 Hun (N. Y.) 38; Murphy *v.* Holbrook, 20 Ohio St. 137; Potter *v.* Bunnell, 20 Ohio St. 150.

3. **For the formal parts** of a petition in a particular jurisdiction see the title Petitions, vol. 13, p. 887.

4. See also, generally, *supra*, note 2, this page.

due with costs of this application, or that your petitioner be granted leave to bring an action against such receiver to recover the same, and for such other and further relief as may be just.

Dated the *tenth* day of *September*, 1899.

(*Signature and verification as in Form No. 17231.*)

(2) Order.[1]

Form No. 17230.[2]

(*Title of court and cause as in Form No. 6957.*)

Upon reading and filing the petition of *John Doe*, dated the *twentieth* day of *September*, 1899, for an order that *Andrew Jackson*, the receiver of (*Here state estate or fund of which he may be receiver*) to pay the demand in said petition set forth, or that the petitioner have leave to bring an action thereon against the said *Andrew Jackson*, as such receiver, to recover said demand (or *for an order that said petitioner have leave to bring an action against the said Andrew Jackson, as such receiver, to recover his damages for the grievances in said petition alleged*), and upon reading and filing proof of the service of said petition upon said receiver, and after hearing *Jeremiah Mason*, of counsel for the petitioner, and *Oliver Ellsworth*, of counsel for said receiver,

Ordered, that the said petitioner, *John Doe*, have leave to bring an action in one of the courts of record of the state of *New York* and in such form as counsel may advise against the said *Andrew Jackson*, as such receiver, upon the grounds of action mentioned in the said petition.

Enter: *J. M.*, J. *S.* C.

2. Proceedings by Receiver to be Made Party to Pending Action.

a. Petition.[3]

1. **For the formal parts** of an order in a particular jurisdiction see the title Orders, vol. 13, p. 356.

2. See, generally, *supra*, note 2, p. 749.

3. **For the formal parts** of a petition in a particular jurisdiction see the title Petitions, vol. 13, p. 356.

Precedent.—In Speckart *v.* German Nat. Bank, 85 Fed. Rep. 12, is set out the following petition, which was filed in the state court of Kentucky and removed to the federal court:

"*R. H. Courtney*, receiver of the *German National Bank*, would respectfully represent unto the court that since the filing of this suit, and since the filing of the last pleading herein, the *German National Bank* has become insolvent; and that under due and regular proceedings had in conformity with the laws of the United States, and especially in conformity with that statute commonly known as the 'National Bank Act,' the comptroller of the currency has assumed charge of all the assets of the said *German National Bank*, and has appointed your petitioner, the said *R. H. Courtney*, as receiver of the said *German National Bank*, and of all its assets, and that he is now such receiver thereof, duly appointed and qualified; and that your petitioner, the said *R. H. Courtney*, receiver, desires to contest the claim of the plaintiffs herein, and does now assert that the said claim is not a just one against the said *German National Bank*, and that no judgment should be rendered against it thereon. Wherefore the said petitioner,

Form No. 17231.[1]

County Court, *Queens* County.

Mary Emma Wood
against
Robert T. Powell and others.
} Petition of receiver.

To the *County* Court of *Queens* County:

The petition of *William A. Onderdonk* respectfully shows:

First — That your petitioner resides in the Village and Town of *Hempstead*, *Queens* county, *New York*.

Second — That an order of this court, duly made on *September 14*, 1895, and on *September 16*, 1895, duly filed in the office of the Clerk of the County of *Queens*, in proceedings supplementary to execution upon a judgment theretofore rendered in the *Supreme* Court, *Queens* County, in an action wherein *Richard Brower* was plaintiff and said *Robert T. Powell* defendant, your petitioner was duly appointed receiver of the goods, chattels and credits of said *Robert T. Powell*, a judgment debtor, all as by reference to said order, of which a copy is hereto annexed, will more fully appear. That thereafter and on *October 12*, 1895, the bond of your petitioner in the form, manner and amount required by said order was duly made and approved as required by law, and as so made and approved was on *October 18*, 1895, duly filed in the office of the said Clerk of the County of *Queens*.

Third — That by an order duly made on said *September 14*, 1895, and on *September 16*, 1895, duly filed in the office of said clerk in the county of *Queens*, in proceedings supplementary to an execution, upon a judgment theretofore recovered in said *Supreme* Court, *Queens* county, in an action wherein *George Willetts* was plaintiff and said *Robert T. Powell* defendant, the receivership of your petitioner referred to in the second paragraph of this petition, was as by law provided, duly extended to such judgment of *Willetts*, and said order further provided that the bond given by your petitioner in the prior proceeding referred to in the second paragraph hereof, should extend to and apply to his receivership in said *Willetts* proceeding, all as by reference to said order, a copy of which is likewise hereto attached, will more fully appear.

Fourth — Your petitioner further says that he has in all respects qualified as such receiver, and has ever since acted and is still acting

R. H. Courtney, now asks the court to require the plaintiffs to make him a party defendant herein, and, upon being made such party defendant, asks to be allowed to conduct the defense herein, the said *German National Bank* now being in his hands as aforesaid, and its directors having no power or authority over its assets, and being therefore without means to conduct the defense herein; and your petitioner will ever pray."

It was held that the receiver was a proper if not a necessary party to the litigation.

1. This is the form of petition in Wood *v.* Powell, 3 N. Y. App. Div. 318, and is copied from the records. An order was entered directing that William A. Onderdonk, as receiver of the goods, chattels and credits of Robert T. Powell, be made a defendant in the action and that said receiver be authorized and directed to file with the court a consent to accept a sum in gross in lieu of the life estate of defendant Robert T. Powell in the net one third of the proceeds of the sale of land in which said Powell had a life estate. The order was affirmed on appeal.

as such, and that on *September 16*, 1895, a copy of each of said orders was duly personally served upon said judgment debtor, as appears by proof thereof by affidavit likewise hereto annexed. That no assets of any kind have come into the hands of your petitioner of said estate, and that to the best of your petitioner's knowledge, information and belief, there is now due and unpaid upon said judgment the sum of *fourteen hundred and twenty-four and 6-100* dollars ($1,424.06) with interest from *March 6*, 1896, amounting now to $2,266.

Fifth — Upon information and belief, that an action in partition was heretofore brought in this court in which *Mary E. Wood* was plaintiff, and said *Robert T. Powell* and others were defendants. That the real estate sought to be partitioned in said action was the real estate devised by one *Charles Powell*, late of the county of *Queens*, deceased; a copy of which will is likewise hereto annexed. That as thereby appears, said defendant *Robert T. Powell* had a life estate in an equal undivided *one-third* of said real estate, which formed the subject matter of said action. That the judgment creditors in whose behalf your petitioner was appointed receiver as aforesaid, were parties defendant to such action, but that your petitioner was not a party thereto, presumably for the reason that your petitioner was so appointed as receiver subsequent to the commencement of said action. That the said real estate affected by such action was all in the county of *Queens* and was duly sold by a referee appointed therefor, and that after deducting from the proceeds of such sale the various costs, charges and expenses incident to such action, the net balance then remaining of said proceeds was divided by said referee as directed by this court, pursuant to the decree settling the rights and interests of the parties, and on or about *January 8*, 1896, there was paid to the *Queens* County Treasurer by said referee pursuant to said decree, among other moneys, the sum of *four thousand seven hundred and six and 23-100* dollars ($4,706.23), which represented the *third* in which said *Robert T. Powell* has an interest as aforesaid and described by said referee in his report, as the one equal *third* part of said net proceeds of sale deposited for the purpose of being invested for the benefit of those interested therein, and subject to the further order or decree of this court with respect thereto. This sum was so paid to the said county treasurer pursuant to a decree of this court as above stated, because as is recited in said decree and in said referee's report, said *Robert T. Powell* had failed to file a consent to accept a sum in lieu of his life interest in said *one-third* of the net proceeds of sale as required by said decree.

Sixth — And your petitioner is informed and believes no further order of this court, as to said *one-third*, has been made and that said moneys are still in the custody of said *Queens* County Treasurer.

Seventh — That as your petitioner is informed and believes, said *Robert T. Powell* is now of the age of *fifty-nine* years, and upon that basis the gross sum representing said life estate in said fund as computed by the annuity tables, would be the sum of *two thousand and twenty-three* dollars and *forty-four* cents ($2,023.44), and your petitioner believes that it would be decidedly to the best interest of the judgment creditors, whom he represents, to have paid to him as

such receiver on their behalf, said sum representing the present value of the life estate of said judgment debtor, rather than to have the small income to be derived from such fund by investment by the county treasurer paid over from time to time by the said county treasurer to your petitioner. That no previous or other application has been made for this order.

Eighth — That the reason why an order to show cause is asked for herein is because, as has been already stated, your petitioner is not now a party to said action, and that it is desirable to have as speedy a disposition of the questions herein involved as possible.

Ninth — And your petitioner further shows the court that he acquired title to the life estate of said defendant *Powell*, prior to the granting of the interlocutory judgment in said partition suit. That your petitioner would have applied to this court for leave to intervene in said suit for the purpose of filing a consent to accept a gross sum in lieu of such life estate, had not your petitioner been informed that said defendant had orally agreed himself to allow the judgments represented by your petitioner to be paid out of his interest in the lands in suit, and your petitioner understood that to that end his consent to accept a sum in gross was to be filed, and the moneys so procured to be paid to the judgment creditors represented by your petitioner.

Wherefore, your petitioner prays for an order to show cause in said action and from this court, why your petitioner should not be allowed to come into said action as a party defendant in good standing for the purposes of this motion and all subsequent proceedings therein, and why he should not be allowed as the owner of said life estate which formerly was of *Robert T. Powell*, to file a consent to accept a sum in gross in lieu of said life interest in said net *one-third* of said proceeds of sale and further, upon so filing said consent as required, to have the moneys representing said sum in gross paid over to him forthwith as such receiver by said *Queens* county treasurer by order of this court in said action directing such payment, and for such other and further order or relief as may be just in the premises.

Dated *January 13th*, 1896. *Wm. A. Onderdonk*, Petitioner.

County of *Queens*, ss.

William A. Onderdonk, being duly sworn, says, that he is the petitioner above named, and that the foregoing petition is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. *Wm. A. Onderdonk.*

Sworn to before me this *15th* day of *January*, *1896*.

George D. Smith, Notary Public, *Queens* County.

b. Affidavit.[1]

(1) By Receiver.

1. **For the formal parts** of an affidavit in a particular jurisdiction see the title Affidavits, vol. 1, p. 548.

Form No. 17232.[1]

New York Supreme Court, *Kings* County.

William J. Fitzpatrick, plaintiff,
against
Charles H. Moses et al., defendants.
} Action No. *2.*

State of *New York*, County of *New York*, ss.

Frank H. Parsons being duly sworn, says that he is the receiver of the property of *William J. Fitzpatrick*, plaintiff herein, appointed by an order of the *City* Court of *Brooklyn*, entered on the *2d* day of *May*, 1894, a copy of which order is hereto annexed; deponent has qualified as such receiver by giving the bond required by such order, which has been approved by a justice of this court, and has been filed with the clerk of the county of *Kings*.

I am informed and believe that the claim which is the subject of this suit arose prior to the *2d* day of *May*, 1894, the date of my appointment as such receiver, and that the title thereof has become vested in me as such receiver. I am also informed that the case has been tried before a referee and the trial thereof concluded; the representatives of the different parties being now engaged in the preparation of their briefs to submit to said referee. I therefore ask that I be substituted as plaintiff herein in the place and stead of *William J. Fitzpatrick*, and I ask for the annexed order to show cause instead of giving the usual *eight* days notice of motion in order that I may be properly represented before the referee herein, before he makes his decision.

Frank H. Parsons.

Sworn to before me this *6th* day of *September*, 1898.
William H. Merriam, Notary Public, *N. Y.* Co.

(2) By Attorney of Receiver.

Form No. 17233.[1]

New York Supreme Court, *Kings* County.

William J. Fitzpatrick, plaintiff,
against
Charles H. Moses et al., defendants.
} Action No. *2.*

State of *New York*, County of *New York*, ss.

Edward P. Lyon, being duly sworn, says: I am an attorney and counsellor at law and represent *Frank H. Parsons*, as receiver of *William J. Fitzpatrick*, in this proceeding. I have examined the original order for said *Fitzpatrick's* examination in supplementary proceedings as well as the original order entered in said proceedings appointing the said *Frank H. Parsons* receiver of said *Fitzpatrick*. Mr. *Parsons'* receivership is based upon a judgment recovered in the *City* Court of *Brooklyn*, by the *Brooklyn Bank*, against the said *William J. Fitzpatrick*, on the *9th* day of *February*, 1894, for the sum of

1. This is the form of affidavit in Fitzpatrick *v.* Moses, 34 N. Y. App. Div. 242, and is copied from the records. The motion which this affidavit supported was denied at a special term of the supreme court, but was granted on appeal to the appellate division.

seventy-three hundred seventeen and 13-100 dollars. Proceedings supplementary to execution upon said judgment were commenced by an order obtained on the *12th* day of *April*, 1894, and resulted (after an examination of said judgment debtor) in an order appointing said *Frank H. Parsons* receiver, entered on the *2d* day of *May*, 1894; which order provides for the filing of a bond in the sum of *one thousand* dollars. The said receiver has given the said bond, and it has been approved by a justice of the *Supreme* Court and filed in the office of the clerk of the County of *Kings*.

I am informed and believe that upon the filing of said bond, the title of said receiver to the property of the said judgment debtor, related back to the *12th* day of *April*, 1894, the date of said order in supplementary proceedings.

I have also examined the pleadings in this case and find that the suit is brought upon a mechanic's lien which the plaintiff claims had its inception in 1891, against the defendants *Moses* and *Fanton*, the defendant *William L. Dowling* being made a party defendant, on the ground that he is upon the bond given by the said *Moses* and *Fanton* to discharge said lien. I am informed by the attorney for one of the defendants that the case has been referred to and tried before *Jay S. Jones*, Esq., as referee; and the attorneys are now preparing their briefs to submit to said referee. The plaintiff in this suit is represented by *William F. Pickett*, Esq., of No. *215 Montague* street, *Brooklyn*, *New York*; the defendants, *Moses* and *Fanton*, are represented by *Cornelius Daremus*, Esq., of No. *189 Montague* street, *Brooklyn*, *New York*, and the defendant *Dowling*, by *George C. Case*, of No. *189 Montague* street, *Brooklyn*, *New York*, and the other defendants are, as I am informed and believe, in default and have not appeared in the action. And this action is, as I am informed and believe, one of *eight* actions of a similar character, brought by the plaintiff *Fitzpatrick* against the defendants, upon claims aggregating several thousand dollars, only one of which has as yet been tried. The case is, as I am informed, a test case, and in my opinion, the receiver should be represented before the referee before his decision is made. I annex hereto a copy of the pleadings in this case, and I therefore ask for the annexed order to show cause why the said receiver should not be substituted as plaintiff. No other application for such order has been made to any court or judge.

Edward P. Lyon.

Sworn to before me this *6th* day of *September*, 1898.

Aaron Lyon Squiers, Notary Public of *Kings* Co.

Certificate filed in *New York* Co.

c. Order to Show Cause.[1]

Form No. 17234.[2]

County Court, *Queens* County.

1. **For the formal parts** of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

2. This is the form of order to show cause in Wood *v.* Powell, 3 N. Y. App. Div. 318, and is copied from the records. No objection was made to it.

Mary Emma Wood
against
Robert T. Powell and others. } Order to show cause.

It appearing to my satisfaction by the annexed petition of *William A. Onderdonk*, receiver of *Robert T. Powell*, a judgment debtor, and other documents, that the treasurer of the county of *Queens* has now in his hands a sum of money paid to him by the referee in an action in partition now pending in this court between *Mary Emma Wood*, plaintiff, and said *Robert T. Powell* and others, defendants (paid pursuant to a decree of this court therefor), in which fund said receiver has, or may have, an interest, and that said receiver was duly appointed by this court and has qualified, and is now acting as such, and that no previous or other application has been made for this order.

I do hereby order and direct that such of the parties to this action as have appeared herein show cause before me at a *Special* Term of this court to be held in and for the county of *Queens*, at the County Court House in *Long Island City*, on the *18th* day of *January*, 1896, at *9.30 A.* M., or as soon thereafter as counsel can be heard, why an order should not be made in this action, bringing in said *William A. Onderdonk*, as receiver, as a party defendant in good standing for the purposes of this motion and all subsequent proceedings therein, authorizing and directing said receiver to file with this court a consent to accept a sum in gross in lieu of the life estate of the defendant, *Robert T. Powell* herein, appointing a referee to ascertain and determine what the present value of the life interest may be, computed by the annuity tables, and upon the coming in of said referee's report and confirmation thereof by this court, directing said *Queens* County Treasurer to forthwith pay to said receiver, out of the sum in his hands, representing the *one-third* in which said judgment debtor had a life interest, the amount so found to represent the present value of said life estate as a sum in gross, and for such other and further order or relief as may be just.

Service of a copy of this order and the papers upon which it is based, less than *eight* days before said order is returnable upon each and all of the attorneys in this action, and on or before *January 16*, 1896, shall be sufficient.

Date *January 14*, 1896.

G. J. Garretson, *County* Judge, *Queens* County.

Form No. 17235.[1]

New York Supreme Court, *Kings* County.

William J. Fitzpatrick, plaintiff,
against
Charles H. Moses, *Henry B. Fanton*, and *William L. Dowling*; and *Angela Refrano* and *Michele Compiglio*, as administrators of the goods, chattels and credits of *Paul Refrano*, deceased, defendants. } Action No. 2. Order to show cause.

On the annexed affidavits of *Frank H. Parsons* and *Edward P.*

1. This is the form of order to show cause in Fitzpatrick *v.* Moses, 34 N. Y. App. Div. 242, and is copied from the records. No objection was made to it.

Lyon, on all the papers and proceedings herein, and on motion of *Edward P. Lyon*, attorney for the said *Frank H. Parsons*, let the plaintiff or his attorney, and the defendants or their attorneys, or such of them as have appeared herein, show cause before a *special* term of this court for motions, to be held at the county court-house, in the borough of *Brooklyn*, city of *New York*, on the *12th* day of *September*, 1898, at *10.30* o'clock in the *fore*noon, why the said *Frank H. Parsons*, as receiver of *William J. Fitzpatrick*, should not be substituted as plaintiff herein in the place and stead of *William J. Fitzpatrick*, without prejudice to any proceedings already had herein, and why the said receiver should not have such other and further relief as may be just.

Sufficient reasons appearing therefore, let the usual *eight* days notice of motion be shortened accordingly, and let the service of this order and the accompanying affidavits on the plaintiff or his attorney and on the defendants or their attorneys, or on such of them as have appeared herein, on or before the *8th* day of *September*, 1898, be sufficient service thereof.

William D. Dickey, J. S. C.

d. Order Granting Petition.[1]

Form No. 17236.[2]

(*Title of cause as in Form No. 9431.*)

This day came *Josiah Crosby*, receiver, and filed herein his petition to be made a party herein, and the plaintiffs and cross plaintiffs objected thereto; and the court being advised, it is now considered that said petition be sustained. And said *Josiah Crosby*, receiver of *Richard Roe*, is now made a party defendant herein to the original and cross petition, to which the plaintiffs and cross plaintiffs except.

3. Bill, Complaint, Declaration or Petition.

a. In Actions by Receivers.

(1) In General.[3]

1. For the formal parts of an order in a particular jurisdiction see the title Orders, vol. 13, p. 356.

2. This is substantially the form of order set out in Speckart *v.* German Nat. Bank, 85 Fed. Rep. 12. The form was not objected to.

3. Requisites of Bill, Complaint, etc., Generally. — For the formal parts of a bill, complaint, declaration or petition in a particular jurisdiction see the titles Bills in Equity, vol. 3, p. 417; Complaints, vol. 4, p. 1019; Declarations, vol. 6, p. 244; Petitions, vol. 13, p. 887.

Appointment of Receiver — *In General.* — In an action brought by a receiver in his official capacity, it is necessary to allege in proper legal form his appointment as receiver. Wason *v.* Frank, 7 Colo. App. 541; Ind. Laws (1899), c. 168; Rossman *v.* Mitchell, 73 Minn. 198; Springs *v.* Bowery Nat. Bank, 63 Hun (N. Y.) 505; Morgan *v.* Bucki, (Supreme Ct. Spec. T.) 30 Misc. (N. Y.) 245; Matter of O'Connor, (Supreme Ct. Gen. T.) 47 N. Y. St. Rep. 415; Rockwell *v.* Merwin, 45 N. Y. 166; White *v.* Joy, 13 N. Y. 83; Stewart *v.* Beebe, 28 Barb. (N. Y.) 34; Bangs *v.* McIntosh, 23 Barb. (N. Y.) 591; White *v.* Low, 7 Barb. (N. Y.) 204; Dayton *v.*

(*a*) *Against Indorser on Promissory Note.*

Connah, (Supreme Ct. Spec. T.) 18 How. Pr. (N. Y.) 326; Platt *v.* Crawford, (Supreme Ct. Spec. T.) 8 Abb. Pr. N. S. (N. Y.) 297; Gillet *v.* Fairchild, 4 Den. (N. Y.) 80; Schrock *v.* Cleveland, 29 Ohio St. 499; Swing *v.* White River Lumber Co., 91 Wis. 517.

Mode of Appointment.— It is, however, not necessary for plaintiff to show all the proceedings by which he was appointed: it is sufficient if he states the mode of his appointment. Matter of O'Connor, (Supreme Ct. Gen. T.) 47 N. Y. St. Rep. 415; Dayton *v.* Connah, (Supreme Ct. Spec. T.) 18 How Pr. (N. Y.) 326; Platt *v.* Crawford, (Supreme Ct. Spec. T.) 8 Abb. Pr. N. S. (N.Y.) 297; Stewart *v.* Beebe, 28 Barb. (N. Y.) 34.

In What Action Appointed. — Complaint must allege in what action or proceeding plaintiff was appointed receiver. Rossman *v.* Mitchell, 73 Minn. 198.

By What Court Appointed. — Complaint must allege by what court or officer plaintiff was appointed receiver. Rossman *v.* Mitchell, 73 Minn. 198; Stewart *v.* Beebe, 28 Barb. (N. Y.) 34.

That an order was made appointing plaintiff receiver must be stated. White *v.* Low, 7 Barb. (N. Y.) 204; Gillet *v.* Fairchild, 4 Den. (N. Y.) 80.

Time of Appointment must be shown. Rossman *v.* Mitchell, 73 Minn. 198; Stewart *v.* Beebe, 28 Barb. (N. Y.) 34; Dayton *v.* Connah, (Supreme Ct. Spec. T.) 18 How. Pr. (N. Y.) 326; Gillet *v.* Fairchild, 4 Den. (N. Y.) 80.

Place where decree or order was made by which plaintiff was appointed receiver must be shown. White *v.* Low, 7 Barb. (N. Y.) 204; Gillet *v.* Fairchild, 4 Den. (N. Y.) 80.

Sufficient Allegations. — It is now well settled, by the weight of authority and on principle, that an allegation in general terms by the plaintiff, showing that at such a time, in such an action or proceeding and by such a court or officer, he was duly appointed receiver of the estate of such a party, is sufficient as to the right of the plaintiff to maintain his suit, and that anything short of this is not sufficient. Rossman *v.* Mitchell, 73 Minn. 198.

In Howarth *v.* Angle, 162 N. Y. 179, the allegations of the complaint showing the appointment of a receiver were as follows:

"4. That on *May 19th*, 1891, by order of the *Superior* Court of the state of *Washington* in and for the county of *Pierce*, duly made and entered on said day in a cause of action then and still pending in said court, and designated as number *11673* in the files and records of said court, and entitled '*Henry Hewitt, Jr.*, and *George Browne*, plaintiffs against *Traders Bank of Tacoma* (a corporation) defendants,' and in which case said *Traders Bank of Tacoma* was duly personally served with process and appeared therein by attorney, and thereafter, in said cause it was duly found and adjudged that said *Traders Bank of Tacoma* was on said *May 19th*, 1894, an insolvent corporation, and had suspended its business and ceased to carry out the purposes and objects of its incorporation, and that a receiver ought to be appointed of the said bank and of its assets, and that thereupon by said order, plaintiff was on said *May 19th*, 1894, duly appointed receiver of said *Traders Bank of Tacoma*, and of all of its property and assets, real and personal, of whatsoever nature. Said *Superior* Court of the state of *Washington* is and at all times was a court of record and of general jurisdiction and in said cause had jurisdiction of the parties thereto as well as of the subject matter litigated therein.

5. That thereafter and on said *May 19th*, 1894, plaintiff duly qualified as such receiver by taking the oath of office as receiver and by executing and filing a good and sufficient bond in the sum of *fifty thousand* dollars ($*50,000.00*), as required by the said court and by the laws of the said state of *Washington*, and plaintiff thereupon immediately took possession of all property and assets of said bank of whatsoever nature, and has at all times since been and is now acting as such receiver under orders of said court, with all the powers of a receiver at law and in equity."

In Rockwell *v.* Merwin, 45 N. Y. 166, the complaint alleged that "on the *24th* day of *April*, 1868, at the city of *New York*, upon an application made by (A, B and C), judgment creditors of *James C. Farrell*, and by an order then made by Hon. *Albert Cardozo*, one of the justices of the *Supreme* Court, the plaintiff was appointed receiver of the property of said *James E. Farrell*." Later an application was made to amend the complaint by in-

serting the word "duly" between the words "was" and "appointed." It was held that this amendment cured any defect in the complaint and gave plaintiff the right to show on the trial all the facts conferring jurisdiction.

In Wigton *v.* Kenney, 51 N. Y. App. Div. 215, the second paragraph of the complaint, to which no objection was made, was as follows:

"II. That heretofore and on or about the *10th* day of *November*, 1896, in an action pending in the *District* Court of the state of *Iowa* in and for *Woodbury* county, wherein one *Leslie T. Richardson* was plaintiff and the said *Iowa Savings Bank* was defendant, one *W. P. Manley* was duly appointed receiver of the said bank, and of all its assets, and that the said *Manley* duly qualified as such receiver and continued in the said office until on or about *March 17th*, 1897, when he resigned, and that thereupon this plaintiff was duly appointed receiver of the said bank and of all its property and assets of every kind and nature, by the order and decree of said court, and that he duly qualified as such receiver and entered upon the performance of his duties of said office, and has continued therein to the present time."

In Springs *v.* Bowery Nat. Bank, 63 Hun (N. Y.) 505, the complaint alleged that by an order of the supreme court, made at a special term thereof held on the sixteenth day of December, 1890, before Justice George D. Andrews, the plaintiff was duly appointed receiver of the property and effects of the I. Harriman Manufacturing Company. No objection was made to this allegation.

In Manley *v.* Rassiga, 13 Hun (N. Y.) 288, the complaint alleged in regard to the plaintiff's appointment: "That on the *31st* day of *May*, 1877, at *Jamaica*, *Queens* county, *New York*, upon an application made by *John Kane*, a judgment creditor of said *August Rassiga*, in proceedings supplementary to execution and by an order of determination, then duly made by Hon. *John J. Armstrong*, *county* judge for the county of *Queens*, the plaintiff was appointed receiver of the property of said *August Rassiga*." This was held sufficient.

In Stewart *v.* Beebe, 28 Barb. (N. Y.) 34, the complaint alleged "that by an order of the *supreme* court of the state of *New York*, made at the city hall of the city of *New York*, on the *fifth* day of *November*, 1857, the plaintiff was duly appointed receiver of the *Bowery Bank* of the city of *New York* on filing certain security therein mentioned," etc. This was held sufficient to enable defendant to take issue upon the legality of the appointment.

In Schrock *v.* Cleveland, 29 Ohio St. 499, the allegation was that plaintiff "was duly appointed receiver of the *Forest City Insurance Company* of the city of *Cleveland*, in the county of *Cuyahoga*, by the Court *of Common Pleas* within and for that county." It was held that this was a sufficient allegation upon demurrer, and if not sufficiently definite and specific, relief might have been sought by a motion.

Insufficient Allegations. — Where the only allegation is that plaintiff was duly appointed receiver, the complaint is insufficient. White *v.* Joy, 13 N. Y. 83; Gillet *v.* Fairchild, 4 Den. (N. Y.) 80.

An allegation "that on the *17th* day of *July*, 1848, the plaintiff was by an order of the court made pursuant to statute, appointed receiver of," etc., is insufficient. White *v.* Low, 7 Barb. (N. Y.) 204.

In Dayton *v.* Connah, (Supreme Ct. Spec. T.) 18 How. Pr. (N. Y.) 326, a complaint describing the plaintiff as "having been duly appointed receiver of *John W. Crane* and bringing this suit by order of the *Supreme* Court," was held insufficient.

Authority to Sue — *In General.* — Where a receiver has no right to sue except by leave of the court, he must show in his pleading that such leave has been obtained. Peabody *v.* New England Water Works Co., 80 Ill. App. 458; Hatfield *v.* Cummings, 142 Ind. 350; Wayne Pike Co. *v.* State, 134 Ind. 672; Davis *v.* Ladoga Creamery Co., 128 Ind. 222; Pouder *v.* Catterson, 127 Ind. 434; Keen *v.* Breckenridge, 96 Ind. 69; Garver *v.* Kent, 70 Ind. 428; Hayes *v.* Brotzman, 46 Md. 519; Morgan *v.* Bucki, (Supreme Ct. Spec. T.) 30 Misc. (N. Y.) 245; Swing *v.* White River Lumber Co., 91 Wis. 517. And an allegation that plaintiff was duly appointed receiver does not show authority to sue where such authority is not incidental to the receiver's appointment. Morgan *v.* Bucki, (Supreme Ct. Spec. T.) 30 Misc. (N. Y.) 245.

To Bring Particular Suit. — It is not necessary that the complaint should

show that the receiver had specific authority from the court to bring the particular action. The complaint is good if it shows that the order appointing the receiver granted him authority to sue and was sufficiently broad to authorize him to institute and prosecute such action. Taylor *v.* Canaday, 155 Ind. 671. See, however, Witherbee *v.* Witherbee, 17 N. Y. App. Div. 181, to the effect that an order of appointment authorizing receiver to prosecute actions generally, without further order of court, was too broad.

Sufficient Allegation. — In Taylor *v.* Canaday, 155 Ind. 671, the complaint alleged that plaintiff was duly and legally appointed by the Randolph circuit court receiver of the Citizens Bank, in an action within the court's jurisdiction, under an order of appointment which commanded him to reduce to his possession all the property, rights, and choses in action of every description, and to "bring, maintain and prosecute in his own individual name any and all actions necessary in the discharge of his duties as such receiver, whenever in the judgment of said receiver it may be necessary to bring and prosecute any such suit in the proper discharge of his duties." This complaint was held sufficient.

In Ray *v.* Louisville First Nat. Bank, (Ky. 1901) 63 S. W. Rep. 762, the receiver filed an amended petition, the commencement of which was as follows:

"By leave of court, the plaintiff amends the second paragraph of the petition, and makes the same more certain and definite, and for amendment states that heretofore, to wit, on the —— day of ——, he was, by an order duly and regularly entered by the *Jefferson circuit* court, common pleas division, appointed receiver of the *Columbian Fire Insurance Company*, a domestic corporation, regularly created such under the laws of the state of *Kentucky*, and carrying on the business of fire insurance, which at the time of this plaintiff's appointment as aforesaid was insolvent. He says that he duly qualified as such receiver, and gave bond as such, and has ever since been, and is now, the receiver of said company. He says that, by an order of the said court, all the claims, rights, demands, accounts, property, and assets, of every kind and description, of said company, were transferred to him as such receiver, and by said order it was made his duty to collect and receive all said assets, property, claims, accounts, and demands, and thereunto was given full and complete power, and the same, when collected and received by him, were to be by him distributed under and according to the orders of said court from time to time made. He says that, pursuant to the orders of said court, he has taken possession of a considerable part of said assets, and has made, from time to time, partial distribution thereof under the orders of said court. He says that, not being able to collect and receive all of the assets and property of said insurance company without litigation, and the defendant, the *First. National Bank*, having in its possession certain property and assets belonging to the plaintiff as such receiver, and refusing to deliver the same to this receiver on demand, and especially having in its possession the assets and property particularly mentioned in the several paragraphs of the petition, this plaintiff applied to the court aforesaid for leave to bring and prosecute this suit against the defendants on the claims and demands set out in the petition, which said request was objected to by the defendant; and the court, being advised therein, granted said request and permission, and this suit is filed and prosecuted by and with leave of said court, and under its direction. A duly attested copy of said order of leave is now on file in this suit, and is here referred to and made part of this paragraph."

No objection was made to this commencement, but the petition was held to state no cause of action.

An allegation that plaintiff is "receiver of *H. Sampson & Co.*, composed of *H. Sampson*, *E. B. Richardson* and *Cornelius Sampson*, late partners doing business as such under the name of *H. Sampson & Co.*, and appointed such receiver by order of the *superior* court of *Rockingham* county in the case of the *First National Bank of Winston* and others against the said firm of *H. Sampson & Co.*, with power and authority to receive and reduce into possession by demand, suit or otherwise, all the assets, estate and choses in action of the said *H. Sampson & Co.*," has been held to show, on demurrer, a legal capacity to sue. Boyd *v.* Royal Ins. Co., 111 N. Car. 372.

Form No. 17237.[1]

Supreme Court,
City and County of *New York.*

Adolph Hegewisch, as receiver of the property of *The United States Rolling Stock Company*, plaintiff,
against
John S. Silver, defendant.

And now comes the plaintiff above named, and, by *Seward, Guthrie & Morawetz*, his attorneys, complains of the defendant above named, and thus complaining, alleges:

I. That upon or about the *fourth* day of *October*, 1890, *The Decatur & Nashville Improvement Company*, a corporation organized and existing under the laws of the state of *New Jersey*, duly made and executed its promissory note, in writing, dated upon that day, whereby, for value received, it promised to pay to the order of the said *The United States Rolling Stock Company*, *nine thousand five hundred and ninety-six* dollars and *sixty-three* cents (*$9,596.63*) *sixty* days after the date of said note. That thereupon the said defendant, *John S. Silver*, for value received and in consideration of the acceptance of said note by the said *The United States Rolling Stock Company*, as hereinafter stated, duly indorsed the said note, and the same was hereafter and before the maturity thereof, delivered to the said *The United States Rolling Stock Company*, for value, and was, in consideration of the said

Insufficient Allegation. — A declaration which states that the plaintiff was, in the city of New York, "duly appointed receiver of the *Third Avenue Savings Bank* by the *Supreme* Court of the state of *New York*, and afterwards, to wit, etc., was duly qualified as such receiver, and thereupon became empowered to exercise and perform all the powers and duties imposed upon him as receiver as aforesaid," and that the defendant was before that indebted for money loaned, work and labor, etc., to the Third Avenue Savings Bank, following which this promise of payment is laid: "And being so indebted, the defendant in consideration thereof, then and there promised the *Third Avenue Savings Bank* to pay it, and afterwards promised the said plaintiff to pay him the said sum of money, on request," is insufficient in that it does not appear with sufficient certainty that plaintiff had a right to sue for debts alleged to be due not to him but to another person, since the court cannot tell what are the powers of a receiver who has been created by a judicial order of a New York court. Hurd *v.* Elizabeth, 40 N. J. L. 218.

Under Statute. — In many jurisdictions, statutes giving to a receiver the right to sue make unnecessary a showing that leave of the court has been obtained. Pouder *v.* Catterson, 127 Ind. 434; Hayes *v.* Brotzman, 46 Md. 519; Swing *v.* White River Lumber Co., 91 Wis. 517.

An averment in a complaint that a receiver was appointed by a United States court avoids an objection that leave to sue has not been obtained, since congress has provided that a receiver appointed by any court of the United States may sue without previous leave of court. Peirce *v.* Chism, 23 Ind. App. 505.

Cause of Action. — Complaint must set out a cause of action that the party over whose property receiver was appointed could have maintained. Daggett *v.* Gray, (Cal. 1895) 40 Pac. Rep. 959; La Follett *v.* Akin, 36 Ind. 1; Billings *v.* Robinson, 94 N. Y. 415; Coope *v.* Bowles, 42 Barb. (N. Y.) 87.

1. This is the form of complaint in Hegewisch *v.* Silver, 140 N. Y. 414, and is copied from the records. It was held by the court of appeals that a motion to dismiss the complaint was improperly allowed.

See also, generally, *supra*, note 3, p. 757.

indorsement, accepted by the said *The United States Rolling Stock Company* in payment for certain cars and personal property sold by it to the said *The Decatur & Nashville Improvement Company.*

II. That the said note became due and payable upon the *8th* day of *December*, 1*890*, and upon that day the same was duly presented for payment to, and payment thereof was duly demanded of, the said *The Decatur & Nashville Improvement Company*, and the said *The Decatur & Nashville Improvement Company* thereupon refused to pay the said note, whereupon the same was duly protested for non-payment, and notice of the said demand, refusal and protest was given to the said defendant, *John S. Silver.*

III. That, by an order of the *Circuit* Court *of the United States* in the *Southern* District of *New York*, duly made and entered upon the *25th* day of *November*, 1*890*, in a certain suit then and there pending in said court, wherein the *Jewell Belting Company* was complainant and the said *The United States Rolling Stock Company* was defendant, the plaintiff was duly appointed receiver of all and singular the real and personal property, assets and offsets of the said *The United States Rolling Stock Company*, situated in the *Southern* District of *New York* or elsewhere, including all claims, demands and choses in action due to it.

IV. That, at the time of the appointment of the plaintiff as receiver as aforesaid, the said note was held by and belonged to the said *The United States Rolling Stock Company*, and since the appointment of the plaintiff as receiver as aforesaid the said note has belonged to and been held by the plaintiff as such receiver.

V. That upon the *9th* day of *February*, 1*890*, and before the commencement of this action, an order was duly made and entered by the said *United States Circuit* Court for the *Southern* District of *New York*, authorizing and empowering the plaintiff, as receiver as aforesaid, to commence and prosecute this action in the *Supreme* Court of the state of *New York*, in the city and county of *New York.*

VI. That no part of the said note has been paid, and there is now due and owing to the plaintiff by the said *The Decatur & Nashville Improvement Company* and by the said defendant by reason of the premises, the sum of *nine thousand five hundred and ninety-six* dollars and *sixty-three* cents (*$9,596.63*) besides the costs and expenses of protesting the said note for non-payment, amounting to the sum of *two* dollars and *sixty* cents (*$2.60*), in all the sum of *nine thousand five hundred and ninety-nine* dollars and *twenty-three* cents (*$9,599.23*), with interest thereon from the *8th* day of *December*, *1890.*

Wherefore, the plaintiff demands judgment against the defendant for the sum of *nine thousand five hundred and ninety-nine* dollars and *twenty-three* cents (*$9,599.23*), with interest from the *8th* day of *December*, 1*890*, besides the costs of this action.

By his attorneys,
Seward, Guthrie & Morawetz,
29 Nassau St., *New York.*

State of *New York*,
City and County of *New York.* } ss.

Adolph Hegewisch, being duly sworn, deposes and says that he is the receiver of the property of *The United States Rolling Stock Com-*

pany and the plaintiff named in the foregoing complaint; that he has read the said complaint and knows the contents thereof, and the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Adolph Hegewisch.

Subscribed and sworn to before me this *11th* day of *February*, A. D. 1891. *R. F. Rogers*, Notary Public, *Kings* Co.

(*b*) *To Recover Balance on Securities Remaining After Satisfaction of Debt for Which Securities were Given.*

Form No. 17238.[1]

Supreme Court, County of *Monroe*.

William W. Armstrong, as receiver of the property of *George S. Riley*, plaintiff,
against
Hector M. McLean and *George S. Riley*, defendants.

The plaintiff herein, as receiver as aforesaid, for his complaint herein alleges, upon information and belief, that *Frederick L. Durand* heretofore duly recovered a judgment in this court against the said *George S. Riley* for the sum of $*2,938.24*, debt, and $*16.75*, costs; that said judgment was duly entered and docketed in *Monroe* county clerk's office on the *25th* day of *April*, 1*893*; that an execution thereon against the property of said *Riley* was duly issued to the sheriff of *Monroe* county, where said *Riley* then resided and yet resides, and was duly returned wholly unsatisfied; that afterwards, and on the *25th* day of *August*, 1*893*, in proceedings supplementary to execution instituted by said judgment creditor upon said judgment, an order was duly made on that day by the Hon. *John F. Kinney*, special county judge of *Monroe* county, requiring the said *Riley* to appear before *Horace J. Tuttle*, Esq., as referee thereby appointed, and make discovery on oath concerning his property, and by said order the said *Riley* was forbidden to transfer and dispose of or in any manner interfere with any property, money or things in action then belonging to him until further order in the premises; that said order was duly served upon said *Riley*, who in pursuance thereof was duly examined; that upon said examination duly certified to said judge, the said judge, by an order made on the *2d* day of *November*, 1*893*, duly appointed the plaintiff herein receiver of all the property, equitable interests and things in action of said *Riley*, the said judgment debtor, and duly awarded to said judgment creditor $*30.00* as the costs of said proceedings and $*12.00* disbursements, and further ordered that before entering upon his trust the said receiver execute a bond with sufficient sureties, to be approved by the said judge or the county judge of *Monroe* county, in the penal sum of $*3,000.00*, conditioned for the faithful discharge of said trust, and that upon filing and

1. This is the form of complaint in Armstrong *v.* McLean, 153 N. Y. 490, and is copied from the records. The judgment of the court of appeals was that judgment in favor of plaintiff entered at special term be affirmed. See also, generally, *supra*, note 3, p. 757.

recording said bond and order in *Monroe* county clerk's office, he be vested with all the rights and powers of receiver according to law; that thereafter, the said receiver executed his bond to the people of the state of *New York*, conditioned as required by said order, and duly approved by the Hon. *William E. Werner*, county judge of *Monroe* county; that said bond and order were duly filed and recorded in *Monroe* county clerk's office on the *4th* day of *December*, 1893.

Second. The plaintiff herein, upon information and belief, further says that the *Union Bank of Rochester*, a corporation duly formed under the laws of this state, recovered a judgment in this court against said *Riley* for the sum of $539.12 debt, and $17.78 costs; that the same was duly entered and docketed in said clerk's office, on the *2d* day of *November*, 1892; that an execution thereon against the property of said *Riley* was duly issued to the sheriff of *Monroe* county, where said *Riley* then resided and yet resides, and was duly returned by said sheriff wholly unsatisfied; that afterwards and on the *4th* day of *November*, 1893, the said judgment was duly assigned to said *Durand* by the bank; that thereupon proceedings supplementary to execution were instituted by him upon the said judgment; that upon his application an order therein dated the *18th* day of *November*, 1893, was duly made by the Hon. *John F. Kinney*, special county judge of *Monroe* county, requiring the said *Riley* to attend before him and make discovery on oath concerning his property; that said order was duly served upon said *Riley*, who duly attended and was examined before said judge upon oath concerning his property; that thereupon, by an order then duly made by said special county judge, dated *November 11th*, 1893, said receivership of this plaintiff was duly extended over said last named proceedings with $30.00 costs thereof awarded to said *Durand*.

Third. The plaintiff, upon information and belief, further says that heretofore the said *The Union Bank of Rochester*, being the owner of *three* several judgments in its favor in the *Monroe* County Court, to wit: *one* against *James H. Crouch* and said *Riley* for $128.90 debt and $7.60 costs; *one* against *Martin L. Sanford* and said *Riley* for $630.96 debt, and $20.78 costs, and *one* against *William R. Renshaw* and said *Riley* for $311.65 debt and $9.90 costs; the said judgments being docketed respectively *June 20*, 1893, *January 23*, 1893, and *June 20*, 1893, in *Monroe* county clerk's office; and executions upon said several judgments against the property of said defendants having been duly issued to the sheriff of *Monroe* county and by him returned wholly unsatisfied; duly instituted proceedings supplementary to execution upon said *three* judgments, and by an order therein duly made by the Hon. *William E. Werner*, county judge of *Monroe* county, bearing date the *19th* day of *June*, 1894, the aforesaid receivership of this plaintiff was duly extended over the proceedings aforesaid upon the last-mentioned *three* judgments.

Fourth. That when the aforesaid supplementary proceedings were instituted upon the *two* first above described judgments respectively, and upon said last named *three* judgments, and while in force as aforesaid, the said *Riley* was the owner of divers debts and securities

therefor amounting in the aggregate at their face value to at least $8,300.00 and upwards, subject only to a lien thereon given by said *Riley* to the said defendant *Hector McLean* as collateral security for a debt in his favor against said *Riley*, of $3,636.41 and interest thereon from the *first* day of *January*, 1893; that said debt and accrued interest was afterwards reduced by a payment thereon from the proceeds of a foreclosure sale of other securities held by said *McLean* as collateral to said debt, to $2,012.02 or thereabouts, and was afterwards still further reduced to $1,971.00 or thereabouts by a sale and assignment by said *McLean* to the said *Union Bank of Rochester* of another bond and mortgage executed by said *Riley* to said *McLean* as a further collateral security for said debt of $3,636.41 and interest, among other debts held by him against said *Riley*; that said bond and mortgage were dated the *7th* day of *April*, 1891, and the said mortgage was recorded in *Monroe* county clerk's office on the *13th* day of *October*, 1891, in Book No. *349* of Mortgages, at page *150*; that the value of said bond and mortgage so sold and disposed of by *McLean* was at least $954.65 and the proportionate part of said value applicable to the reduction of said debt and interest, and by said sale lost to the plaintiff herein was as above stated.

The plaintiff herein further says upon information and belief, that the securities aforesaid, on which the aforesaid lien for said $3,636.41 and interest so given by said *Riley* to said *McLean* consisted of a bond and mortgage made by *Wilhelmina Wiegand* and *Edward Wiegand* to said *Riley*, dated *September 8*, 1889, for the sum of $2,000 and interest from date, on which, as this plaintiff is informed and believes, interest has been paid since his said appointment as receiver, to the amount of $60 to said *McLean*, and thereby the latter's said debt of $3,636.41 and interest has been further reduced to $1,911.00 or thereabouts; also of a land contract, under a sale, made by *Edward Hirschfield* to said *Riley* dated *May 4th*, 1888, for $3,000, on which, as this plaintiff is informed and believes, a large balance remains unpaid; also of a land contract made by *J. Livingston Roseboon*, dated *March 5th*, 1888, on which at the date of giving said lien as aforesaid there remained due and unpaid the sum of $3,300.

The plaintiff further says upon information and belief, that after the reduction of said debt of $3,636.41 and interest as aforesaid there remained a surplus value in the said *three* last named securities of upwards of $4,500 belonging to this plaintiff as receiver as aforesaid; that afterwards, and on or about the *24th* day of *May*, 1894, the said *McLean* in violation of the lien upon the surplus of the said *Roseboon* security, acquired by the aforesaid judgment creditors by virtue of the several supplementary proceedings aforesaid and of the title of this plaintiff thereto as receiver as aforesaid, assumed to dispose absolutely of the said *Roseboon* security, and of the whole thereof, and did thereby convert the same and the proceeds thereof to his own use; that the amount and value thereby realized by said *McLean* from said security, including interest to that date, was the sum of $3,975, which is in excess of the balance then due to him upon the aforesaid debt of $3,646.41 and accrued interest, in the sum of $2,364 or thereabouts.

The plaintiff further says that he has demanded of said *McLean* that he surrender and turn over to him as receiver as aforesaid the said bond and mortgage for $2,000, executed by *Wilhelmina Wiegand* and *Edward Wiegand* to said *Riley* and the interest paid thereon to him as aforesaid, and also the said land contract executed by the said *Edward Hirschfield* to said *Riley* and all payments, if any, made thereon to said *McLean*; that he also demanded of said *McLean* that he turn over and surrender to him as said receiver the surplus amount or value remaining of the said *Roseboon* security over and above the extinguishment of the balance remaining unpaid of the said debt of $3,636.41 and accrued interest thereon at the time he disposed of the said *Roseboon* security and converted the same as aforesaid to his own use; all of which the said *McLean* refused to do and still refuses.

Wherefore the plaintiff herein, as receiver as aforesaid, demands judgment that the said *McLean* turn over and surrender to him the said *Wilhelmina Wiegand* and *Edward Wiegand* bond and mortgage, the said *Hirschfield* land contract and all payments thereon, if any, made to said *McLean*; also demands judgment that he turn over and surrender to him, as such receiver, the surplus amount or value remaining of the said *Roseboon* security over and above the extinguishment of the balance remaining unpaid of said debt of $3,636.41 and accrued interest thereon at the time he disposed of the said *Roseboon* security and converted the same to his own use as aforesaid; also that the said *Riley* be barred of all title or interest in the *three* last named securities, or the avails thereof, or of either of them, or for such other or further judgments as shall be agreeable to equity, with the costs of this action.

John E. Durand, Plaintiff's Attorney,
4 Durand Building, *Rochester*, *N. Y.*

State of *New York*,
County of *Monroe*, } ss.
City of *Rochester*.

William W. Armstrong, being duly sworn, says that he is the plaintiff in the above entitled action; that the foregoing complaint is true to the knowledge of deponent except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Wm. W. Armstrong.

Sworn to before me this *19th* day of *July*, 1894.
Genevieve Bogue, Commissioner of Deeds.

(*c*) *To Recover Property Obtained through Unlawful Preference.*

Form No. 17239.[1]

(*Title of court and cause as in Form No. 17238.*)

1. This is the form of complaint in Nealis *v.* American Tube, etc., Co., 150 N. Y. 42, and is copied from the records. Judgment was entered for plaintiff, which was affirmed at a general term of the supreme court and in the court of appeals.

See also, generally, *supra*, note 3, p. 757.

The plaintiff above named complains of the defendant above named and alleges:

I. That on the *28th* day of *March*, 1889, at the city of *New York*, by an order then duly made by the Hon. *Abraham R. Lawrence*, one of the justices of this court, and entered on that day in the office of the clerk of the city and county of *New York*, in an action in said court, wherein one *George F. Nock* was plaintiff, and the *New York Supply Company, Limited*, was defendant, the plaintiff was duly appointed permanent receiver of the *New York Supply Company, Limited*, a corporation, its stocks, bonds, property, franchises, contracts, things in action, and effects of every kind and nature, with the usual powers and duties, according to the laws of this state and practice of this court, upon his executing and acknowledging in the usual form, and filing with the clerk of this court for the county of *New York*, a bond to the people of the state of *New York* in the penal sum of *two hundred and fifty* dollars ($250) with at least *two* sufficient freeholders and householders of the state of *New York*, who shall severally justify, conditioned for the faithful discharge of the duties of receiver and for an accounting of all moneys and property of every kind, received by him as such receiver, which bond is to be approved as to its sufficiency, form and manner of execution, by a justice of this court: and which said order further provided that upon filing said bond so approved, said receiver proceed forthwith to collect and receive the debts, demands and other property of the said corporation, and to preserve, the proceeds of the debts and demands, to sell or otherwise dispose of the property as hereinafter directed by this court, to collect, receive, and preserve the proceeds thereof, and to maintain any action or special proceeding for either of these purposes.

II. That thereafter on the *15th* day of *April*, 1889, plaintiff duly filed a bond in compliance with the order above set forth, and duly qualified as receiver of the *New York Supply Company, Limited.*

III. That thereafter and on or about the *15th* day of *April*, 1889, the plaintiff as such receiver took possession of the property and effects of the *New York Supply Company, Limited.*

IV. That thereafter and on the *12th* day of *June*, 1889, by an order then duly made by the Hon. *George P. Andrews*, one of the justices of this court, and entered on that day in the office of the clerk of the city and county of *New York* upon a petition of the plaintiff duly verified on the *6th* day of *June*, 1889, it was ordered "that the said *James J. Nealis*, as receiver, is hereby authorized and directed to commence and prosecute an action or actions to vacate or set aside judgments obtained against the *New York Supply Company, Limited*, by the *American Tube Company* on the said *31st* day of *October*, 1888, for *one thousand five hundred and ninety-five and 18-100* dollars ($*1,595.18*), and various other judgments obtained by other parties." That the *American Tube Company* referred to in said order is the defendant herein.

V. Upon information and belief, that the defendant is, and at all times hereinafter mentioned was, a foreign corporation, duly incor-

porated and existing under and by virtue of the laws of the state of *Pennsylvania.*

VI. Upon information and belief that on the *30th* day of *October*, 1*888*, the said *New York Supply Company, Limited*, was insolvent and wholly unable to pay its just debts.

VII. Upon information and belief, that on the said *30th* day of *October*, 1*888*, the insolvency of the *New York Supply Company, Limited*, was known to the officers and directors of the said company, including *Robert G Weeks*, the treasurer and general managerth ereof.

VIII. Upon information and belief that on the said *30th* day of *October*, 1*888*, the insolvency of the *New York Supply Company, Limited*, was known to the officers and directors of the defendant.

IX. Upon information and belief, that the said defendant on or about the *30th* day of *October*, 1*888*, began an action in the *Supreme* Court of the state of *New York* in and for the county of *New York*, against the *New York Supply Company, Limited*, as defendant, by the service upon said *Robert G. Weeks*, the treasurer and general manager of the *New York Supply Company, Limited*, of a summons and complaint to recover the sum of *one thousand five hundred and seventy-eight and 22-100* dollars (*$1,578.22*) upon said complaint, alleged to be due from the said *New York Supply Company, Limited*, to the said defendant, in which said action the *New York Supply Company, Limited*, appeared on the *30th* day of *October*, 1*888*, by its attorney, one *William E. Cook.* On the same day, to wit, the *30th* day of *October*, 1*888*, the said *New York Supply Company, Limited*, by the said *William E. Cook*, its attorney, offered to allow judgment in favor of the said defendant against it, the *New York Supply Company, Limited*, for the sum of *one thousand five hundred and seventy-eight and 22-100* dollars (*$1,578.22*) and costs, and thereafter and on the said *30th* day of *October*, 1*888*, the said defendant accepted the said offer of judgment, and on the *31st* day of *October*, 1*888*, judgment was entered in the office of the clerk of the city and county of *New York*, upon and pursuant to said offer and the acceptance thereof in favor of said defendant against the *New York Supply Company, Limited*, for the sum of *one thousand five hundred and ninety-five and 18-100* dollars (*$1,595.18*), all of which facts in this paragraph set forth will more fully and clearly appear by the judgment roll in the said action, filed in the office of the clerk of the city and county of *New York* on the *31st* day of *October*, 1*888.*

X. Upon information and belief that on the *31st* day of *October*, 1*888*, the said defendant, the *American Tube and Iron Company*, issued an execution upon said judgment to the sheriff of the city and county of *New York* against the property of the *New York Supply Company, Limited*, for the sum of *one thousand five hundred and ninety-five and 18-100* dollars (*$1,595.18*) and the said sheriff levied said execution on the property of the said *New York Supply Company, Limited*, and sold the same at public auction on the *10th* day of *December*, 1*888*, and realized from said sale enough money to, and did, pay on account of said judgment and execution to said defendant, or its attorney, the sum of *$578.50*; and also pay to himself for his fees, charges and compensations in and about the levying of said

execution and the sale of said property and the said payment of said judgment, the sum of $77.47.

XI. Upon information and belief he alleges that the said offer to allow judgment and the acceptance thereof, as set forth in paragraph IX hereof, and the judgment entered thereon, were made and entered while the said *The New York Supply Company, Limited*, the defendant in said action referred to, was wholly insolvent, and was known so to be by the officers thereof and by the said defendant; and that the said offer and acceptance were made in comtemplation of such insolvency, and were made for the purpose of defrauding the creditors of said corporation, other than the defendant in this action, and were made with the intention of giving a preference to the defendant in this action for the other creditors of the said corporation, by transferring to such defendant the property of the said corporation, contrary to the statute in such case made and provided; and that the said execution was issued and levied, and the said sale thereunder had pursuant to the same corrupt and unlawful nature and purpose and in contemplation of said insolvency.

XII. That the said offer to allow judgment referred to in said paragraph IX and the acceptance thereof, and the judgment entered thereon, and the sale thereunder, and the payment on account of said judgment, were and are wholly void and of no effect.

Wherefore the plaintiff demands judgment declaring the said offer of judgment and acceptance thereof, and the judgment entered thereon, and the execution issued upon said judgment, to have been fraudulent and void and of no effect as to this plaintiff as receiver as aforesaid, and adjudging that the defendant *The American Tube and Iron Company* pay to this plaintiff as such receiver the sum of *six hundred and fifty-five and 77-100* dollars ($*655.77*) with interest thereon from the *31st* day of *October*, 1*888*, and the costs of this action, and the plaintiff also demands such other and further relief as to this court shall seem just.

Large & Stallknecht, Plaintiff's Attorneys,
No. *5 Beekman* street, *New York City*.

(*Verification as in Form No. 17237.*)

(*d*) *To Set Aside Fraudulent Transfer of Property.*

Form No. 17240.[1]

Supreme Court, *Cayuga* County.

Thomas Jones, as receiver of *The Rheubottom & Teall Manufacturing Company*,
against
Ferdinand S. M. Blun and *Sigmund Bendit*.

The above named plaintiff complains of the defendants and shows to the court on information and belief.

1. This is the form of complaint in Jones *v.* Blun, 145 N. Y. 333, and is copied from the records. Judgment was entered for plaintiff, which was affirmed at a general term of the supreme court and in the court of appeals.

See also, generally, *supra*, note 3, p. 757.

1. That on or about *January 16th*, 1889, *The Rheubottom & Teall Manufacturing Company* was duly incorporated under chapter *40* of the laws of 1848 of the state of *New York*, having its principal place of business in *Cayuga* county, *N. Y.* That the stock of said corporation consisted of *four hundred* shares of *fifty* dollars per share; that said defendant, *Ferdinand S. M. Blun*, was a stockholder of said corporation; that as a stockholder such defendant, *Ferdinand S. M. Blun*, owned and held *one hundred and twenty* shares of the stock of said corporation, and that said *Ferdinand S. M. Blun* was a stockholder during the times hereinafter stated and until about *December 18th*, 1890.

2. That said plaintiff was duly appointed receiver of said *Rheubottom & Teall Manufacturing Company* by an order of the *Supreme* Court, dated *January 7th*, 1891, and also in an action for the sequestration of the property of said corporation, brought by the *National Bank of Auburn* against said corporation, by an order dated *February 23d*, 1891. That said plaintiff duly qualified as receiver of said corporation and is now acting as such receiver.

3. That by the said last mentioned order the plaintiff was granted full power to maintain or defend any action, suit or special proceeding for the purpose of protecting or preserving the property of said corporation or the proceeds thereof, or for the purpose of setting aside any assignment or illegal preference made in contemplation of insolvency or in fraud. That on the *6th* day of *April*, 1891, a judgment was rendered in the *Supreme* Court and entered in the *Cayuga* county clerk's office in the said action, brought by the *National Bank of Auburn* against the said corporation, sequestrating the property of the said corporation, and vesting the same in the plaintiff herein, and continuing the plaintiff as permanent receiver of said corporation, with the usual powers and duties of receiver so appointed, and reforming all of said order of *February 23*, above mentioned.

4. Said plaintiff further shows that said defendants are copartners, doing business in *New York* city under the firm name and style of *F. S. M. Blun & Co.*

5. That the *American Clasp & Steel Company* is a corporation organized under the laws of the state of *New Jersey* for the purpose of controlling the price of corset steels. That said *Rheubottom & Teall Manufacturing Company*, said defendants *F. S. M. Blun & Co.*, *Mayer, Strouse & Campam*, a firm doing business in *New York City*, and *M. Cohn & Co.*, of *New York City*, were the principals interested in said *American Clasp & Steel Company*. That the defendant *F. S. M. Blun* is the treasurer of said *American Clasp & Steel Company*, and was such treasurer during the times hereinafter stated.

6. The plaintiff further says that *The Rheubottom & Teall Manufacturing Company* refused the payment of its notes and evidences of debt on or about *October 10th*, 1890, and from that time until a judgment was entered against said company on *December 13th*, 1890, had refused the payment of its notes and evidences of debt.

7. That said *Rheubottom & Teall Manufacturing Company* sold and delivered to said *American Clasp & Steel Company* goods, wares and merchandise, at its special instance and request, for which said

American Clasp & Steel Company was indebted to said *Rheubottom & Teall Manufacturing Company* in the sum of $2,818.05.

8. That said *Rheubottom & Teall Manufacturing Company*, as this plaintiff is informed and believes, assigned and transferred to the defendants of the money due it from the *American Clasp & Steel Company*, on *October 25th*, 1890, $536.29; on *November 15th*, 1890, $349.52; on *November 21st*, 1890, $697.07, and on *December 13th*, 1890, $337.25.

9. That said assignment or transfer was designed for the payment of debts of said *Rheubottom & Teall Manufacturing Company* to said defendants which were not then due, and said transfers and assignments were made in contemplation of the insolvency of said company, of which insolvency said defendants had notice, and were and are void as against this plaintiff.

II.

And for a second and further cause of action, said plaintiff alleges the facts stated in the first cause of action herein, and on information and belief, that from *November 1st*, 1890, to *December 13th*, 1890, said *Rheubottom & Teall Manufacturing Company* assigned and transferred to the defendants, corsets and other merchandise of the value of $6,917.00, and also assigned and transferred on account for corsets sold to Mrs. *George A. Scott* $2,801.12, making the total amount transferred $9,718.12. That said defendants made advances to *Rheubottom & Teall Manufacturing Company* during said period from *November 1st*, 1890, to *December 13th*, 1890, of $4,717.08, leaving a balance of $5,001.04, which plaintiff alleges was assigned to the defendants in contemplation of insolvency, and with a purpose of preferring said defendants, and of paying the debts of said *Rheubottom & Teall Manufacturing Company* due and owing to said defendants.

III.

And for a third and further cause of action, said plaintiff alleges the facts stated in the first cause of action herein, and that on or about *December 18th*, 1890, a check for $120.00 or thereabouts was received by *Homer E. Rheubottom*, president of the said *Rheubottom & Teall Manufacturing Company*, from *Jorgenson, Blisch & Co.*, who were indebted to *Rheubottom & Teall Manufacturing Company* for goods sold and delivered to them; and the said *Rheubottom & Teall Manufacturing Company*, through its president, assigned and transferred the said check to said defendants. That said assignment and transfer was made in contemplation of insolvency, and after the company had become insolvent, and was assigned and transferred with the purpose and design of preferring said defendants in the payment of their debts.

The plaintiff further alleges that each and all of the aforesaid assignments and transfers to said defendants were and are void, and that said defendants should account to this plaintiff for the value thereof.

Wherefore plaintiff demands judgment that the transfers and assignments hereinbefore referred to as made by *The Rheubottom &*

Teall Manufacturing Company or its officers, may be set aside and be held to be void and of no effect, and that said defendants may account to this plaintiff for the value thereof, and that said plaintiff may have judgment for the sum of $7,041.06, besides costs, together with such other and further relief as may be just.

E. C. Aiken, Plaintiff's Attorney,
91 Genesee St., *Auburn*, N. Y.

State of *New York*, } ss.
Cayuga County. }

Thomas Jones being duly sworn, says that he is the plaintiff in the above entitled action; that he has heard read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. *Thomas Jones.*

Sworn to before me this *18th* day of *May*, 1891.

D. Edwin French, Notary Public,
Cayuga County, *N. Y.*

(2) Of National Bank.[1]

(a) *To Enforce Lien on Note.*

Form No. 17241.[2]

(Precedent in Gibbons *v.* Hecox, 105 Mich. 509.)[3]

1. Right to Sue. — It is well settled that the receiver of an insolvent national bank represents both the corporation and its creditors. He is the statutory assignee of all the property and effects of the corporation, and is therefore entitled to sue in his own name to recover such property and enforce the rights of the corporation without making the corporation or its creditors a party to such suit. Cockrill *v.* Abeles, 86 Fed. Rep. 505.

Requisites of Bill, Complaint, etc., Generally. — See *supra*, note 3, p. 757.

Legal Capacity to Sue. — In Platt *v.* Crawford, (Supreme Ct. Spec. T.) 8 Abb. Pr. N. S. (N. Y.) 297, the allegations of the complaint as to capacity of plaintiff to sue was as follows:

"That previous to *September 5*, 1867, the *Farmers' & Citizens' National Bank* was a corporation, organized under and in pursuance of the provisions of an act of the Congress of the United States, entitled 'An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' passed June 3, 1864, and the amendments thereof.

That on said *September 5*, 1867, *Hiland R. Hulburd* was the comptroller of the currency of the United States; and that on said *September 5*, 1867, this plaintiff was duly appointed a receiver of said bank by the said *Hiland R. Hulburd*, comptroller of the currency, in accordance with the provisions of the said act of Congress, and the amendments thereof, by and with the concurrence of the secretary of the treasury."

It was held that this allegation was sufficient on demurrer, although the complaint would have been fuller and more artistic if it had contained a direct averment showing the precise cause ascertained by the comptroller on account of which the appointment of the receiver was made, rather than the argumentative averment that the appointment was made in accordance with the provisions contained in the act of congress.

2. *United States.* — Rev. Stat. (1878), § 5234.

3. This bill was demurred to as not stating a case for equitable relief, and dismissed in the court below, but on appeal to the supreme court it was held that the bill set out sufficient grounds for equitable relief and the demurrer should have been overruled.

[(*Commencement as in Form No. 5638.*)][1]

1. That he is the receiver of the said *City National Bank of Greenville*, which is a corporation organized under an act of congress known as the "National Bank Act" and acts amendatory thereof.

2. That said bank, being insolvent, suspended payment on or about the *22d* day of *June*, 1893; that your orator was appointed as receiver thereof by the Comptroller of the Currency on or about the *27th* day of *June*, 1893; that he qualified as such receiver, and took possession of the bank books, records, and assets of said bank, on or about the *1st* day of *July*, 1893, and ever since has been, and still is, acting as such receiver.

3. That among the assets of said bank which came into the possession of your orator, as such receiver, was a note of $*2,000* made by the defendant *Charles L. Hecox*, under the name of *C. Leander Hecox*, of which note the following is a copy:

"*2,000.* *New York, May 5*, 1893.

Three months after date, I promise to pay to the order of *Stanwood Mfg. Co. two thousand* dollars, at *Mutual Bank*; value received.

C. Leander Hecox."

That said note belonged to said bank, and has, ever since your orator was appointed receiver of said bank, been in his possession and under his control as such receiver; that said note was indorsed in blank by the payee, the *Stanwood Manufacturing Company*, before its delivery to the said *City National Bank of Greenville*; that no payment whatever has been made upon the same, and that the defendant *Hecox*, the maker of said note, was at the time your orator was appointed such receiver, and ever since has been, and still is, financially irresponsible.

4. That on or about the *23d* day of *November*, 1892, the defendant *Charles L. Hecox* left with the said bank for collection a note which then belonged to him, of which the following is a copy:

"$*1,000.* *Greenville, Michigan, September 27*, 1892.

One year after date, I promise to pay to the order of *Charles L. Hecox, one thousand* dollars, at the *City National Bank of Greenville, Michigan*; value received. Interest at 7 per cent. Due *September 30th*, 1893. (*Signed*) *R. F. Sprague.*"

And the note so left for collection was in the custody of said bank at the time it suspended payment, and at the time your orator was appointed its receiver as aforesaid; that the same remained in the custody of your orator, as such receiver, until long after the maturity of the note mentioned above in paragraph 3, and is still in his possession.

5. That on or about the *16th* day of *April*, 1894, and while said note so signed by *Rufus F. Sprague* was still in the possession of your orator, as such receiver, the defendant *Charles L. Hecox* made an assignment thereof to the defendant *Theodore I. Phelps*; that on or about the *25th* day of *April*, 1894, said *Theodore I. Phelps* began an action upon said note against the maker, *Rufus F. Sprague*, in the *circuit* court for the county of *Montcalm*, which action came on to

1. The matter to be supplied within [ ] will not be found in the reported case.

be tried in said court on the *27th* day of *July*, 1894; that your orator was required, by a subpœna duces tecum issued out of said court, to appear at the trial of said cause, and produce said note. That he did appear in answer to said subpœna, and, in obedience to the orders of the court, produce the said note to be used in evidence, whereupon, on the trial, with the permission of the judge presiding in said court, the defendant *Charles L. Hecox* indorsed the said note in the following form: "Pay to *T. I. Phelps* or order. *Charles L. Hecox.*" That this was the first indorsement which had ever been made upon said note, which, until that time, had remained to the order of *Charles L. Hecox*.

6. That on the *27th* day of *July*, 1894, a judgment was rendered in the said action in favor of the said *Theodore I. Phelps* against the said *Rufus F. Sprague* on said note for the sum of $1,128.30 and costs; that your orator, as the receiver of said bank, had a lien upon the said note signed by *Rufus F. Sprague*, which was at the time it was left with the *National Bank of Greenville* for collection, and at the time the $2,000 note which was held by said bank against said *Charles L. Hecox* matured, the property of the said *Charles L. Hecox*, and that, as such receiver, he has a lien upon such judgment, or the money which may be collected upon the same by the said *Theodore I. Phelps*, or any other person; but the defendants deny that your orator has any lien or claim upon said note, or upon said judgment, or upon the moneys which may be collected on the same.

7. To the end, therefore, that the defendants may, if they can, show why your orator should not have the relief thereby prayed, and may answer this bill without oath (their answers on oath being hereby waived), that your orator may be declared, as such receiver, to have a lien upon the said note signed by *Rufus F. Sprague*, and upon the judgment obtained thereon by the said *Theodore I. Phelps*, that the defendants may be decreed to account to your orator for said note and judgment, and anything which may have been or which may be collected thereon by either or any of the said defendants, and that your orator may have such other and further relief as the nature of the case may require. [And this plaintiff will ever pray, etc.

(*Signature and verification as in Form No. 5688.*)][1]

(*b*) *To Enforce Stock Liability.*

Form No. 17242.[2]

United States of America, *Eastern* District of *Michigan.*

In the *Circuit* Court *of the United States* for the *Eastern* District of *Michigan.* Of the *March* Term, 1897.

Joseph L. Hudson, plaintiff herein, who sues as the receiver of the *Third National Bank of Detroit*, a corporation organized under, and formerly doing business at the City of *Detroit*, in said district, by virtue of the Laws of the United States, by *Warner, Codd & War-*

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

2. *United States.* — Rev. Stat. (1878), § 5234.
This form is copied from the records.

ner, his attorneys, complains of *John Doe*, defendant herein, who has been summoned, etc., of a plea that he render to the plaintiff the sum of $*2,000*, which he owes to and unjustly detains from him.

For that whereas, prior to and on the *31st* day of *January*, 1*894*, the *Third National Bank of Detroit* was a corporate body, created and existing for the purpose, and engaged in the business of banking, having its office where its operations of discount and deposit are carried on, at the City of *Detroit*, in said District.

That said corporation was created and organized under an act of the congress of the United States of America, entitled "An act to provide a National Currency, secured by a pledge of the United States bonds, and to provide for the circulation and redemption thereof," and subsequent acts in addition to or amendatory thereof.

That from its said creation and organization, and thereafter continuously, until the *31st* day of *January*, 1*894*, said bank accepted, exercised and enjoyed the various powers and privileges granted to it by said acts of congress, and continued to carry on the business of banking, in the said City of *Detroit* aforesaid.

That on the date last aforesaid, at the City of *Detroit*, said bank closed its doors and then and there suspended and discontinued its business of banking, and has not since resumed the same; that on the *1st* day of *February*, A. D. 1*894*, the then Comptroller of the Currency of the United States, having become satisfied, as specified in §§ 5226 and 5227 (Title LXII. "National Banks," ch. 4) of the Revised Statutes of the United States, that said bank had refused to pay said circulating notes as therein mentioned, and was in default, duly appointed the plaintiff the receiver of the said bank.

That afterwards and on the *2d* day of *February*, A. D. 1*894*, the plaintiff, at said District, accepted said office and entered upon the duties of the same, took possession of the books, records and assets of every description of said bank, and from thence hitherto has been, and still is, engaged in the collection of all debts, dues and claims, belonging to said bank, and since then has been and still is discharging the duties devolving upon him by law, by reason of his said office as such receiver.

That on the day when said bank closed its doors and ceased to do business, and suspended as aforesaid, said defendant was a shareholder in said bank, and then held and owned *100* shares of the capital stock of the said bank, of the par value of $*100* each, amounting to the sum of $*10,000*.

That on the *12th* day of *January*, 1*896*, at said City of *Washington*, said Comptroller, in order to pay and discharge the debts and liabilities of said bank, and in pursuance of the powers vested in him by law, did find and determine that it was necessary to enforce the individual liability of the shareholders of such bank to the extent of $*18* per centum of the par value of the capital stock thereof, and then and there did order and make an assessment and requisition on the shareholders of the said bank, and each and every one of them, equally and ratably, to the amount of $*18* per centum of the par value of the shares of the capital stock of the said bank, held and owned by them respectively at the time of the failure and suspension

of the bank; and then and there said comptroller did direct and empower the plaintiff to take the necessary legal proceedings to enforce said assessment and requisition.

That by virtue of the premises, and under the laws of the United States, said defendant became individually liable to the plaintiff, as such receiver to an amount equal to $18 per centum of the said amount of said shares of stock of said bank, held and owned by said defendant at the time said bank closed its doors and failed and suspended as aforesaid, to wit, the sum of $2,000, which said sum of money was to be paid to the plaintiff as such receiver, by the defendant, when he should be thereto requested.

And whereas, also, the defendants, on the *14th* day of *January*, 1896, at the district aforesaid, became, and was indebted to the plaintiff, as such receiver, in the sum of $2,000, for money before that time lent by the plaintiff, as such receiver to the defendant, at his request; and in the like sum for money before that time received by the defendant for the use of the plaintiff, as such receiver; and in the like sum for money before that time paid and expended by the plaintiff as such receiver for the use of the defendant, at his request; and in the like sum for interest on divers sums of money before that time forborne by the plaintiff as such receiver to the defendant, at his request for divers spaces of time before then elapsed; which said several sums of money so due to the plaintiff as receiver, as aforesaid, were respectively to be paid to him by the defendant on request.

Yet the defendant, though often requested so to do, has not paid to the plaintiff the several sums of money, in the several counts above specified, or any or either of them, or any part thereof, but refuses so to do, to the damages of the plaintiff of $2,000; and therefore he brings his suit, etc.

And the plaintiff shows to the court now here the order appointing him receiver of the said *Third National Bank of Detroit.*

Warner, Codd & Warner, Attorneys for Plaintiff.

(*c*) *To Recover on Promissory Note.*

Form No. 17243.[1]

United States of America, *Eastern* District of *Michigan.*

In the *Circuit* Court *of the United States*, at the *March* term, A. D. 1897.

Joseph L. Hudson, who sues as the receiver of the *Third National Bank of Detroit*, a corporation organized and existing under, and formerly doing business at the City of *Detroit* in said District, by virtue of the laws of the United States of America by *Warner, Codd & Warner*, his attorneys, complain of the *Panhandle Stave Co.*, a corporation doing business by virtue of the laws of the State of *Michigan*, defendant, which has been summoned of a plea of trespass on the case on promises.

For that, whereas, said defendant, on the *10th* day of *June*, 1893,

1. *United States.* — Rev. Stat. (1878), § 5234. This form is copied from the records.

made a certain note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, and then and there delivered the said note to said *Third National Bank of Detroit*, in and by which said note, defendant by the name, style and description of the *Panhandle Stave Co.*, by *Harry Winder*, business manager, promised to pay to the order of said bank by the name, style and description of the *Third National Bank of Detroit*, *sixty* days after date thereof $1,500, at their office in *Detroit*, for value received.

By reason whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay the said bank the said sum of money, in the said note specified, according to the tenor and effect of the said note, and being so liable, said defendant, in consideration thereof, undertook, and then and there faithfully promised said bank, well and truly to pay unto it the said sum of money, and the said note specified according to the tenor and effect of said note; that on the *thirty-first* day of *January*, A. D. 1894, said bank was put into liquidation, and the plaintiff was duly appointed the receiver thereof, by the Comptroller of the Currency of the United States, under, and in pursuance of the laws of the United States. (*Here was set out the money counts.*)

Yet the defendant, though often requested, has not paid the said sums of money, or any or either of them, or any part thereof, either to said bank prior to its being put in liquidation or to the plaintiff, since said bank was put into liquidation, but refuses so to do, to the damage of the plaintiff, as receiver, as aforesaid of $1,650 dollars.

And the plaintiff brings into the court here an order putting said bank into liquidation, and appointing the plaintiff as such receiver.

By *Warner, Codd & Warner*,
Attorneys for Plaintiffs.

b. In Actions Against Receivers.

(1) For Personal Injuries Caused by Negligence of Employee.[1]

Form No. 17244.[2]

(Precedent in Proctor *v.* Missouri, etc., R. Co., 42 Mo. App. 128.)[3]

1. **Nature of Proceeding.** — For torts committed by servants of receiver of a railroad company while operating the railroad under his management he is responsible, upon the principle of respondeat superior. The liability, however, is not a personal liability, but a liability in his official capacity only, and the damages for such torts are not to be recovered in suits against him personally and collected on executions against his individual property, but recovered in suits in which he is named or designated as receiver, and to be paid only out of the fund or property which the court appointing him has placed in his possession and under his control. McNulta *v.* Lockridge, 137 Ill. 270; Camp *v.* Barney, 4 Hun (N. Y.) 373; Davis *v.* Duncan, 19 Fed. Rep. 477.

2. See, *supra*, note 1, this page.

3. It was objected to this petition that the action as stated was against the corporation and not against the receivers thereof, or that it was against both the corporation and the receivers. It was held to be against the receivers alone; that the petition charged "that the *Missouri, Kansas & Texas Railroad Company* is a corporation," and that "the defendants *George A. Eddy* and

[*Bartley Proctor*, plaintiff, against *George A. Eddy* and *H. C. Cross*, as receivers of the *Missouri, Kansas and Texas Railway Company*, defendants.] In the *Circuit* Court, *Howard* County, state of *Missouri*. To the *September* Term, *1890*.][1]

Now at this day comes the plaintiff and for his amended petition, leave of court having been asked and obtained, states: That the *Missouri, Kansas and Texas Railway Company* is a corporation, incorporated according to law; that the defendants, *George A. Eddy* and *H. C. Cross*, are the receivers of the corporation, appointed as such by Judge *David J. Brewer*, Judge of the *eighth* circuit of the *United States circuit* court; and at the time hereinafter mentioned were operating such railway in the state of *Missouri*. Plaintiff further states that on or about the *nineteenth* day of *February*, *1889*, he was in the employ of said defendants as a common laborer, and was under the control of the boss, whose duty it was to direct the plaintiff in and about his duties as said employee, as well as a number of other employees of said defendants; that on said day the said boss in the discharge of his duties ordered the said plaintiff, in company with his other colaborers, to proceed to *Boonville*, *Cooper* county, *Missouri*, for the purpose of loading on the cars of the defendants certain piling belonging to said defendants; that the plaintiff, together with certain other employees of said defendants, was assisting under the command of said boss, in loading said piling on said cars, and in loading said piling it was necessary to place from the ground to the car a railroad iron to be used as a skid in loading said piling; that the said boss ordered the plaintiff with others of his colaborers to raise one of the iron rails from the ground and place one end on the defendants' car; that when said rail was so raised the plaintiff, acting under the order of said boss, thought that said rail was to be placed with one end on the car and the other on the ground, as the rails were formerly placed, but that said boss negligently and carelessly ordered the colaborers of the plaintiff to throw said rail to the ground without giving the said plaintiff warning. The plaintiff being on the opposite side of said rail from the other laborers, and through the negligence and carelessness of said boss in giving said order, the rail was thrown on the foot and ankle of said plaintiff, bruising and injuring the ankle of said plaintiff, by reason of which he, the said plaintiff, was sick and sore and lame for a period of *two* months and unable to work and suffered great pain in body and mind, and was put to the expense of hiring a physician and surgeon, and the plaintiff lost *two* months from his labor, and the plaintiff still suffers from said wound, caused from the negligence and carelessness of the defendants as aforesaid. Wherefore, the plaintiff

H. C. Cross are the receivers of the corporation;" that although it was true that in after portions of the complaint the word "defendant" was used instead of "defendants," yet, taken as an entire proceeding, it must be held to be against the receivers alone. The form as set out in the text has been changed so as to overcome the objection.

1. The matter enclosed by [ ] will not be found in the reported case.

says he has been damaged to the sum of *one thousand* ($*1,000*) dollars for which he asks judgment, together with costs of this suit.

[*Jeremiah Mason*, Attorney for Plaintiff.][1]

(2) For Rents and Taxes.

Form No. 17245.[2]

New York Supreme Court.

Benjamin Moore, as trustee of *Clement Moore* under the last will and testament of *Clement C. Moore*, deceased,
against
Francis Higgins, as receiver of the estate of *John H. McCunn*, deceased.
} Complaint.

The plaintiff above named, by *C. de R. Moore*, his attorney, complaining alleges:

For a First Cause of Action.

First. That on the *15th* day of *February*, A. D. 18*71*, by a lease in writing dated on the said day, he demised and leased to one *John H. McCunn* for the term of *twenty-one* years from the *1st* day of *March*, 18*87*, and the said *McCunn* hired and took from him, at the usual rent of *two hundred and fifty* dollars, all that certain lot of ground situate, lying and being in the *sixteenth* ward of the city of *New York*, distinguished on a map of certain lands of the said *Clement C. Moore*, situated at *Greenwood*, in said city, recorded in the office of Register of the city and county of *New York*, in Liber *310* of Conveyances, page *259*, by the number *six hundred and forty-five* (*645*).

Second. That the said *McCunn* in and by said lease covenanted and agreed to pay said rent in *two* equal half-yearly payments, on the *first* days of *March* and *September* in each and every year during the term thereby demised, and also that he, his executors, administrators or assigns, should and would at his or their own proper costs and charges, defray, pay and discharge all said duties, taxes, charges for croton water, assessments and payments, extraordinary as well as ordinary, as should during the term thereby demised be laid, levied, assessed or imposed on, or grow due or payable out of, or over, or by reason of the said demised premises or any part thereof, by virtue of any present or future law of the United States of America, or of the state of *New York*, or of any present or future law or ordinance of the corporation of the city of *New York*.

Third. That under and by virtue of said lease, the said *McCunn* on or about the *first* day of *March*, 18*71*, entered in and upon said demised premises and became and was possessed thereof for the term so to him granted as aforesaid, and remained so possessed up to the time of his decease on or about the month of *June* or *July*, 18*72*.

Fourth. That as this plaintiff is informed and believes, by an order of this court, made and entered on the *28th* day of *February*, 1877,

1. The matter enclosed by [ ] will not be found in the reported case.

2. This is the form of complaint in Wells *v.* Higgins, 132 N. Y. 459, and is copied from the records. Judgment was entered for plaintiff upon verdict directed by the court, which was affirmed on appeal to the general term of the supreme court.

the above named *Francis Higgins* was appointed receiver of the rents, issues and profits of the estate of the said *John H. McCunn*, deceased; that as in and by said order required, the said *Higgins* duly qualified as receiver, and has ever since and still continues to discharge his duties as such, and that in and by said order the said receiver became invested with all the estate of the said *McCunn*, deceased, both real, personal and mixed, and was thereby authorized to pay the taxes and assessments and other lawful charges to which the premises coming into his hands might be from time to time subject, as by reference to said order will the more particularly and at large appear.

Fifth. That upon his appointment as receiver aforesaid, the said *Francis Higgins* became possessed of the leasehold interest in the premises above described, and thereafter he sub-let a portion thereof, and that he paid the rent therefor to this plaintiff up to and including the *first* day of *September*, 1878.

Sixth. That on the *first* day of *September*, 1879, the sum of *two hundred and fifty* dollars, as *one* year's rent of the said premises, became due from the said *Francis Higgins*, receiver, to the plaintiff; that the same has been duly demanded, but that no part thereof has been paid; that the whole amount thereof is now due and owing from said receiver to said plaintiff, with interest on *one hundred and twenty-five* dollars ($*125*) from the *first* day of *March*, 1879, and on *one hundred and twenty-five* dollars ($*125*) thereof from the *first* day of *September*, 1879.

Seventh. And as a further, separate and second cause of action, the plaintiff alleges, incorporating herewith and repeating each and every allegation hereinbefore set forth, except those contained in the next preceding paragraph, numbered *sixth*, that contrary to the meaning and intent of the foregoing covenant in said lease contained, the said *Francis Higgins*, receiver, has failed to pay the taxes duly assessed upon said premises for the years 1876, 1877 and 1878, and that he has also failed to pay the assessments duly levied thereon for the years 1873, 1874 and 1875; that said taxes and assessments now are due, owing and unpaid, and a lien on said premises to the damage of the plaintiff *eight hundred* dollars.

Eighth. That the plaintiff has duly performed all the covenants and conditions of said lease on his part.

Wherefore the plaintiff demands judgment against the defendant in the sum of *one thousand and fifty* dollars, with interest on *two hundred and fifty* dollars thereof as aforesaid, besides the costs of this action. *C. de R. Moore*, Plaintiff's Attorney.

(*Address and verification as in Form No. 11457.*)

(3) For Taxes.

Form No. 17246.[1]

(Precedent in Athens County *v.* Dale, 60 Ohio St. 180.)[2]

[(*Venue and title of court as in Form No. 5929.*)

1. *Ohio.* — Bates' Anno. Stat. (1897), § 1097.

2. The supreme court held that the treasurer, on the facts stated in this application, had a right to a rule on the receiver as prayed for, and reversed a

John Doe, as Treasurer of *Athens* County, plaintiff, against *Theodore D. Dale*, as Receiver of the Property of the *Toledo and Ohio Central Extension Railroad Company*, defendant. } Petition.][1]

The plaintiff says that on the *fourteenth* day of *August*, 1894, by the consideration of the *common pleas* court of *Washington* county, *Ohio*, the defendant, *Theodore D. Dale*, was appointed receiver for *The Toledo and Ohio Central Extension Railroad Company*; that said *Theodore D. Dale* thereupon qualified, and has ever since said date and is now such receiver for said Railroad Company; that he caused the property of said Railroad Company for the year 1897 then in his possession as such receiver to be listed in the name of said Company for the purposes of taxation in *Athens* county, *Ohio*, for said year; that the taxes charged against said property by him for said year, stands upon the duplicate in the Treasurer's office of *Athens* county, *Ohio*, in the name of said Railroad Company; but the said Treasurer avers that the taxes for said year are a proper charge and debt of the said *Theodore D. Dale* as receiver of the aforesaid Railroad Company.

The said Treasurer says that there stands charged in the manner aforesaid, against the said *Theodore D. Dale*, as receiver for *The Toledo and Ohio Central Extension Railroad Company*, upon the duplicate in his hands and upon the duplicate on which he is now engaged in collecting the taxes for the current year 1897, the sum of $1,626.84 taxes; that the same are delinquent, due and unpaid together with *five* per cent. penalty thereon allowed by law to said Treasurer as a compensation for collecting the same, and that the said *Theodore D. Dale* as such receiver is indebted to said Treasurer in the sum of $1,708.18, taxes and penalty for the year of 1897.

Wherefore plaintiff asks that the defendant show cause why he should not pay said taxes and penalty amounting to the sum of $1,708.18, and the costs of this proceeding, and that the said rule so entered may have the force and effect of a judgment at law, and that the same may be enforced by execution issuing from this court against the said *Theodore D. Dale* as receiver as aforesaid, and for all other relief to which plaintiff may be entitled in equity.

A. E. Price, Attorney for Plaintiff.

(4) To Recover Money Collected by Receiver Under Void Appointment.

Form No. 17247.

(Precedent in Johnson *v.* Powers, 21 Neb. 292.)[2]

[(*Title of court and cause as in Form No. 5923.*)][3]

judgment of the circuit court dismissing the application.

1. The matter supplied and to be supplied within [ ] will not be found in the reported case.

2. The judgment of the district court sustaining a demurrer to this petition, on the ground that it did not state facts sufficient to constitute a cause of action, was reversed in the supreme court.

3. The matter to be supplied within [ ] will not be found in the reported case.

1st. Plaintiff for cause of action says that he is owner of lots *three*, *four*, and *five* in block No. *30* in the city of *Blair*, *Washington* county, *Nebraska*, and has been such owner continuously for the last past *three* years, and that all of said time he has been in peaceable, undisputed possession of the same, either in person or by tenant, up to the *27th* day of *June*, 1885.

That there have been for more than *two* years immediately before filing this petition, and there are now on said lots costly and valuable improvements consisting of a good brick *two*-story dwelling house in good repair and condition, and a good *two*-story frame barn, wells, cisterns, fruit trees, and shrubbery and all other necessary buildings and improvements for to make said premises very valuable as a family residence; that the rental value of said premises is and has been for the last year *two hundred* dollars a year, payable in advance.

That on or about the *3d* day of *April*, 1885, the *Omaha Savings Bank* commenced an action in this court to foreclose a mortgage on said premises and made this plaintiff defendant as mortgagor, and *A. Castetter*, *E. H. Monroe*, and *Palmer & Ryan* defendants as subsequent purchasers or incumbrancers; that on the *27th* day of *June*, 1885, at an adjourned term of this court, the defendant, *A. Castetter*, made application to said court for the appointment of a receiver to collect the rents and profits of said premises. Such application was supported by affidavit filed on said *27th* day of *June*, 1885. That on said day the court appointed this defendant receiver of said rents and profits.

This plaintiff further alleges that he had no knowledge or notice of said application and proceedings until several days after the receiver was appointed; that his attorney had no notice until said proceeding came up for hearing; that plaintiff was a resident of this county, and that no notice by publication was made in any manner; that he did not appear in said proceedings either in person or by attorney, and alleges that no notice was issued or served as is required by law, and that no notice whatever was issued or served on any of the parties or their solicitors; that for the want of notice as is required by law this court had no power to appoint this defendant receiver or to make any appointment, and that said pretended appointment is void and of no effect; that this plaintiff had a good and valid defense to said proceedings, as he believes and has been advised by counsel; that he would have made said defense had he been served with notice as is required by law.

2d. That on the said *27th* day of *June*, 1885, and all the time since, this defendant has been in possession and exercised control over said premises under said proceedings. This plaintiff alleges that this pretended receiver has not filed in the office of the clerk of this court the bond required by law, and that no bond whatever has at any time been filed in said proceedings; that on the *27th* day of *June*, 1885, this defendant, without authority, urged and persuaded the tenant then on said premises to pay the rent for the future use of said premises to this supposed receiver, which has been done, and by such payment this defendant has received of such rent the sum of *two hundred and twenty* dollars; that on the *6th* day of *March*, 1886,

this plaintiff demanded of defendant the said rent, and defendant refused to pay the same or any part thereof.

Therefore plaintiff asks judgment against said defendant for the said sum of *two hundred and twenty* dollars, and costs of this action, and that defendant cease to act as such receiver, and for such other and further relief as this case may require.

[(*Signature and verification as in Form No. 5923.*)][1]

4. Judgment Directing Transfer to Receiver of Securities Remaining After Satisfaction of Debt for Which Securities were Given.[2]

Form No. 17248.[3]

Supreme Court, County of *Monroe*.

William W. Armstrong, as receiver of the property of *George S. Riley*, against *Hector McLean* and *George S. Riley*.

This cause having been brought to trial and tried by the court without a jury at the *December*, 1894, term thereof upon the issues joined in said cause, and the decision of the court having been made and filed, and due proof having been filed of the service of the summons and complaint herein upon both of said defendants on the *19th* day of *July*, 1894, and that no answer, demurrer, or appearance has been served by said defendant *Riley* in this action, and that more than *twenty* days have elapsed since such service; and on motion of *John N. Durand*, attorney for the plaintiff,

It is adjudged that the defendants transfer and assign to the plaintiff, as receiver aforesaid, the *Wiegand* bond and mortgage described in said complaint; also the *Hirschfield* land contract therein mentioned; and also that the defendant *Hector McLean* pay over to said plaintiff the sum of *two thousand two hundred and nine* dollars and *fifty-two* cents ($2,209.52), the surplus moneys remaining in his hands, as stated in said decision, and the plaintiff's costs in this action having been taxed at the sum of $92.56, it is further adjudged that in the event that the said surplus moneys and securities are insufficient to pay in full the *five* judgments mentioned in said complaint, the expenses of the plaintiff as such receiver and his said costs, the said defendant *McLean* be adjudged to pay the said costs and disbursements of this action.

K. P. Shedd, Clerk.

IX. Proceedings to Compel Receiver of Insolvent Corporation to Sue for Unpaid Instalments on Stock.

1. The matter to be supplied within [] will not be found in the reported case.

2. **For the formal parts** of a judgment in a particular jurisdiction see the title Judgments and Decrees, vol. 10, p. 645.

3. This is the form of judgment in Armstrong *v.* McLean, 153 N. Y. 490, and is copied from the records. In the court of appeals, the order of the general term reversing this judgment was reversed.

1. Petition.[1]

Form No. 17249.[2]

To the Honorable the Judges of *Baltimore County* Court, in *Equity*:

The petition of *Herman Stump*, of *Harford* county, showeth to your honors that he heretofore filed his bill of complaint in this honorable court, against the *United States Insurance Company*, in *Baltimore*, and that upon the prayer contained in that bill your honors appointed *James Harwood*, *John B. Howell* and *Walter Fernandis*, receivers of the estate and effects of said company, as will be seen by reference to said bill of complaint, and the proceedings now therein remaining of record in this court. Your petitioner further shows that the former president and directors of said company, to wit: *Peter Neff*, *Job Smith*, *John Patterson*, *John A. Hamilton* and *Joseph P. Grant*, were each holders of a large amount of the stock of said company, on which there was, and still is due to said company, unpaid instalments to a large amount, and that said president and directors, when they knew said company was insolvent, and when, too, that insolvency had been produced by their management, assigned and transferred their stock to irresponsible persons, for the purpose of exempting themselves from liabilities for the unpaid instalments on said stock, and in fraud of your petitioner and the other creditors of said company. Your petitioners further show that all the stockholders of said company owe to said company *nine* dollars on each share of stock, and that by the act of incorporation, said stockholders are entitled to a notice for *sixty* days previous to the time at which the unpaid instalments can be demanded. That said company is insolvent, and that all its effects and estate, together with the unpaid instalments due on its stock, is wholly insufficient to pay its debts. Wherefore, your petitioners pray your honors will direct and order said receivers to institute suits against said president and directors for the unpaid instalments on said stock so fraudulently assigned as aforesaid, and to give notice to all other stockholders and persons liable to pay the unpaid instalments on said stock to pay the same, and, upon their failure to do so, to institute suits for the recovery of the same. And your petitioners will ever pray.

Herman Stump, Petitioner.

2. Order Granting Petition.[3]

Form No. 17250.[4]

On the foregoing petition it is ordered by the court, this *26th June*, 18*34*, that the aforesaid receivers institute suit against the president and directors therein named, as prayed, and that the receivers aforesaid give *sixty* days notice, by advertisement, in *three*

1. **For the formal parts** of a petition in a particular jurisdiction see the title PETITIONS, vol. 13, p. 887.

2. This is the form of petition introduced in evidence and set out in Hall *v.* U. S. Ins. Co., 5 Gill (Md.) 484.

3. **For the formal parts** of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

4. This is the form of order introduced in evidence and set out in Hall *v.* U. S. Ins. Co., 5 Gill (Md.) 484.

of the newspapers printed in the City of *Baltimore*, to all the stockholders of the said Insurance Company, (except said president and directors,) to pay the remaining instalments due on their stock respectively. And it is further ordered, that if said stockholders fail to pay, according to said notice, that said receivers forthwith proceed to coerce the payment of the same by suit, unless said receivers show cause to the contrary, on or before *Tuesday next.* Provided a copy of this order be served on or before *Saturday next.*

R. B. Magruder.
John Purviance.

X. PROCEEDINGS TO RECOVER BACK PROPERTY NOT SUBJECT TO RECEIVERSHIP.

1. Affidavit.[1]

Form No. 17251.[2]

Supreme Court, *Dutchess* County.
The D. M. Koehler & Son Company, plaintiff,
against
Henry Flebbe, defendant.

State of *New York*, }
County of *Dutchess*. } ss.

Henry Flebbe, being duly sworn, says that he is one of the defendants in an action entitled "*D. M. Koehler et al.* against *Henry Flebbe*;" that on the *19th* day of *May*, 1897, judgment was taken in said action against said *Henry Flebbe* for the sum of $*78.73*; that deponent was examined in proceedings supplementary to execution under said judgment before *Frank Connolly* as referee, and said *Frank Connolly* was appointed receiver of deponent's property; that as such receiver said *Connolly*, on the *17th* day of *July*, 1897, took from deponent's premises, No. *1 Jay* street, *Poughkeepsie*, *N. Y.*, a liquor tax certificate No. ———, without deponent's consent, and against his protestation. That said certificate was not deponent's property, but the property of *George I. Amsdell*, of *Albany*, *N. Y.*, said certificate having been obtained by money advanced to deponent by said *George I. Amsdell* for that purpose, and deponent having made a formal transfer and assignment of said certificate to said *George I. Amsdell* on the *first* day of *May*, 1897.

Deponent further says that he has no interest, right or title to said certificate, but that the same belongs exclusively to said *George I. Amsdell.*

Henry Flebbe.

Sworn to before me this *20th* day of *July*, 1897.
Wm. R. Woodin, Notary Public.

1. **For the formal parts** of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

2. This is the form of affidavit in D. M. Koehler, etc., Co. *v.* Flebbe, 21 N. Y. App. Div. 210, and is copied from the records. An order was entered directing the receiver to deliver the liquor-tax certificate, which was affirmed on appeal.

2. Order to Show Cause.[1]

Form No. 17252.[2]

At a *Special* Term of the *Supreme* Court of *New York*, held in and for the county of *Dutchess*, at the Court House, *Poughkeepsie*, *N. Y.*, on the ——— day of *July*, 1897.

Present — Hon. *J. F. Barnard*, Justice.

Supreme Court, *Dutchess* county.

The D. M. Koehler & Son Company, plaintiff,
against
Henry Flebbe, defendant.

On reading and filing the affidavits of *Henry Flebbe*, *James A. Amsaell* and *Gaius C. Bolin*, all verified the *20th* day of *July*, 1897, and on reading and filing the stipulation between *Charles Marschauser*, Esq., and *Gaius C. Bolin*, it is

Ordered, That *Frank Connolly*, receiver of the goods, chattels and effects of said defendant, *Flebbe*, show cause at a term of this court, to be held at the court-house, in the city of *Poughkeepsie*, *N. Y.*, on the *28th* day of *July*, 1897, at *ten* o'clock in the *fore*noon, or as soon thereafter as counsel can be heard, why an order should not be made directing the said *Frank Connolly* to deliver to *George I. Amsdell* a certain liquor tax certificate which he now holds in his possession or control, belonging to said *George I. Amsdell*, taken from said defendant, *Flebbe*.

J. F. Barnard, Justice *Sup.* Court.

3. Order for Return of Property.[1]

Form No. 17253.[3]

At a *Special* Term of the *Supreme* Court of *New York*, held in and for the county of *Dutchess*, at the Court House, *Poughkeepsie*, *N. Y.*, on the *28th* day of *July*, 1897.

Present — Hon. *J. F. Barnard*, Justice.

Supreme Court, *Dutchess* County.

The D. M. Koehler & Son Company, plaintiff,
against
Henry Flebbe, defendant.

The plaintiffs herein having heretofore obtained judgment against the defendant and having duly caused a receiver in proceedings supplementary to execution, of the goods, chattels and effects, of the defendant, to be appointed, and the receiver, pursuant to such appointment having taken possession of a certain liquor tax certificate No. *15200*, issued to *Henry Flebbe* on the *first* day of *May*, 1897, by the treasurer of the county of *Dutchess*, and *George I. Amsdell* having

1. **For the formal parts** of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

2. This is the form of order to show cause in D. M. Koehler, etc., Co. *v.* Flebbe, 21 N. Y. App. Div. 210, and is copied from the records. An order was entered directing the receiver to deliver the liquor-tax certificate, which was affirmed on appeal.

3. This is the form of order in D. M. Koehler, etc., Co. *v.* Flebbe, 21 N. Y.

claimed to be the owner of said certificate by reason of assignment thereof, and having made a motion requiring said receiver to show cause why he should not be directed to surrender such liquor tax certificate to said *George I. Amsdell*, and *Gaius Bolin* having appeared for said *George I. Amsdell*, and *Chas. Marschauser* having appeared for said receiver, and after reading and filing the affidavits of *Henry Flebbe* and *George I. Amsdell*, and also the affidavit of *Frank J. Connolly*, and the examination of *Henry Flebbe*,

Ordered, that the said certificate is the property of the said *George I. Amsdell*, and that said receiver has no right, title or interest therein, and he is hereby directed to surrender the same to said *George I. Amsdell*.

J. F. Barnard, Justice *Supreme* Court.

XI. FINAL ACCOUNT OR REPORT OF RECEIVER.[1]

1. Petition for Leave to File.[2]

Form No. 17254.[3]

(*Title of court and cause as in Form No. 6954.*)

To the *Supreme* Court of the state of *New York*:

The petition of *Nathan Hale* respectfully shows to the court,

That by virtue of an order made by this court in the above entitled cause and dated the *tenth* day of *June*, *1899*, your petitioner was duly appointed receiver of (*state estate of which he was appointed receiver*).

That on the *eleventh* day of *June*, 1899, your petitioner, with *Samuel Short* and *Nathan Hale* as sureties, entered into a bond to the people of the state of *New York* in the penal sum of *twenty thousand* dollars, conditioned as follows, to wit, (*state condition of bond*), and on said *eleventh* day of *June*, 1899, your petitioner took the oath of office prescribed by law.

That your petitioner has performed all the duties of his said office as such receiver and has executed all the trusts thereof so far as it has been within his power so to do; that all the assets of said estate known to him have been collected; that he has duly advertised for all claims against said estate and that all claims presented have been discharged; that to the knowledge of your petitioner there are no creditors of said estate.

That there remains, after paying all necessary expenses and

App. Div. 210, and is copied from the records. The order was affirmed on appeal.

1. **Account of Receiver.** — The receiver must render to the court an account of the administration of his trust. Adams *v.* Woods, 8 Cal. 306; American Trust, etc., Bank *v.* Frankenthal, 55 Ill. App. 400; Hayden *v.* Chicago Title, etc., Co., 55 Ill. App. 241; Heffron *v.* Rice, 40 Ill. App. 244; Hackensack Sav. Bank *v.* Terhune, 50 N. J. Eq. 297; Stretch *v.* Gowdey, 3 Tenn. Ch. 565; Lowe *v.* Lowe, 1 Tenn. Ch. 515; Mabry *v.* Harrison, 44 Tex. 286; Morehead *v.* Striker, 82 Fed. Rep. 1003; Conkling *v.* Butler, 4 Biss. (U. S.) 22; Cowdrey *v.* Galveston, etc., R. Co., 1 Woods (U. S.) 331.

2. **For the formal parts** of a petition in a particular jurisdiction see the title PETITION, vol. 13, p. 887.

3. See *supra*, note 1, this page.

charges of his said trust, together with the compensation of your petitioner as such receiver (*state amount remaining*), as will appear by the account of your petitioner hereto annexed, marked "Exhibit *A*."

That there are no suits or legal proceedings now pending in respect to said receivership, to the knowledge of your petitioner, and no duty except the final settlement of his accounts remains to be performed by your petitioner as such receiver.

Your petitioner therefore prays that his account as such receiver may be finally settled and allowed by the court, and that he may be awarded suitable compensation for the performance of his duties as such receiver and his bond canceled, and for such other and further relief as may be just.

(*Signature and verification as in Form No. 15173.*)

2. Order Granting Leave to File.[1]

Form No. 17255.[2]

At a *special* term of the *New York Supreme* Court, in and for the county of *New York*, held at the county court-house in the county of *New York*, on the *20th* day of *September*, 1899.

Present — Hon. *Charles H. Truax*, Justice.

Joseph L. McKee et al., plaintiffs,

against

Hoffman Machine Company et al., defendants.

In the matter of the final settlement of *Arthur R. Pope*, as temporary and ancillary receiver of the *Hoffman Machine Company*.

On reading and filing the petition of *Arthur R. Pope*, ancillary receiver of the *Hoffman Machine Company*, verified *August 31st*, 1899, together with the notice of motion thereon dated *August 31st*, with proof of due service thereof upon the parties who have appeared herein, upon the *American Surety Company* and upon Hon. *J. C. Davies*, Attorney General of the State of *New York*, and it is, on motion of *Merritt E. Haviland* and *Charles R. Pelgram*, attorneys for said receiver,

Ordered, that the prayer of said petitioner be granted, and that said *Arthur R. Pope* be permitted to present and file a final account of his proceedings as such receiver since the *23d* day of *September*, 1898, the date of his previous accounting herein, and that previous to the filing of the same he give notice of its intended presentation and filing to the stockholders, bondholders, creditors, and officers of said corporation appearing on its books, by publishing the same, with a copy of this order, *once* a week for *three* weeks, beginning *September 25th*, 1899, in *The New York Law Journal* and in *The New York Times*, newspapers published in the city of *New York*, and that a copy of said notice with this order be mailed to the above named persons at least *three* weeks prior to the filing of said account.

And it is further ordered that on filing said account and proof of

1. **For the formal parts** of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

2. This form of order is copied from the records.

publication and service of notice thereof, as aforesaid, the stockholders, bondholders, officers, and creditors of said corporation, and all persons interested therein and in the distribution of the corporate assets, show cause at a *Special* Term of the *Supreme* Court to be held at Part I thereof at the county court house in the county of *New York* on the *31st* day of *October*, 1899, at *10.30* o'clock in the *fore*noon of that day, why a referee should not be appointed to take proof of the facts set forth in the said petition and report thereon, and to take, settle, and state the accounts of said receiver to be filed herein, to report in what proportions the funds in said receiver's hands shall be distributed among the creditors of said corporation and others interested therein, to the end that upon confirmation of said report and said receiver's compliance with the decree of the court confirming the same he may be discharged from further liability as such receiver, and why said receiver should not have such other and further relief as is prayed for in said petition.

Ent.: *C. H. T.*, J. *S.* C.

3. Notice of Intention to Present.

a. In General.

Form No. 17256.[1]

New York Supreme Court, *City and* county of *New York.*

The People of the State of New York
against
The St. Nicholas Bank of New York.
In the matter of the receivership of
The St. Nicholas Bank of New York.

The undersigned hereby gives notice of his intention to present to the *Supreme* Court of the state of *New York*, at a *Special* Term thereof, to be held in Part I, at the county court house, in the Borough of *Manhattan*, City of *New York*, on *Wednesday*, the *6th* day of *June*, 1900, at *10.30* o'clock in the *fore*noon, or as soon thereafter as counsel can be heard, a full and accurate account of his proceedings as temporary receiver and as permanent receiver of the said *St. Nicholas Bank of New York.*

New York, May 14, 1900. *Hugh J. Grant*,
Receiver of *St. Nicholas Bank of New York.*
Bowers & Sands, Receiver's Attorneys,
31 Nassau St., *N. Y. City.*

b. By Ancillary Receiver.

Form No. 17257.[2]

Notice: To the stockholders, bondholders, officers, and creditors and all other parties having an interest in the estate of the *Hoffman Machine Company*:

1. This form of notice is copied from the records.
2. This is the form of notice annexed to the order set out *supra*, Form No. 17255, and is copied from the records.

Please take notice that, pursuant to the foregoing order, the undersigned, *Arthur R. Pope*, as ancillary receiver of said *Hoffman Machine Company*, a foreign corporation, will render to the *Supreme* Court a final account of his proceedings as receiver since *September 23d*, 1898, the date of his last accounting, and will file said account in the office of the clerk of the county of *New York*, on the *16th* day of *October*, 1899.

Dated *New York, September 22d*, 1899.

Yours, etc.,

Arthur R. Pope,

Ancillary Receiver of the *Hoffman Machine Company*,

318 East 23d St., *New York City*.

Charles R. Pelgram and *Merritt E. Haviland*,

Attys. for Receiver, *32 Nassau* St., *New York City*.

4. Account or Report.[1]

a. In General.

Form No. 17258.[2]

(*Title of court and cause as in Form No. 6954.*)

To the *Supreme* Court of the state of *New York*.

I, *Nathan Hale*, of the city of *Albany*, in said county of *Albany*, do render the following account of my proceedings as receiver of (*state estate of which receiver was appointed*).

On the *tenth* day of *June*, 1898, by an order of this court made and

1. Requisites of Account or Report, Generally. — Great precision is required in respect to accounts of receivers. Heffron *v.* Rice, 40 Ill. App. 244. And their accounts should be so presented that the parties interested may be sufficiently informed thereby to enable them to assent to the correctness thereof. Hayden *v.* Chicago Title, etc., Co., 55 Ill. App. 241.

Vouchers should be filed with the account. Heffron *v.* Rice, 40 Ill. App. 244. Or a satisfactory reason given why they are not filed. Heffron *v.* Rice, 40 Ill. App. 244.

Verification of Account — *In General.* — Account of receiver should be verified by oath. Hayden *v.* Chicago Title, etc., Co., 55 Ill. App. 241; People *v.* Columbia Car Spring Co., 12 Hun (N. Y.) 585.

Must be Positive. — Receiver must swear positively to the fact that he has paid the money which the account alleges that he has paid. Heffron *v.* Rice, 40 Ill. App. 244.

In Absence of Vouchers. —Where some items of the account have no vouchers, the receiver should file a verified statement showing to whom, for what and when such items were paid, and this verification should be positive and not merely upon belief; and where the receiver, from not himself having personally made or witnessed the payment, is unable to swear positively to the disbursement, it would seem that positive affirmation, under oath, of the person who did make the payment should be filed, and this should be supplemented by the sworn statement of the receiver as to his information and belief in the matter. Heffron *v.* Rice, 40 Ill. App. 244.

Insufficient Verification. — A verification "that the same is true to the best of his [deponent's] knowledge and belief," or "that the same is true of his [deponent's] own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true," is insufficient, because it amounts to no more than a statement that he believes the account to be true. Heffron *v.* Rice, 40 Ill. App. 244.

2. See, generally, *supra*, note 1, this page.

entered in the above entitled action I was appointed such receiver. (*Here state such facts as may be necessary to explain the account, such as appointment of agents, sale or compromise of claims, etc.*)

Schedule "*A*," hereto annexed, contains a statement of all moneys collected or received by me, and of all interest for moneys received for which I am legally accountable.

Schedule "*B*," hereto annexed, contains a statement of all moneys paid out and expended by me and the names of persons to whom such payments were made, the time of such payments, and the object of such expenditures.

The receipts, statements and vouchers annexed to this account form a part thereof.

I charge myself as follows:

With amount of money collected or received by me as shown by schedule "*A*" ..... $*50,000*

I credit myself as follows:

With amount of money paid out and expended, as shown by schedule "*B*" *45,000*

Leaving a balance of..... $ *5,000*

The above mentioned balance consists of (*stating of what balance consists, whether of money or other assets*) to be distributed, subject however to the payment of my commissions and expenses of this accounting.

Nathan Hale, Receiver.

(*Title of court and cause as in Form No. 6954.*)

State of *New York*, } ss.
County of *Albany*. }

Nathan Hale, the receiver of (*specify estate*) in this cause, being duly sworn, says:

That the foregoing account by him signed contains, according to the best knowledge and belief of deponent, a full and true account of (*Here specify source of receipts, such as rents and profits, or other source as the case may be*) which have been received by this deponent or by any other person by his order or for his use to the *tenth* day of *September*, 1899.

That he has charged himself with all moneys received by him and embraced in said account for which he was legally accountable, and that according to the best of his knowledge, information and belief the moneys in said account stated as collected were all of the assets that were collectible.

That the several sums of money in the foregoing account mentioned as having been paid or allowed have actually been paid or allowed for or on account of the said estate and for the purposes therein mentioned, according to the best of the knowledge and belief of this deponent.

That deponent does not know of any error or omission in the said account to the prejudice of any person interested in the said estate.

That the sums charged in said account as having been expended by deponent for which no vouchers or other evidence of payment

are produced, and for which he may not be able to produce vouchers or other evidence of payment, have positively been paid and disbursed by him as stated in said account and schedule.

(*Signature and jurat as in Form No. 8805.*)

(*Attach schedules.*)

Form No. 17259.

(Precedent in McNair *v.* Pope, 104 N. Car. 351.)[1]

[(*Venue and title of court and cause as in Form No. 5927.*)

To the Honorable *Supreme* Court]:[2]

The undersigned receiver, who has heretofore been appointed, by a decree in this cause, to take charge of the lands described in the pleadings in this cause, would respectfully report that he has received and disbursed as follows, on account of the rents and profits, viz:

1886.			
Nov. 16.	Collected as per statement filed.....	$641 72	
	Expended in collecting.....	141 86	
	Balance.....		$499 86
1887.			
Nov. 1.	Rent received.....		100 00
1888.			
May 21.	Rent note.....		175 00
			$774 86
	Paid attorney.....		20 00
			$754 86

Your receiver would, therefore, report that he has $589.86 cash on hand and a note for $175 as a rent note, and he has received nothing for his services, and, therefore, prays for directions as to whom to turn over the funds on hand, for his discharge, and for an allowance for his services.

William Stubbs.

b. In Mortgage Foreclosure Proceedings.

Form No. 17260.[3]

In Chancery of *New Jersey.*

Between
John Doe, complainant,
and
Richard Roe, defendant.
} On Bill, etc.
Receiver's Report.

To His Honor *Theodore Runyon*, Chancellor of the state of *New Jersey*:

I, *Josiah Crosby*, receiver appointed in the above cause, do hereby duly report — that since my appointment I have taken charge of

1. No objection was made to this report.
See, generally, *supra*, note 1, p. 790.

2. The matter to be supplied within [] will not be found in the reported case.

3 This form is copied from the records.
See, generally, *supra*, note 1, p. 790.

the mortgaged premises, and have rented the same for the best price that could be obtained for the same; that I have collected the rents agreed upon with the various tenants, and have made such repairs to the premises as were necessary and proper to be made.

That I have in my possession as such receiver, the sum of *three thousand* dollars, which amount includes all rents received by me, up to and including the *thirtieth* day of *October*, A. D. 1880, the date on which the property was sold, less the amount paid for repairs and insurance, as shown by the following account, viz.: (*Here was set out an itemized statement, showing receipts, disbursements and balance on hand*).

Josiah Crosby, Receiver.

State of *New Jersey*, } ss.
Hudson County. }

Josiah Crosby, being duly sworn on his oath, says: That he is the receiver within mentioned, and that the account in the within report set forth, showing his receipts and expenditures as such receiver, is true.

Josiah Crosby.

(*Jurat as in Form No. 4277.*)

5. Proceedings on Account or Report.

a. Objections to Account or Report.

Form No. 17261.[1]

(*Title of court and cause as in Form No. 6954.*)

Samuel Short (*Here state relation the objecting party bears to the estate, whether a judgment creditor or otherwise*) of *Richard Roe*, the defendant in this action, for himself and others interested in said action, makes objection to the account of *Josiah Crosby*, the receiver in this action, filed the *tenth* day of *September*, 1899, as follows, to wit:

First objection: (*State objections in detail, numbering each in order.*)

(*Signature and office address of attorney, date, and address as in Form No. 6954.*)

b. Reference to Pass Account or Report.[2]

(1) Notice of Motion for.[3]

Form No. 17262.[4]

(*Commencing as in Form No. 6954, and continuing down to* *) for an order that it be referred to a referee to take and state the account of *Josiah Crosby*, the receiver in the above entitled action, and to ascer-

1. See, generally, *supra*, note 1, p. 790.

2. Necessity of Reference. — If objections are filed to the account or any items thereof, there should be a reference. American Trust, etc., Bank *v.* Frankenthal, 55 Ill. App. 400; Hayden *v.* Chicago Title, etc., Co., 55 Ill. App. 241; Heffron *v.* Rice, 40 Ill. App. 244.

For proceedings relating to references, generally, see the title References, *post*.

3. For the formal parts of a notice of motion in a particular jurisdiction see the title Motions, vol. 12, p. 938.

4. See, generally, *supra*, note 2, this page.

tain and report to this court the balance of cash remaining in the hands of said receiver after making just allowances to said receiver and the costs and expenses of receivership, and said receiver's commissions and other disbursements and payments properly made by him on account of said trust fund, and of the properties and assets, if any in question in this action, remaining undisposed of (*if receiver be in fault and the motion is against him, add*: "with costs of this motion to be paid by said receiver personally").

(*Signature, office address of attorney, date, and address as in Form No. 6954.*)

(2) Order for,[1]

Form No. 17263.[2]

(*Commencing as in Form No. 17147, and continuing down to* *.)

Ordered, that it be referred to *John Hancock*, Esq., of the city of *Albany*, in the county of *Albany* and state of *New York*, counsellor at law, to take and state the account of *Josiah Crosby*, the receiver in the above entitled action, and to ascertain and report to this court the balance of cash remaining in the hands of said receiver after making just allowances to said receiver for the costs and expenses of receivership, and said receiver's commissions and other disbursements and payments properly made by him on account of said trust fund, and of the properties and assets, if any in question in this action, remaining undisposed of (*if the receiver be in fault and the motion was against him, add*: "and it is further ordered that the said receiver personally pay to the moving party *ten* dollars, the costs of this motion").

Enter: *John Marshall*, J. *S.* C.

(3) Report of Referee.

Form No. 17264.[3]

Supreme Court, *City and* County of *New York*.

The People of the State of New York
against
The Bushwick Chemical Works and others. } Report of Referee.

To the *Supreme* Court of the State of *New York*:

I, *John E. Ward*, the referee appointed by an order of this court made herein and dated the *20th* day of *January*, 1*889*, by which it was ordered that I, the said "*John E. Ward* should be substituted in the place and stead of *Edward S. Darkin*, Esq., deceased, in the order made and entered herein on the *10th* day of *June*, 1*887*, with the same force and effect as if the said *John E. Ward* had been originally

1. **For the formal parts** of an order in a particular jurisdiction see the title Orders, vol. 13, p. 356.

2. See, generally, *supra*, note 2, p. 793.

3. *New York.* — Code Civ. Proc., §§ 1019, 1022.

This is the form of report of referee on a receiver's accounting in the case of People *v.* Bushwick Chemical Works, 133 N. Y. 694, and is copied from the records. An order overruling exceptions to the report was affirmed in the general term of the supreme court and again in the court of appeals.

named as referee in said order," do respectfully report that having first taken the oath prescribed by section *1016* of the Code of Civil Procedure, which oath is entered in my minutes, I proceeded to a hearing of the matter so referred to me, and was attended from time to time by *C. Bainbridge Smith*, Esq., counsel for certain creditors, and by *Malcolm Graham*, Esq., *Charles F. MacLean*, Esq., and *Allan McCulloch*, Esq., counsel for the receiver, and after considering and hearing the account filed by the receiver and the allegations, proofs and arguments of the respective parties, I respectfully report that I find as matters of fact:

Findings of Fact.

I.

By an order made by the *Supreme* Court in *Kings* county on the *26th* day of *July*, 1886, *William Brookfield* was appointed receiver of the copartnership property of the firm of *Martin Kalbfleisch's Sons.*

II.

Martin Kalbfleisch's Sons were the owners of $595,000 of the $600,000, capital stock of the *Bushwick Chemical Works*, all of which came into the possession of the said *William Brookfield*, as receiver of the said firm of *Martin Kalbfleisch's Sons.*

III.

Upon application of the said *William Brookfield* to the *Supreme* Court of *Kings* County, an order was made and entered by the said court on the *6th* day of *August*, 1886, authorizing him, the said *William Brookfield*, to expend in the proper carrying on of said Works, including the payment of overdue payrolls, and for the purchase of nitrate of soda and other necessary materials, such sums of money as should be necessary from time to time for the continuance of said Works and for the benefit and profitable conduct of the same.

This order was granted, however, upon the condition that the *Bushwick Chemical Works* should, by resolution of its board of directors, surrender to the said *William Brookfield* all of its property of every kind.

IV.

On the *9th* of *August*, 1886, by resolution of the board of directors of the *Bushwick Chemical Works*, all of its property was turned over to the said *William Brookfield*, and he thereupon entered, as such receiver, into possession of the Works, as directed by the court and authorized by the board of directors.

V.

At a *Special* Term of the *Supreme* Court of the state of *New York*, held at the chambers thereof, in the city and county of *New York*, on the *27th* of *October*, 1886, on application of the people of the state of *New York*, an order was made appointing the said *William Brookfield*, receiver of all the property assets, real, personal and mixed, of the *Bushwick Chemical Works.*

VI.

Immediately after the making of said order, on the *1st* of *November*, 1886, the said *William Brookfield* by petition applied to the *Supreme* Court in the city and county of *New York*, stating to the said court that in his capacity as receiver of the firm of *Martin Kalbfleisch's Sons*, and by virtue of the order of the *6th* of *August*, 1886, he wished to ask for further instruction, and particularly that he be instructed whether it was his duty to insist that as the receiver of the *Bushwick Chemical Works* he was entitled to the possession of the same rather than the possession which he then held as receiver of *Martin Kalbfleisch's Sons*.

Upon the said petition, at a *Special* Term of the *Supreme* Court of the state of *New York*, held at chambers thereof, at the court-house in the city and county of *New York*, on the *fifth* day of *November*, 1886, an order was made directing the said *William Brookfield* to take such proceedings under the order of the *6th* of *August*, 1886, made by the court in *Brooklyn*, as would obtain the approval and consent of that court in which the said *William Brookfield* was appointed receiver of *Martin Kalbfleisch's Sons*; and it was further ordered that upon certain payments being made to the said receiver of *Martin Kalbfleisch's Sons*, the said receiver take possession of the said *Bushwick Chemical Works* as receiver of the said Works.

VII.

By an order made on the *10th* day of *June*, 1887, at a *Special* Term of the *Supreme* Court held at the court-house in the city and county of *New York*, the order made on the *27th* of *October*, 1886, appointing *William Brookfield* receiver of the *Bushwick Chemical Works*, was vacated and set aside.

VIII.

On the *10th* day of *June*, 1887, when the order appointing *William Brookfield* receiver was vacated and set aside, the payment had not been made.

IX.

On the *17th* of *November*, 1888, an order was made by the *Supreme* Court in the county of *Kings*, directing the said *William Brookfield*, upon repayment of his advances, to surrender the works and property of the *Bushwick Chemical Works* to the then existing board of directors of the corporation. These advances having been paid, the said *William Brookfield*, on the *twenty-fourth* day of *November*, 1888, surrendered the property to the corporation, there being no receiver of the corporation in existence at that time, and the corporation then received the property and assumed the control and management of the same.

X.

No property, assets, effects, or books of said company came into the hands of the said *William Brookfield* as receiver under the order of the *Supreme* Court of the city, county and state of *New York*, appointing him receiver upon the application of the people of the state of *New York*.

XI.

The receiver's account, filed *February 27th*, 1889, is correct.

Conclusions of Law.

The said *William Brookfield* should be discharged as such receiver and the recognizance entered into by him and sureties should be vacated and the clerk directed to cancel the same.

All of which is respectfully submitted.

Dated *New York*, *June 10*, 1891.

John E. Ward, Referee.

(4) Exceptions to Report of Referee.

Form No. 17265.[1]

(*Title of court and cause as in Form No. 6954.*)

John Doe, the plaintiff (*or other person, specifying his relation to the cause*) excepts to the report of *Josiah Crosby*, Esq., the referee in this action, appointed by an order of this court dated the *tenth* day of *June*, 1899, and which report is dated the *tenth* day of *September*, 1899, as follows, to wit:

First: For that the said referee has reported (*Here set out portion of report objected to*); whereas the said referee should have found and reported (*Here set out facts excepting party desires incorporated in report*).

Second: (*Here set out matter objected to and matter excepting party believes should have been incorporated in the report as above, and continue in this manner, taking a separate exception for each objection.*)

Jeremiah Mason, Attorney for Plaintiff.

(5) Order Confirming Report of Referee.[2]

Form No. 17266.[3]

At a *Special* Term of the *Supreme* Court, held at the New Court-House, in the city of *New York*, on the *21st* day of *July*, 1891.

Present — Hon. *Charles H. Truax*, Esq., Justice.

The People of the State of New York against *The Bushwick Chemical Works*, *Charles H. Kalbfleisch*, *Franklin H. Kalbfleisch*, *Leander T. Savage*, as President, Directors, etc.

In the Matter of the Receivership of *William Brookfield.*

This matter coming on to be heard on the exceptions filed by the *Merchants National Bank of Burlington*, *Vermont*, and the *Second National Bank of Mauch Chunk*, *Pennsylvania*, to the report of the referee

1. See, generally, *supra*, note 2, p. 793.

2. **For the formal parts** of an order in a particular jurisdiction see the title Orders, vol. 13, p. 356.

3. This order was affirmed at general term and again in the court of appeals. See also, generally, *supra*, note 2, p. 793.

heretofore filed herein; now on reading the order made and entered herein, and the report and opinion of the said referee, and the said exceptions, and on reading and filing the notice of hearing of said exceptions, and of this motion, and the affidavits of *William Brookfield*, verified *June 20th*, 1891, and *July 13th*, 1891, and the affidavit of *C. Bainbridge Smith*, verified *July 9th*, 1891, and on hearing Mr. *Charles F. MacLean* of counsel for *William Brookfield*, receiver, in support of said motion and in opposition to said exceptions, and Mr. *C. Bainbridge Smith*, of counsel for said banks in opposition to said motion and in support of said exceptions. Now on motion of *Charles F. MacLean*, attorney for *William Brookfield*, receiver, plaintiff, it is

Ordered that said exceptions be and the same are hereby overruled and that said report of *John E. Ward*, referee, be and the same is hereby confirmed in all things; and that the account of said *William Brookfield*, receiver herein, be passed and allowed, and that said *Brookfield* be forever discharged as such receiver, and that the recognizance entered into by him and his sureties as such receiver, filed with the clerk of the city and county of *New York* on or about *October 27th*, 1886, be vacated and said clerk is directed to cancel the same, and it is further

Ordered that said *Merchants National Bank of Burlington, Vermont*, and the *Second National Bank of Mauch Chunk, Pennsylvania*, do pay to the said *William Brookfield* his costs and disbursements herein, which are hereby taxed and allowed, at the sum of *three thousand two hundred fourteen and 16-100* dollars.

Ent'd: *C. H. T.*, J.

c. Petition that Account or Report be Confirmed.[1]

Form No. 17267.[2]

In Chancery of *New Jersey*.

Between *David Forshay*, complainant, and *Diederich W. Hutaf et als.*, defendants. } No. *2*. On Bill, etc. Petition.

To His Honor *Theodore Runyon*, Chancellor of the State of *New Jersey*:

The petition of *David Forshay*, the complainant in the above cause, respectfully represents,

That the bill in this cause was filed to foreclose a certain mortgage on certain premises in the City of *Hoboken*, in this State.

That such proceedings were had in said cause that a final decree was made therein on the *sixth* day of *May* last.

That on the *twentieth* day of *May* last an execution was issued out of this court in said cause directed to the sheriff of the county of *Hudson* commanding him to make sale of said premises to satisfy the demand of your petitioner, together with costs and execution fees.

That said sheriff proceeded to execute said writ and made sale of

1. **For the formal parts** of a petition in a particular jurisdiction see the title PETITIONS, vol. 13, p. 887.

2. This form is copied from the records.

said premises on the *seventh* day of *August* last for the sum of *two hundred* dollars.

That the amount to be realized on said execution on the day of said sale, including costs, interest and execution fees, was as follows:

Decree for complainant	$*1,521 43*
Int. from *April 28*, 1879, to *Aug. 7*, 1879	*25 10*
Costs taxed at	*159 21*
Int. from *May 6*, 1879, to *Aug. 7*, 1879	*2 41*
Sheriff's execution fees	*35 72*
Total	$*1,743 87*

That after deducting the amount of said sale from the amount so due at the day of sale, there remains a deficiency due your petitioner of the sum of *fifteen hundred and forty-three* dollars and *eighty-seven* cents ($*1,543.87*).

That your petitioner has received from said Sheriff the amount of said sale less his execution fees, which payment was made by the delivery of a deed for the property, your petitioner being the purchaser thereof.

That by the report of the receiver heretofore appointed in this cause, bearing date the *thirteenth* day of *September*, A. D. 1879, there is shown to be a balance in his hands of *two hundred and twenty-one* dollars and *forty* cents ($*221.40*).

Your petitioner therefore prays that an order may be made confirming said receiver's report fixing the compensation of said receiver and discharging him from further liability, and directing him to retain out of the moneys in his hands the compensation so fixed and to pay the balance to your petitioner or his solicitors.

Dated *September 15*, 1879.

Bedle, Muirheid and McGee, Sols. of Petitioner.

New Jersey, ss:—

William Muirheid, being duly sworn on his oath, says: That he is one of the solicitors for the petitioner above named, and that the statements contained in said petition are true.

W. Muirheid.

Sworn and subscribed before me at *Jersey City* this *15th* day of *September*, A. D. 1879.

Francis J. McGowen,
Notary Public, *N. J.*

d. Order.[1]

(1) To Show Cause on Petition.

Form No. 17268.[2]

Commonwealth of *Massachusetts*.

Suffolk, ss. *Supreme Judicial* Court, in *Equity*.

Harry G. Steadman et al.
vs.
The People's Five Year Benefit Order et al.

Upon the petition of *James C. Davis*, the receiver appointed in

1. **For the formal parts** of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

2. This form is copied from the records.

said cause, submitting an account and also a list of the names of the persons entitled to moneys remaining in the hands of the receiver, and praying that the said account may be allowed, and that the court will instruct the receiver as to the disposition to be made of the moneys remaining in his hands and the books and papers of the respondent corporation and of the receiver, it is ordered that the receiver give notice, by publishing an attested copy of this order *twice* a week, for *two* weeks, in the *Boston Daily Advertiser* and the *Boston Herald*, newspapers published in *Boston*, in said county, the last publication to be made before the *third* day of *November next*, to all persons interested in said cause or said petition, or in the affairs of the respondent corporation, to appear at the court-house in *Boston*, on *Friday*, the *third* day of *November*, 1899, at *9.30* o'clock in the *fore*noon, and show cause, if any they have, why the prayer of said petition should not be granted.

By the Court, *John Noble*, Clerk.
October 20, 1899.

(2) Confirming Account or Report.[1]

Form No. 17269.[2]

In Chancery of *New Jersey*.

Between *David Forshay*, Complt., and *Diederich W. Hutaf et als.*, Defts. } No. *2*. On Bill, etc. On Petition, etc. Order.

On reading and filing the petition of the complainant herein bearing date the *fifteenth* day of *September*, A. D. 1879, and the report of the receiver herein bearing date the *thirteenth* day of *September*, A. D. 1879, and on motion of *Bedle, Muirheid & McGee*, solicitors of said complainant, it is on this *fifteenth* day of *September*, A. D. eighteen hundred and *seventy-nine*, ordered: That said receiver's report be in all things confirmed, that the compensation of said receiver be fixed at the sum of *thirty* dollars, and that said receiver retain said sum of *thirty* dollars in his hands and pay the balance remaining after such retention to the solicitors of the complainant on account of the decree, and said receiver shall be discharged from all further liability on filing with the clerk of this court the receipt of said solicitors for such payment.

Theodore Runyon.

XII. Discharge or Removal of Receiver.

1. Discharge.[3]

1. **For the formal parts** of an order in a particular jurisdiction see the title Orders, vol. 13, p. 356.

2. This form is copied from the records.

3. **Proceedings to Discharge.** — A receiver is not entitled to a discharge as a matter of course. He must show some reasonable cause why he should be relieved from the performance of a

a. Notice of Motion for Discharge.[1]

Form No. 17270.[2]

(*Commencing as in Form No. 6954, and continuing down to* *) for an order that *Josiah Crosby*, the receiver heretofore appointed in this action, be discharged, and that upon an accounting by the said receiver and a delivery by him of all property and other things held by him as such receiver, to be made as this court may direct, the bond entered into by said receiver and his sureties be vacated and annulled, and that the plaintiff in this action pay to him, the said receiver, the said sum of *four hundred* dollars reported to be due to him as such receiver by the report of *Andrew Jackson*, the referee appointed herein pursuant to an order made in this action the *tenth* day of *June*, 1899, which report is dated the *tenth* day of *September*, 1899, and for the costs of this motion, and for such other and further relief as may be just.

(*Signature of attorney, office address, date, and address as in Form No. 6954.*)

b. Petition for Discharge.[3]

Form No. 17271.[4]

(Precedent in Texas, etc., R. Co. *v.* Johnson, 151 U. S. 88.)

[(*Title of court and cause as in Form No. 5939.*)][5]

To the honorable the judges of the said *Circuit* Court:

Your petitioner, *John C. Brown*, as receiver of the *Texas and Pacific Railway* and its property in the above entitled and numbered causes, represents that heretofore it has been made to appear to the court that the objects and purposes of all the bills in these causes have been accomplished by settlement and agreement of the parties, and evidence of that fact filed as part of the record; that on its being so made to appear the court ordered him to render his accounts as receiver up to the *first* of *June*, which has been done, and it has been examined and approved, and since that date petitioner has kept his account as with the company. By the same order he was directed to hold the property under the orders of the court until the *first* of *June*, 1888, at which time if said order was not vacated the railway company might operate the road under such orders as the court

duty which he has voluntarily taken upon himself. Beers *v.* Chelsea Bank, 4 Edw. (N. Y.) 277.

1. **Necessity for Notice** — *Generally.* — Notice of motion for discharge of a receiver should be served upon all parties in interest. Coburn *v.* Ames, 57 Cal. 201; Beverley *v.* Brooke, 4 Gratt. (Va.) 187.

To Creditors. — In New York, etc., Tel. Co. *v.* Jewett, 115 N. Y. 166, it was held not necessary to serve notice of motion for discharge upon creditors.

For the formal parts of a motion in a particular jurisdiction see the title MOTIONS, vol. 12, p. 938.

2. See, generally, *supra*, note 1. this page.

3. **For the formal parts** of a petition in a particular jurisdiction see the title PETITIONS, vol. 13, p. 887.

4. The receiver in this case was discharged. No objection was made to the validity of such discharge.

See also, generally, *supra*, note 3, p. 800.

5. The matter to be supplied within [] will not be found in the reported case.

might make from time to time and under the supervision and control of the receiver. No formal delivery of the road and property in his hands has been made to said railway company, and petitioner now asks that he be allowed formally to deliver all property and funds in his hands as such receiver to said railway company, and that he be allowed to account to said company according to his account filed up to the *first* of *June* and for all receipts and expenditures by him received and made since the *first* of *June*. He has carried over on the present books of the company the cash balance and all other balances of property and assets as found in his hands by his report to the *first* of *June* aforesaid, and he is now the president of said railroad company, and after his discharge will be in possession of all of said company's road, property, and funds as such for the said company. Wherefore he asks that he be discharged from his said receivership, and that his bond as receiver be vacated and annulled on payment of all costs legally taxable, but he prays the court to make such order as will charge the property so turned over in the hands of said railway company and its assigns with all liability for which he as receiver is or might be held personally responsible. Your petitioner further says that the sum of his compensation as receiver has been agreed on by the parties in interest and is satisfactory to him and has been settled up to the *31st* day of *October*, 1888, at which time he asks that his discharge take effect. *Jno. C. Brown.*

c. Order.[1]

(1) To Show Cause.

Form No. 17272.[2]

Commonwealth of *Massachusetts.*

Suffolk, ss. *Supreme Judicial* Court.

Chesapeake and Ohio Railway Company vs. *Atlantic Transportation Company.*

In the above entitled cause, *Edward P. Meany* and *Melville E. Ingalls, Jr.*, heretofore appointed ancillary receivers in this Commonwealth of the said *Atlantic Transportation Company* having filed a petition, alleging that the *Chancery* Court of the State of *New Jersey*, in which they were originally appointed receivers of said corporation, has accepted their resignation as such receivers; that they have never received any assets within this Commonwealth of any kind or nature, except certain vessels, which have been taken possession of by the mortgagees under orders of said *Chancery* Court; that they have accounted to the principal receivers in *New Jersey* for all their operations in this Commonwealth; that there are not, and never have been, any net receipts available for creditors within this Commonwealth, and the petitioners now have absolutely nothing in their hands within this Commonwealth, either of actual property or claims;

1. **For the formal parts** of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

2. This form is copied from the records.

See, generally, *supra*, note 3, p. 800.

that, in accordance with an order of the *Chancery* Court of *New Jersey*, the petitioners are about to render an account to that Court of their entire administration of the receivership; and that there is no longer any necessity for continuing the receivership in this Commonwealth; and praying that this Court will order that they be finally discharged from all duties and obligations as such ancillary receivers, and will approve their accounts filed herewith:

It is ordered that *Tuesday*, the *seventh* day of *November next*, at *9 1-2* o'clock *A.* M., be fixed for a hearing on said petition at the Court-House in *Boston*; and that the receivers give notice of said hearing to creditors and all other persons interested therein, by publishing an attested copy of this order *once* a week, *three* weeks successively, in the *Boston Daily Advertiser*, a newspaper printed in said *Boston*, the last publication to be before said hearing, that they may then and there appear before the Justices of this Court and show cause, if any they have, why the prayer of said petition should not be granted.

By the Court,

October, *20*, 1899. *John Noble*, Clerk.

(2) Discharging.[1]

Form No. 17273.

(Precedent in Duncan *v.* Atlantic, etc., R. Co., 88 Fed. Rep. 853.)[2]

[(*Commencement as in Form No. 14145.*)][3]

This cause came on again this day to be heard, and it appearing to the court that *Charles L. Perkins* and *Henry Fink*, who, by the order and decree of this court, entered herein on the ——— day of *July*, 1876, were jointly appointed receivers in this cause, have fully discharged to the satisfaction of the court all and singular the duties enjoined upon them as such receivers by the said order and decree, and all subsequent orders and decrees herein entered, and that their

1. **For the formal parts** of an order in a particular jurisdiction see the title Orders, vol. 13, p. 356.

Precedent.— In Texas, etc., R. Co. *v.* Johnson, 151 U. S. 81, the order discharging a receiver was in part as follows:

"*The Missouri Pacific Railway Company* vs. *The Texas and Pacific Railway Company.* } No. *11,181.*

On consideration of the foregoing petition it is now ordered, adjudged, and decreed that the prayer of the same be granted, and accordingly that *John C. Brown*, receiver of the property of the *Texas and Pacific Railway* in the above-entitled causes, be, and he is hereby, directed to make delivery unto said *Texas and Pacific Railway Company* of all property, funds, and assets in his hands as such receiver, and that he be directed to account to said company according to his account filed and approved up to *June 1st*, 1888, and for all receipts and expenditures by him received and made since the said *1st June*, 1888. Such delivery will be made as of *October 31st*, 1888. It is further ordered that said receiver be finally discharged on said *31st October*, 1888, from his receivership on payment of all costs legally taxed, and that thereupon his bond be vacated and cancelled."

No objection was made to this part of the order.

2. The order in this case was not objected to.

See also, generally, *supra*, note 3, p. 800.

3. The matter to be supplied within [ ] will not be found in the reported case.

accounts down to this time have been duly allowed by *M. F. Pleasants*, Esq., master, to whom the same was referred, which said accounts have been approved and confirmed by the court; and it further appearing that they have turned over and delivered up all the property and moneys in their possession and custody as such receivers, as required by the final decree and subsequent orders entered in this cause: Now, on motion of *Legh R. Page*, Esq., counsel for said receivers, it is ordered, adjudged, and decreed that the said receivers, and each of them, be, and they are hereby, finally discharged from their said receivership, and from all accountability and liability as such receivers; and it is further ordered and decreed that the bonds given and filed by said receivers, severally, for the faithful discharge of their duties in the premises respectively, to wit, the bond of the said *Charles L. Perkins*, executed on the *8th* day of *June*, 1876, with *Richard T. Wilson* and *Edward Cooper* as his securities, filed and approved by the court on the *12th* day of *June*, 1876, and the bond of the said *Henry Fink*, executed on the *7th* day of *June*, 1876, with *Thomas L. Babcock* and *Charles W. Statham* as his securities, filed and approved by the court *June 12*. 1876, be, and the same are hereby, vacated and annulled; and the clerk of this court is hereby directed to deliver up the said bonds to the said receivers, respectively, for cancellation.

Richmond, March 17, 1882.

Hugh L. Bond, Circuit Judge.
Ro. W. Hughes, District Judge.

2. Removal.[1]

a. Notice of Motion for Removal.[2]

Form No. 17274.[3]

(*Commencing as in Form No. 6954, and continuing down to* *) for an order that *Josiah Crosby*, the receiver appointed in this action, be

1. Removal of Receiver.—The receiver may be removed by order of the court for cause shown. Voorhees *v.* Indianapolis Car, etc., Co., 140 Ind. 220; Detroit First Nat. Bank *v.* E. T. Barnum Wire, etc., Works, 60 Mich. 487; McCullough *v.* Merchants L. & T. Co., 29 N. J. Eq. 217; Fowler *v.* Jarvis-Conklin Mortg. Co., 63 Fed. Rep. 888.

See also list of statutes cited *supra*, note 1, p. 591.

2. Necessity of Notice — *Generally.* — Notice in writing of intention to move for removal o receiver must be given. *In re* Premier Cycle Mfg. Co., 70 Conn. 473; Douherty *v.* Jones, 37 Ga. 348; Bruns *v.* Stewart Mfg. Co., 31 Hun (N. Y.) 195; Attrill *v.* Rockaway Beach Imp. Co., 25 Hun (N. Y.) 509.

To Receiver. — As a general rule, the receiver is entitled to notice of the proceedings for his removal. *In re* Premier Cycle Mfg. Co., 70 Conn. 473; Douherty *v.* Jones, 37 Ga. 348; Smith *v.* Trenton Delaware Falls Co., 4 N. J. Eq. 505; Bruns *v.* Stewart Mfg. Co., 31 Hun (N. Y.) 195; Fowler *v.* Jarvis-Conklin Mortg. Trust Co., 64 Fed. Rep. 279; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 61 Fed. Rep. 546.

Requisites of Notice of Motion, Generally.— For the formal parts of a notice of motion in a particular jurisdiction see the title MOTIONS, vol. 12, p. 938.

Grounds upon which removal is sought must be set forth in the notice of motion. Douherty *v.* Jones, 37 Ga. 348; Bruns *v.* Stewart Mfg. Co., 31 Hun (N. Y.) 195.

3. See, generally, *supra*, note 2, this page.

removed, and that the court appoint a substitute in his place (or *that it be referred to a referee to appoint a substitute in his place and take the requisite security*), and for costs of this motion to be paid by the said *Josiah Crosby* personally, and for such other and further relief as may be just.

(*Signature and office address of attorney, date and address as in Form No. 6954.*)

b. Order of Removal.[1]

Form No. 17275.[2]

(*Commencing as in Form No. 17147, and continuing down to* *.)

Ordered that *Andrew Jackson*, the receiver heretofore appointed in this cause by an order of this court dated the *tenth* day of *June*, 1899, be removed from the office of such receiver for the following reasons, to wit: (*Here state grounds of removal if desired*).

And it is further ordered that *Josiah Crosby*, of the city of *Albany*, in said county of *Albany*, counsellor at law, be and he hereby is appointed receiver herein, with the powers and duties conferred by the order of this court entered in this cause on the *tenth* day of *June*, 1899.

And it is further ordered that the said *Josiah Crosby*, before entering upon his duties as such receiver, execute to the people of the state of *New York* and file with the clerk of this court (or *of the county of Albany*) his bond with sufficient sureties to be approved by a justice of this court, in the penal sum of *twenty thousand* dollars, conditioned for the faithful performance of his duties as such receiver.

And it is further ordered that upon the filing of said bond so approved, in the office of the clerk of this court (or *of the clerk of the county of Albany*) that the said *Andrew Jackson* shall forthwith deliver to the said *Josiah Crosby*, the receiver herein as aforesaid, all the books, papers, evidences of debt, accounts, notes, bills, bonds and property of every description belonging to the said (*Here state name of defendant*) which may have heretofore come into the hands of the said *Andrew Jackson*, as receiver herein, and that the said *Andrew Jackson* shall also forthwith execute, acknowledge and deliver

1. **For the formal parts** of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

Precedent. — In *In re* Premier Cycle Mfg. Co., 70 Conn. 473, a portion of the order, to which there was no objection, was as follows:

Ordered, that *John C. Cassidy* be forthwith removed from the position of receiver of the *Premier Cycle Mfg. Co.*, and that he forthwith turn over to his successor in office everything which has come into his possession and hands as such receiver, including therein all books and papers and correspondence appertaining to such receivership.

Ordered, that *John C. Cassidy*, heretofore receiver of the *Premier Cycle Mfg. Co.*, forthwith prepare and file with the clerk of this court, a full and complete account of all his doings as receiver of said company, and that *John C. Cassidy* shall not be discharged of all or any of the liabilities resulting from or obligations incurred by said receivership, until said account shall be accepted and approved by the *Superior* Court or a judge thereof, and until the further order of said court or a judge thereof.

George W. Wheeler, a judge of the *Superior* Court.

2. See, generally, *supra*, note 1, p. 804.

to said *Josiah Crosby*, receiver as aforesaid, proper deeds of conveyance of all the real estate of said (*stating defendant*) standing in the name of said *Andrew Jackson* as such receiver, conveying thereby to the said *Josiah Crosby* as receiver herein, his successors and assigns, all such real estate, which said deed so to be executed shall contain a covenant against all acts of the said *Andrew Jackson*, and shall be approved as to form by one of the justices of this court.

And it is further ordered that it be referred to *Nathan Hale*, of *Albany*, in said county of *Albany*, counsellor at law, to take an account of all the property with which the said *Andrew Jackson*, as such receiver herein, is properly chargeable, and to report the same to this court with all convenient speed.

Enter: *J. M.*, J. *S.* C.

RECEIVING STOLEN GOODS.

See the title LARCENY, vol. 11, p. 195.

RECOGNIZANCE.

See the title BAIL AND RECOGNIZANCE, vol. 3, p. 1.

RECORDARI.

By Ernest Foss.

CROSS-REFERENCES.

For Forms relating to the Analogous Proceeding of Certiorari, see the title CERTIORARI, vol. 4, p. 427.

I. PETITION FOR WRIT OF.[1]

1. Writ of recordari is issued for two purposes: the one in order to have a new trial of the case upon its merits, and this is a substitute for an appeal from a judgment rendered before a justice; the other for a reversal of an erroneous judgment, performing in this respect the office of a writ of error or a writ of false judgment. State *v.* Griffis, 117 N. Car. 709; King *v.* Wilmington, etc., R. Co., 112 N. Car. 318; Weaver *v.* Vein Mountain Min. Co., 89 N. Car. 198; State *v.* Swepson, 83 N. Car. 584; Caldwell *v.* Beatty, 69 N. Car. 365; Webb *v.* Durham, 7 Ired. L. (29 N. Car.) 130; Leatherwood *v.* Moody, 3 Ired. L. (25 N. Car.) 129.

Necessity for Petition. — A writ of recordari granted upon the application of the plaintiff without notice to the defendant, and without any petition or affidavit setting forth the ground upon which it should be issued, is irregular and must be dismissed upon the hearing. Wilcox *v.* Stephenson, 71 N. Car. 409; N. Car. Super. Ct. Rules (104 N. Car. 939), No. 14.

Requisites of Petition, Generally. — For the formal parts of a petition in a particular jurisdiction see the title PETITIONS, vol. 13, p. 887.

Ground of application must be specified in the petition. N. Car. Super. Ct. Rules (104 N. Car. 939), No. 14.

Recordari as Substitute for Appeal — *Generally.* — Where the petition is for recordari as a substitute for an appeal, it must show: first, excuse for laches; second, some meritorious defense. Pritchard *v.* Sanderson, 92 N. Car. 41; Sossamer *v.* Hinson, 72 N. Car. 578; Ledbetter *v.* Osborne, 66 N. Car. 379.

Where the petition accounts in a satisfactory manner for the failure of petitioner to prosecute his appeal, so as to repel the inference of an intention to abandon it and to acquit himself of laches, the writ will issue as a matter of course. North Carolina R. Co. *v.* Vinson, 8 Jones L. (53 N. Car.) 119.

In a case where there was a delay of three months in applying for recordari, but it did not appear when the petitioner first knew of the rendition of the judgment against him, nor that any damage thereby accrued to the opposite party, it was held that the petitioner was not thereby deprived of his right to the writ. Koonce *v.* Pelletier, 82 N. Car. 236.

Where appeal was lost by misconduct of justice, the petition need not show merit. State *v.* Griffis, 117 N. Car. 709; State *v.* Warren, 100 N. Car. 489.

New Trial Upon the Facts. — Where a recordari is brought with a view to have a new trial upon the facts, since it is in the nature of an extension of

Form No. 17276.[1]

North Carolina — Buncombe County.

John Doe, plaintiff,
against
Richard Roe, defendant. } Petition for Recordari.

To the Hon. *John Marshall*, Judge of the *Superior* Court, presiding in the *Twelfth* Judicial District.

The petition of *Richard Roe* respectfully showeth to your honor:

1. That your petitioner is the defendant in the above entitled action;

2. That your petitioner and the plaintiff above named are both residents of said county of *Buncombe*;

3. That on the *tenth* day of *June*, 1900, the above named plaintiff obtained a judgment in the above action against your petitioner before *Abraham Kent*, a justice of the peace of said county, for the sum of *twenty* dollars and costs;

4. That (*Here state facts which show that petitioner is entitled to the remedy prayed for*).[2]

Wherefore your petitioner prays that your honor grant to him a writ of recordari directed to the said *Abraham Kent*, justice as aforesaid, commanding him that he cause to be recorded the summons, judgment and other proceedings in the above entitled action lately pending before him, and that he have that record at our *next Superior* Court to be held in the county of *Buncombe*, at the court-house in *Asheville*, on the *thirteenth* day of *August next*.

And your petitioner further prays that writ of supersedeas be directed to said justice and to the plaintiff above named, and to *Clyde Culp*, constable, commanding them and each of them to desist from all further proceedings in this action.

Jeremiah Mason, Attorney for Petitioner.

Sworn to before me this *fifteenth* day of *June*, 1900.

Calvin Clark, Clerk *Superior* Court.[3]

the power of appeal, the writ must be applied for speedily, and any delay after the earliest period in the petitioner's power to apply must be accounted for in the petition. Webb *v.* Durham, 7 Ired. L. (29 N. Car.) 130.

Recordari in Nature of Writ of Error or of False Judgment. — Where the petition is for a writ of recordari in the nature of a writ of error or of false judgment, it must assign errors in law. Sossamer *v.* Hinson, 72 N. Car. 578.

That Justice's Fees were Paid or Tendered. — Petition should allege that the justice's fees were paid or tendered. In the absence of such an allegation, it has been held wrong for the judge to order the justice to return the papers without requiring his fees to be first paid. Steadman *v.* Jones, 65 N. Car. 388. But see Carmer *v.* Evers, 80 N. Car. 55, wherein it was held no objection to a motion to docket a case upon a return to a writ of recordari that there was no averment in the petition of payment of the justice's fees.

On Joint Judgment. — A petition to obtain a reversal of a joint judgment must be made by all parties defendants in the judgment, and where the writ is issued upon a petition of one of such defendants only it is irregular. Leatherwood *v.* Moody, 3 Ired. L. (25 N. Car.) 129.

1. *North Carolina.* — Code (1883), § 545; Super. Ct. Rules (104 N. Car. 939), No. 14.

See also, generally, *supra*, note 1, p. 807.

2. Grounds of application for the writ must be particularly specified in the petition. N. Car. Super. Ct. Rules (104 N. Car. 939), No. 14.

See also, generally, *supra*, note 1, p. 807.

3. Verification. — Petition must be

II. ORDER FOR WRIT OF.[1]

Form No. 17277.[2]

North Carolina — *Buncombe* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

The application of the above named defendant, *Richard Roe*, for writs of recordari and supersedeas in the above entitled cause, coming on to be heard upon the petition and affidavit filed herein,

It is hereby ordered that the clerk of the *Superior* Court of said *Buncombe* county issue writs of recordari and supersedeas[3] in accordance with the prayer of the said petition as soon as the said *Richard Roe* shall file with the said clerk a bond with good security[4] according to law to the end that the above action may be sent on for trial in the *Superior* Court of said *Buncombe* county.

This *fifteenth* day of *June*, 1900.

John Marshall, Judge,
presiding in the *Twelfth* Judicial District.

III. BOND OF PETITIONER.[5]

verified. N. Car. Super. Ct. Rules (104 N. Car. 939), No. 14.

For a form of verification in a particular jurisdiction see the title VERIFICATIONS.

1. For the formal parts of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

2. *North Carolina.* — Code (1883), § 545.

3. Supersedeas. — It is proper, in ordering a recordari, for the judge to order also a supersedeas and suspension of execution until the hearing. Steadman *v.* Jones, 65 N. Car. 388.

4. Security. — The usual, most convenient and generally the best practice is to make the order for the writs conditionally, and referring it to the clerk to pass on the sufficiency of the security. The power to revise and control the action of the clerk in such a case must necessarily exist with the judge, and the proper mode of bringing the question before the judge is by an appeal from the ruling of the clerk to the judge. Marsh *v.* Cohen, 68 N. Car. 283.

5. Bond of Petitioner — *Generally.* — If the writ of recordari is granted without notice, the petitioner must give an undertaking for costs before the writ will be issued. N. Car. Code (1883), § 545; Super. Ct. Rules (104 N. Car. 939), No. 14.

Suspension of Execution. — If the petition prays for supersedeas to suspend execution, supersedeas will not be issued until an undertaking is filed or a deposit made to secure the judgment sought to be vacated, as in case of appeal where the execution is stayed. N. Car. Code (1883), § 545; Super. Ct. Rules (104 N. Car. 939), No. 14. But when the execution is not stayed and no legal default is imputable to the party seeking relief, the issuance of the writ without requiring security is not error. State *v.* Warren, 100 N. Car. 489.

Bond Filed Nunc pro Tunc. — Failure to give bond as required by law is remedial in the discretion of the court, after return of the writ is made, by the execution of a bond nunc pro tunc. Carmer *v.* Evers, 80 N. Car. 55.

Bond of Plaintiff. — When the judgment of a justice is removed by the defendant therein by recordari to the superior court, the court may, upon sufficient cause shown by affidavit, compel the plaintiff to give an undertaking with sufficient surety for the payment of the costs of the suit in the event of his failing to prosecute the same with effect. N. Car. Code (1883), § 564.

Form No. 17278.[1]

(*Commencement as in Form No. 15965.*)

The condition of this obligation is such that whereas, on the *tenth* day of *June*, 1900, in a certain case before *Abraham Kent*, a justice of the peace of the county of *Buncombe* and state of *North Carolina*, in which case the said *John Doe* was plaintiff and the said *Richard Roe* was defendant, a judgment was obtained in favor of the said *John Doe* and against the said *Richard Roe*, for the sum of *twenty* dollars, with interest thereon from the *tenth* day of *June*, 1899, and for costs; and whereas the said *Richard Roe* has prayed for and obtained a writ of recordari to cause the proceedings in said action to be sent to the *Superior* Court of said *Buncombe* county, to be held at *Asheville*, in said county, on the *thirteenth* day of *August next*: now, therefore, if the said *Richard Roe* shall prosecute the aforesaid writ to effect, and if he shall fail in said prosecution and the case shall be decided against him, he shall pay the judgment of the said court with costs, then this obligation to be void; otherwise (*concluding as in Form No. 4567*).

IV. WRIT OF.

Form No. 17279.[2]

State of *North Carolina* to *Abraham Kent*, a Justice of the Peace of *Buncombe* County,[3] Greeting:

Whereas *John Doe* obtained a judgment against *Richard Roe* on the *tenth* day of *June*, 1900, before you, a justice of the peace of *Buncombe* county, for the sum of *twenty* dollars and costs, and caused an execution to be issued thereon and placed in the hands of *Clyde Culp*, a constable of *Asheville* township, in said county, and the said *Richard Roe* has presented a petition to *John Marshall*, judge of the *Superior* Court, presiding in the *Twelfth* Judicial District, praying a writ of recordari to remove the said judgment and other proceedings to the *Superior* Court of said county of *Buncombe*, and a writ of supersedeas to suspend the execution of said judgment;

We therefore command you that you cause to be recorded the summons, judgment and other proceedings in the above entitled action, and that you have that record under your seal at our *next Superior* Court,[4] to be held for the county of *Buncombe* at the court-house in *Asheville* on the *thirteenth* day of *August next*, and that you prefix the same day to the parties that they may then and there be ready to proceed in said action, and have you then and there this writ.

Dated this *twentieth* day of *June*, 1900.

(SEAL) *Calvin Clark*, Clerk *Superior* Court.

1. See, generally, *supra*, note 5, p. 809.

2. *North Carolina.*—Code (1883), § 545.

3. **Address of writ** should be to the justice and not to the sheriff. Carmer *v.* Evers, 80 N. Car. 55; Steadman *v.* Jones, 65 N. Car. 388. Where the writ was addressed to the sheriff instead of the justice, but was served on the justice, who yielded obedience and recorded and sent up his proceedings, it was held legally as sufficient as if formally addressed to the justice. Carmer *v.* Evers, 80 N. Car. 55.

4. **Return of Writ.** — If the writ is granted without notice to the adverse party, it must be made returnable to the term of the superior court of the

V. WRIT OF SUPERSEDEAS.[1]

Form No. 17280.[2]

State of *North Carolina* to *Abraham Kent*, a Justice of the Peace of *Buncombe* County, Greeting:

Whereas, on the *tenth* day of *June*, 1900, in an action then pending before you, a justice of the peace of *Buncombe* county and state of *North Carolina*, wherein *John Doe* was plaintiff and *Richard Roe* was defendant, the said *John Doe* obtained a judgment against the said *Richard Roe* for the sum of *twenty* dollars and costs. And whereas the said *John Doe* has caused an execution to be issued upon said judgment and placed in the hands of *Clyde Culp*, a constable of *Asheville* township, in said county of *Buncombe*, to execute; and whereas the said *Richard Roe* has obtained a writ of recordari to remove to the *Superior* Court of said *Buncombe* county the aforesaid judgment and other proceedings thereon; therefore, we command you that you cause the said *Clyde Culp*, constable as aforesaid, or any other officer who may have in his hands the aforesaid execution, to desist from all further proceedings on the said judgment.

And we further command you that you deliver copies of this writ to the said *Clyde Culp*, constable as aforesaid, or to any other officer who may have in his hands the said execution, and to the said *John Doe*, the plaintiff in said judgment, and have you this writ at our *next Superior* Court to be held for the county of *Buncombe*, at the court-house in *Asheville*, on the *thirteenth* day of *August*, 1900.

Dated this *twentieth* day of *June*, 1900.

(SEAL) *Calvin Clark*, Clerk of the *Superior* Court.

county in which the judgment or proceeding complained of was granted or had. N. Car. Super. Ct. Rules (104 N. Car. 939), No. 14.

1. **For forms relating to supersedeas,** generally, see the title SUPERSEDEAS.

2. *North Carolina.* — Code (1883), § 545.

RECOUPMENT.

See the title SET-OFF AND COUNTERCLAIM.

REDEMPTION.

By Ernest Foss.

CROSS-REFERENCES.

For Form of Bill for Redemption and Account of Rents and Profits, see the title ACCOUNTS AND ACCOUNTING, vol. 1, *Form No. 492.*

For Form of Answer to Bill for Redemption and Account of Rents and Profits, see the title ACCOUNTS AND ACCOUNTING, vol. 1, *Form No. 493.*

For Forms in Proceedings relating to Chattel Mortgages, see the title CHATTEL MORTGAGES, vol. 4, p. 777.

For Forms in Proceedings to Set Aside Execution Against Property, see the title EXECUTIONS AGAINST PROPERTY, vol. 8, p. 1.

For Forms in Proceedings to Foreclose Mortgages, see the title MORTGAGES, vol. 12, p. 390.

For Forms relating to Reformation of Instruments, Generally, see the title RESCISSION, REFORMATION AND CANCELLATION.

See also the GENERAL INDEX to this work.

I. OF LAND FROM MORTGAGE.[1]

1. Bill, Complaint or Petition.[2]

1. Statutory provisions relating to redemption of land from mortgage, generally, exist in the following states, to wit:

Alabama. — Civ. Code (1896), § 3505 *et seq.*

Arizona. — Rev. Stat. (1901), §§ 2577, 3275.

California. — Code Civ. Proc. (1897), § 346.

Georgia. — 2 Code (1895), § 2734.

Illinois. — Starr & C. Anno. Stat. (1896), c. 77, par. 18 *et seq.*

Indiana. — Horner's Stat. (1896), § 1094.

Iowa. — Code (1897), §§ 4045 *et seq.*, 4289.

Kansas. — Gen. Stat. (1897), c. 95, §§ 521 *et seq.*, 544.

Kentucky. — Stat. (1894), § 2364.

Maine. — Rev. Stat. (1883), c. 90, §§ 6, 14 *et seq.*

Massachusetts. — Pub. Stat. (1882), c. 181, § 21 *et seq.*

Michigan. — Comp. Laws (1897), §§ 11143–11145.

Minnesota. — Stat. (1894), §§ 4198, 6041–6044, 6064–6066.

Missouri. — Rev. Stat. (1899), § 4343.

Montana. — Code Civ. Proc. (1895), §§ 521, 522.

Nebraska. — Comp. Stat. (1899), § 6088.

New Hampshire. — Pub. Stat. & Sess. L. (1900), c. 139, §§ 5–13.

New Mexico. — Comp. Laws (1897), § 3938.

New York. — Birds. Rev. Stat. (1896), p. 2093, §§ 25, 26; Code Civ. Proc., §§ 340, 379, 1446 *et seq.*

North Dakota. — Rev. Codes (1895), §§ 5854, 5881, 5540 *et seq.*

Oregon. — Hill's Anno. Laws (1892), §§ 305 *et seq.*, 418.

Rhode Island. — Gen. Laws (1896), c. 207, § 2 *et seq.*

South Dakota. — Dak. Comp. Laws (1887), §§ 5150 *et seq.*, 5421, 5447.

Tennessee. — Code (1896), § 3811 *et seq.*

Utah. — Rev. Stat. (1898), §§ 3261 *et seq.*, 3503.

Vermont. — Stat. (1894), § 1829 *et seq.*

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 5295.

Wisconsin. — Stat. (1898), §§ 3165, 3167, 3533, 3533*a*.

2. Requisites of Bill, Complaint or Petition — Generally. — For the formal parts of a bill, complaint or petition in a particular jurisdiction see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol. 4, p. 1019; PETITIONS, vol. 13, p. 887.

Interest of Plaintiff — *Generally.* — A bill to redeem must show on its face

a. By Mortgagor.

that the person seeking to exercise the right has a subsistent interest in the land, derived immediately or remotely from the person whose contract or obligation created the lien, or that such interest in some way springs out of the general equity of redemption of such person. Hazen *v.* Nicholls, 126 Cal. 327; Buser *v.* Shepard, 107 Ind. 417; Lamb *v.* Jeffrey, 47 Mich. 28; Harwood *v.* Underwood, 28 Mich. 427; Smith *v.* Austin, 9 Mich. 465. An averment that the plaintiff is now the owner of the land is not sufficient. Hazen *v.* Nicholls, 126 Cal. 327.

Person Other than Mortgagor. — Where a person other than the mortgagor files a bill to redeem, he must show some title or interest in the land, derived immediately or remotely from the mortgagor, or in some way springing out of his general equity of redemption; and he must show the nature and derivation of the title or interest claimed, that defendant may admit or deny it and be prepared to meet it. Buser *v.* Shepard, 107 Ind. 417; Lilly *v.* Dunn, 96 Ind. 220; Smith *v.* Austin, 9 Mich. 465.

In Smith *v.* Austin, 9 Mich. 465, the bill was filed by a person other than the mortgagor, and stated that complainant, after the giving of the mortgage, became interested in the lands by contract, but the bill did not set out the contract or state the parties to it or the terms thereof, or the interest contracted about. The bill prayed that certain exhibits attached to the bill, and referring to complainant as having "become the purchaser" of the mortgaged premises, might be made a part of the bill. This bill was held insufficient. It was further held that the recitals in the exhibit did not aid the bill, as they did not show from whom the purchase was made, nor the interest purchased, nor whether or not such interest was subject to mortgage.

Where the complaint alleges that Holtz conveyed the mortgaged premises to Hillman; that Hillman conveyed the same to the plaintiff, "who ever since has been and still is the lawful owner in fee simple of the same," it sufficiently alleges title in plaintiff. Thompson *v.* Foster, 21 Minn. 319.

Widow of Mortgagor. — A bill by a widow to redeem a mortgage given by her husband must distinctly set forth that the husband was seised during coverture of an estate in fee, or of some estate in which the wife would be dowerable in the lands mortgaged. It must show such seisin in the husband as would entitle the widow to dower. Wing *v.* Ayer, 53 Me. 465. In this case the bill alleged that "during her coverture with said *Fogg* he was seised and possessed of the equity of redemption of" the land described, "the same having been conveyed to the said *Fogg* during his intermarriage with" the complainant, and "that by reason of the aforesaid conveyances to and from her said husband, she took and had an inchoate right of dower in the equity of redemption of both of said parcels of land, and upon the decease of her said husband she became dowerable therein and entitled to be endowed with one-third part of said equity, and thereby and by reason thereof has the right to redeem the said mortgaged lands in order that she may be let into the enjoyment of her reasonable dower aforesaid." It was held that the bill did not distinctly set forth that the husband was seised during the coverture of an estate in fee or of any estate in which the wife would be dowerable in the lands mortgaged, and was insufficient. Wing *v.* Ayer, 53 Me. 465.

Description of Property. — Where the description is such as clearly to identify the land intended, it is sufficient. Milliken *v.* Bailey, 61 Me. 316.

A description of the premises, stating the southern boundary of one parcel to be "land of *William Tenny*," when it should have been "*Terry*," and part of the northern boundary of another parcel to be "the road leading to one *Hutchinson's*," when it should have been "*Hutchins'*," has been held to be sufficient, the identity of the parcels being sufficiently demonstrated. Milliken *v.* Bailey, 61 Me. 316.

Negativing Statute of Limitations. — A party seeking to redeem after a long lapse of time from the maturity of the mortgage, for example, thirty-four years, is bound to show affirmatively by his bill such facts as will establish the instrument as continuing in force and subject to redemption. Reynolds *v.* Green, 10 Mich. 355. See also Miller *v.* Smith, 44 Minn. 127.

Where it appeared that at the time the bill was filed one of the complain-

ants had reached her majority and there was nothing in the bill to show when she became of age, there being merely a general averment that at the time of the transactions referred to in the bill the complainants were minors of tender years, her right to redeem was presumptively barred by the statute of limitations. Lovelace *v.* Hutchinson, 106 Ala. 417.

Assignment of Mortgage. — Where the assignment of the mortgage is alleged in general terms, it is sufficient. Bryant *v.* Jackson, 59 Me. 165; Lovell *v.* Farrington, 50 Me. 239. Thus, where the bill stated that "*Philbrook* by his assignment in writing on said deed, sealed with his seal, dated *May 14, 1860*, in consideration of $6000 conveyed and assigned unto your orator all his right, title and interest in the same, together with the notes secured thereby and all liens on the premises, and all claims of the said *Philbrook* in and to the same. All which will more fully appear by said mortgage deed and the assignment thereon, when produced in court," it was held that the assignment was sufficiently set forth. Lovell *v.* Farrington, 50 Me. 239.

Assignment of Interest of Mortgagor. — That interest of mortgagor was assigned to plaintiff with the consent of the mortgagee must be alleged.

But it is not necessary to allege that the consent of the mortgagee to the assignment was in writing. Bryant *v.* Jackson, 59 Me. 165.

Usury. — In order that plaintiff may avail himself of the statutes relating to usury, he must distinctly and correctly set forth in his bill the terms and nature of the usurious agreement and the amounts of the payments which he has made therein. Welsh *v.* Coley, 82 Ala. 363; Security Loan Assoc. *v.* Lake, 69 Ala. 456; Waterman *v.* Curtis, 26 Conn. 241; Jeffrey *v.* Flood, 70 Md. 42.

Tender — *Generally.* — Where the bill is to enforce the equitable right of redemption before a valid foreclosure, it is generally held that the bill need not allege any tender before the suit, and that tender is material only to entitle the plaintiff to costs and to a suspension of interest. Murphree *v.* Summerlin, 114 Ala. 54; Beebe *v.* Buxton, 99 Ala. 117; McCalley *v.* Otey, 90 Ala. 302; Pryor *v.* Hollinger, 88 Ala. 405; Thomas *v.* Jones, 84 Ala. 302; Adams *v.* Sayre, 70 Ala. 318; Security Loan Assoc. *v.* Lake, 69 Ala. 456; Carlin *v.* Jones, 55 Ala. 624; McGuire *v.* Van Pelt, 55 Ala. 344 (*criticising* Daughdrill *v.* Sweeney, 41 Ala. 310); Daubenspeck *v.* Platt, 22 Cal. 330; Taylor *v.* Dillenburg, 168 Ill. 235; Smith *v.* Sheldon, 65 Ill. 219; Dwen *v.* Blake, 44 Ill. 135; Barnard *v.* Cushman, 35 Ill. 451; Decker *v.* Patton, 20 Ill. App. 210; Essley *v.* Sloan, 16 Ill. App. 63; Anson *v.* Anson, 20 Iowa 55; Sandford *v.* Flint, 24 Mich. 26; Nye *v.* Swan, 49 Minn. 431; Aust *v.* Rosenbaum, 74 Miss. 893; Jopling *v.* Walton, 138 Mo. 485; Casserly *v.* Witherbee, 119 N. Y. 522; Miner *v.* Beekman, (N. Y. Super. Ct. Gen. T.) 42 How. Pr. (N. Y.) 33; Swegle *v.* Belle, 20 Oregon 323; Lavigne *v.* Naramore, 52 Vt. 267.

Where Foreclosure or Sale was Invalid. — Where redemption is sought from a sale or foreclosure which is invalid, the plaintiff proceeds under his equitable right of redemption and not under statute, and the bill need not allege a previous tender. Thus, in a bill for redemption and accounting, filed by a mortgagor within two years after a sale under a power of sale in the mortgage, at which the mortgagee, without authority in the mortgage, became the purchaser, an averment that at the time of the sale nothing was due on the mortgage, a prayer that an account be taken and the mortgage canceled, an offer to submit to the decree of the court and to pay whatever might be found due, and a prayer to be allowed to redeem if the balance should be found against the mortgagor, was held sufficient. Pryor *v.* Hollinger, 88 Ala. 405; Thomas *v.* Jones, 84 Ala. 302. And where the plaintiff was not made a party to the foreclosure proceedings, it was held sufficient to offer in the complaint to pay what may be found due. Nesbit *v.* Hanway, 87 Ind. 400; Coombs *v.* Carr, 55 Ind. 303; Bunce *v.* West, 62 Iowa 80.

In Statutory Redemption. — Under the statutory right of redemption after foreclosure of mortgage, the bill or complaint must allege a tender and refusal of the amount due before suit, or a sufficient excuse for not making such tender. Long *v.* Slade, 121 Ala. 267; Murphree *v.* Summerlin, 114 Ala. 54; Beatty *v.* Brown, 101 Ala. 695; Beebe *v.* Buxton, 99 Ala. 117; Stocks *v.* Young,

67 Ala. 341; Wood *v.* Holland, 57 Ark. 198; Hyman *v.* Bogue, 135 Ill. 9; Dawson *v.* Overmyer, 141 Ind. 438. So also in a bill which seeks to set aside the mortgage sale. Garland *v.* Watson, 74 Ala. 323.

In a case where it is necessary to take an account of rents, etc., a tender before suit is not necessary, and where the bill contains an offer to pay whatever is due it is sufficient. Kline *v.* Vogel, 90 Mo. 239. And where the creditor denies absolutely the right of complainant to redeem, it is held that no tender is necessary. Rogers *v.* Tindall, 99 Tenn. 356; Pearson *v.* Douglass, 1 Baxt. (Tenn.) 151.

In *Maine*, a bill to redeem under the statute cannot be maintained which does not aver a tender of the amount due upon the mortgage, or that the plaintiff has been prevented from making a tender by default of the defendant, which default may consist in refusing or neglecting to render an account of the sum due upon the mortgage, when requested so to do, or in rendering a false account. Dinsmore *v.* Savage, 68 Me. 191. But a bill which alleged that the defendant held the real estate in trust for the plaintiff's testator as security for loans from him, and prayed that the defendant might be declared to hold the lands described in the bill in trust and as security for certain loans therein set forth, and be compelled to release the same to the complainant and his co-heirs upon being paid or tendered the amount which might be due him for and on account of loans made, was held not to be a bill for the redemption of a statutory mortgage, and hence the provisions of the statute in regard to tender did not apply and the offer in the bill to pay whatever might be due the trustee was sufficient. Chamberlain *v.* Lancey, 60 Me. 230.

In Pease *v.* Benson, 28 Me. 336, it is said that in order to recover costs the plaintiff must make tender unless prevented from doing so by some act of the mortgagee or his assignee, and that a mere denial of his right to redeem does not excuse plaintiff from tendering performance.

In *Massachusetts*, prior to 1833, the statute required the plaintiff to aver in his bill a payment or tender of the amount due, or that he had requested of the defendant an account and that the defendant had refused or neglected truly to state his account of the sum due on the mortgage. Putnam *v.* Putnam, 13 Pick. (Mass.) 129; Willard *v.* Fiske, 2 Pick. (Mass.) 540; Fay *v.* Valentine, 2 Pick. (Mass.) 546; Tirrell *v.* Merrill, 17 Mass. 117. But by statute now the plaintiff may bring his bill without a previous tender or a request for an account. The only difference between making a tender and not making one before suit is that if anything is due on the mortgage and no tender or request to render an account is made, costs may be adjudged against the plaintiff. Pub. Stat. 1882), c. 181, §§ 27, 29; Stat. (1888), c. 433; Brown *v.* South Boston Sav. Bank, 148 Mass. 300; Way *v.* Mullett, 143 Mass. 49; Lamson *v.* Drake, 105 Mass. 564; Montague *v.* Phillips, 16 Gray (Mass.) 566; Houghton *v.* Field, 2 Cush. (Mass.) 141.

Sufficient Averments of Tender. — Where the complaint in an action to redeem from a foreclosure sale stated that the plaintiff "had always since the making of the tender aforesaid been ready and willing to pay said sum of money so tendered as aforesaid to the said defendant, and said plaintiff still is ready and willing so to do, and now offers the same to the court for that purpose and hereby offers to pay the same," it was held sufficient. The court said that if it was necessary to keep the tender good the allegations made were sufficient in that behalf. Thompson *v.* Foster, 21 Minn. 319.

In a bill to redeem from a judicial sale, the following has been held a sufficient averment of tender: "That complainant has now ready to pay to the said *Wm. P. Mitchell, Jr.*, *Edward B. Carroll*, and *Humes & Poston* the sums severally tendered to them, * * * and hereby offers to pay to the said several parties the sums so tendered, and here brings into your honorable court with this bill the said several sums, and will pay the same to your Honor's Clerk and Master, subject to such orders as shall be proper in regard to said money." Polk *v.* Mitchell, 85 Tenn. 634.

Where a bill showed that the mortgagor tendered to the mortgagee the amount of the debt secured by the mortgage and the interest thereon up to the date of the tender, at the rate agreed on, and the mortgagee refused to receive it for the alleged reason that he had sold the property to a third party, an act which he had no authority to do, and that the mortgagor deposited

the same with the clerk of the circuit court of the county in which the land was situated, for the use of the mortgagee, and took the clerk's receipt, and appended the receipt to the bill, it was held that though the allegation of tender in the bill was, strictly speaking, not technically correct, yet that the bill alleged all the facts necessary to show that it was a good tender, even though made after the time it was due. Franklin *v.* Ayer, 22 Fla. 654.

That amount tendered is amount necessary to redeem should be shown; and where the amount necessary to redeem is not stated in the bill, the bringing into court and tendering of a specific sum is not sufficient. Dawson *v.* Overmyer, 141 Ind. 438.

Excuse for Not Making Tender — *Generally.* — A bill which alleges an excuse for nonperformance of statutory requirements must couple with such excuse an offer in the bill to perform all that the statute requires. Spoor *v.* Phillips, 27 Ala. 193.

Sufficient Allegations. — That the purchaser or his vendee is absent from the state is a sufficient excuse for a failure to make the tender to him in person, and as occasioning a necessity to file a bill for a redemption in which the tender may be made. Long *v.* Slade, 121 Ala. 267; Beebe *v.* Buxton, 99 Ala. 117; Lehman *v.* Collins, 69 Ala. 127.

In a bill to redeem by a mortgagor and to set aside a sale under a mortgage, at which the agent of the mortgagee became the purchaser, an offer to pay what is due, with an averment of complainant's ignorance of the amount paid at the sale, and his unsuccessful application to the defendant for an accounting, and an offer to redeem by paying what is due him, is sufficient. Adams *v.* Sayre, 70 Ala. 318.

In Carlin *v.* Jones, 55 Ala. 624, the following allegations were held sufficient: "On the *8th February*, 1870, in the State aforesaid, your orator tendered to the said *Maria S. Jones*, by making the tender to *W. B. Jones*, her husband, trustee, and agent, the purchase-money bid for said lands at the sale thereof under the mortgage, with *ten* per cent. per annum thereon, and all other lawful charges; which was refused by the said *Maria S. Jones*, through the said *W. B. Jones*, her husband, trustee, and agent; and thereupon your orator tendered to him, the said *W. B. Jones*, as the agent and trustee of his said wife, the sum of *five thousand* dollars in money, for the purpose of redeeming said lands, as by the statute in such case made and provided; and thereupon the said *Maria S. Jones*, through her said husband, agent, and trustee, refused to accept the said money, or any part thereof, and refused to permit your orator to redeem the said lands, without assigning any reason or excuse therefor whatever. And your orator further showeth that, as he is informed and believes, the said *Maria S. Jones* and *W. B. Jones*, her husband, agent, and trustee, have severally and repeatedly declared that your orator shall never redeem the said lands upon the terms prescribed by the statute, or upon any other terms; and have severally and repeatedly declared that your orator is not entitled to redeem the said lands, and that they will not accept from him any sum of money prescribed by the statute in such cases. And your orator further shows, that the said *Maria S. Jones*, and *W. B. Jones*, her husband, agent, and trustee, are unwilling for him to redeem, and are determined that he shall not redeem the said lands, upon the tender or payment of any sum of money prescribed by the statute in such cases. And your orator further shows, that the aforesaid tender to the said *W. B. Jones*, as the agent, husband, and trustee of his said wife, was not made to the said *Maria S. Jones* in her own proper person, for the reason, as the said *W. B. Jones* then informed your orator, that she was sick, and unable to attend to such business, and that he was her agent, and authorized to act as such for her in the matter aforesaid; and your orator avers that the said *W. B. Jones* was in fact then the agent of his said wife, with full power and authority to act in her behalf in the matter aforesaid; and that she was, immediately afterwards, informed of the tender of the said sum of money by your orator to the said *W. B. Jones* as her agent, and of the refusal to accept the same by the said *W. B. Jones*, and thereupon she ratified and approved of his conduct. And your orator further shows that, as he is advised and believes, he has the right, and is lawfully entitled to redeem the said lands, upon the payment to the said *Maria S. Jones* of the amount of the purchase-money paid for said lands by said *R. H.*

Clark and *James T. Jones*, with *ten* per cent. per annum thereon, and all other lawful charges, and such other costs as may be necessary to convey to him such title as the said *Maria S. Jones*, acquired by her said purchase; and for the purpose of redeeming the said lands, your orator hereby offers to pay to the said *Maria S. Jones* the purchase-money paid for said lands by said *R. H. Clark* and *J. T. Jones*, together with *ten* per cent. per annum thereon, and all other lawful costs and charges."

The following averments in a bill were held to sufficiently set forth excuse for failure to make tender before bringing suit: "And your orators say that the said *Wm. M. E. Brown* and *Wm. B. Brown*, being the owners of the equity of redemption in the property under and according to the mortgage hereinbefore mentioned, and hereunto annexed, and by reason of the conveyances hereinbefore described, and being allowed by law *one* year from the date of the first publication of notice of foreclosure, to wit: *one* year from the *18th* day of *July*, A. D. 1889, in which to redeem said property, the said *Wm. M. E. Brown* by and with the consent and authority of the said *Wm. B. Brown*, did, although in feeble health, on *Thursday*, the *17th* day of *July*, A. D. 1890, go to the house of said *Lawton*, in said *Skowhegan*, and in which said *Lawton* was living, but that said *Lawton* was not at home, nor could the said *Wm. M. E. Brown* by diligent search find him anywhere; that on the next day, *Friday, July 18th*, 1890, the said *Wm. M. E. Brown* did go twice to the house of said *Lawton*; the first time he was not in, the second time he found him in, told him his business and asked said *Lawton* where the notes and mortgage were and the amount due. *Lawton* replied that he had the notes and that they amounted to about $350. The said *Wm. M. E. Brown* then asked him if that included the costs of foreclosure, and said *Lawton* replied that he supposed so. The said *Wm. M. E. Brown* then told him that he was prepared to pay the money and asked him if he should pay it at the *Second National Bank* or at *Merrill & Coffin's* office. *Lawton* replied that he could pay it at his house as he had the notes. The said *Wm. M. E. Brown* then said that he was not feeling well, that he was very feeble and did not like to go down to the bank unless necessary, and he asked said *Lawton*, if it would be all right if he should pay it the next day, and *Lawton* replied, 'I shall be at home to-morrow and it will be all right whether you pay it to-morrow or to-day.'

And your orators say that, relying upon this waiver and promise of the said *Lawton*, the said *Wm. M. E. Brown* went away; and on the next day the said *Wm. M. E. Brown* went, according to the agreement made with said *Lawton*, to said *Lawton's* house to pay him the money and redeem the property, and meeting said *Lawton* upon the street near his, the said *Lawson's*, house, he told him that he had come to pay him the money, and put his hand in his pocket to take out his money, whereupon said *Lawton* cried out, 'you need not make me a tender, you needn't take out your money, for I will not take a cent from you,' and when said *Brown* asked him why, said *Lawton* replied, 'The mortgage run off yesterday and I will not take a cent of money from you until you pay the note I sued you and *Blunt* for, and I will have no talk with you,' and went into the house. And afterwards, on the same day, the said *Wm. M. E. Brown* and the said *Wm. B. Brown* went to the house of the said *Lawton* to pay the mortgage or to tender the money, but said *Lawton* was not at home, nor could they find him anywhere.

And your orators further say that on the next *Monday*, to wit, *July 21st*, 1890, they went to the house of the said *Lawton* and the said *Wm. B. Brown* made said *Lawton* a good and lawful tender of $355 and demanded the mortgage, and that said *Lawton* refused to accept the money or to give up the mortgage or to have any talk with the said *Browns*; and that said *Lawton* has refused to give up the mortgage or to do anything in the premises from that time until the present. And your orators aver that they are and have been always ready and willing to pay the amount due upon said mortgage and notes, and that they are now ready to bring the same into court whatever your Honors shall find to be justly and equitably due upon said mortgage and notes secured thereby and to do any and all other things that your Honors may decree that your orators should do in the premises."

The court remarked, however, that

the bill did not sufficiently show whether the tender had been kept good and had been paid into the court. Brown *v.* Lawton, 87 Me. 83.

Insufficient Allegations. — An averment of ignorance on the complainant's part of the amount to be tendered or the persons to whom the tender ought to be made is insufficient when coupled with other averments which show that these facts could have been ascertained by the exercise of reasonable diligence, and that the complainant's ignorance is the result of his own laches. Lehman *v.* Moore, 93 Ala. 186.

Where the bill avers ignorance on the part of the complainant of the amount to be tendered to the person to whom the tender ought to be made, yet avers facts which demonstrate that all necessary information as to the amount to be tendered and as to the persons to whom the tender should be made was in the possession of persons living in the same town with complainant, and the bill fails to aver any effort on complainant's part to gain this information, it is insufficient. Lehman *v.* Moore, 93 Ala. 186.

Offer to Pay Amount Due — *Generally.* — A bill or a cross-bill to redeem land from a mortgage must contain a formal offer to pay whatever sum shall be found due upon taking the account. Conaway *v.* Carpenter, 58 Ind. 477; Kemp *v.* Mitchell, 36 Ind. 249; Kennebec, etc., R. Co. *v.* Portland, etc., R. Co., 54 Me. 173; Way *v.* Mullett, 143 Mass. 49; Mann *v.* Richardson, 21 Pick. (Mass.) 355; Loney *v.* Courtnay, 24 Neb. 580; Eastman *v.* Thayer, 60 N. H. 408; Allerton *v.* Belden, 49 N. Y. 373; Lanning *v.* Smith, 1 Pars. Eq. Cas. (Pa.) 13; Jones *v.* Porter, 29 Tex. 456; Still *v.* Buzzell, 60 Vt. 478; Kopper *v.* Dyer, 59 Vt. 477; Harrigan *v.* Bacon, 57 Vt. 644. And the plaintiff must offer to pay the mortgage debt, and an offer to pay the amount bid under the mortgage sale is not sufficient. Wood *v.* Holland, 53 Ark. 69. And a bill cannot be maintained which merely offers to pay "her just proportion." McCabe *v.* Bellows, 7 Gray (Mass.) 148.

So where the mortgage provided for insurance by the mortgagor, and also that in case of suit on the mortgage notes the maker would pay five per cent. attorney's fees, a complaint which did not allege tender of the insurance money, which the mortgagee had to pay, nor f the attorney's fees, was demurrable. Hosford *v.* Johnson, 74 Ind. 479.

Exceptions. — An exception to the general rule that an equitable tender must be made by offering to pay what may be found due upon the accounting exists where it appears that the lienholder has money in his hands exceeding the amount of his lien, which he is equitably bound to apply to the discharge of his claim. Horn *v.* Indianapolis Nat. Bank, 125 Ind. 381.

Where a bill seeking redemption and an injunction against a sale under a power in the mortgage avers that a tender was several times repeated and refused, and adds, "which complainants are now ready and willing to pay him, and have been ready and willing to pay him ever since," a sufficient tender and readiness to pay is shown and payment into court is not required. McCalley *v.* Otey, 90 Ala. 302.

In an action to have a deed, in form an absolute conveyance, declared a mortgage, and as such adjudged usurious and void, or, if the court should find it not void, that the plaintiff be allowed to redeem by paying the defendants the amount which the court should find due thereon, a tender before suit, or even a formal offer in the complaint to pay, was held unnecessary, because the plaintiff had submitted his rights to the court and indicated his willingness to comply with such conditions as the court might impose. Nye *v.* Swan, 49 Minn. 431.

Sufficient Averments. — That "your orator is still willing and now offers to pay said association whatever amount he may be justly chargeable with, if any, on the application to his said case of the terms of said by-law * * * and in this respect submits himself to the order and decree of this honorable court," is a sufficient offer to do equity and to entitle the complainant to relief, if his bill is otherwise sufficient. Security Loan Assoc. *v* Lake, 69 Ala. 456.

In a bill seeking to have an absolute conveyance declared a mortgage, for a redemption and account, an allegation that the complainant "now offers to pay said defendant the amount of his note to said *Elmore*, indorsed to defendant, as before stated, with interest thereon from this date, and now brings the same into this court and offers to pay all costs with which he may be

chargeable," etc., was held sufficient, and, being added by way of amendment, to take effect as of the time of filing of the original bill. Crews *v.* Threadgill, 35 Ala. 334.

A prayer for an account has been held equivalent to an offer to redeem or to pay whatever may be found due. Edgerton *v.* McRea, 5 How. (Miss.) 183.

A petition which alleges in substance that the plaintiff purchased the lot which he seeks to redeem, and became the owner thereof in fee, that he was not aware of the mortgage held by the defendant, that the former owner of the lot had executed the mortgage to secure the payment of the note mentioned in the mortgage, that this note consisted largely of usurious interest which had been embodied in the note as a part thereof, and that the maker had made payments on the note which had not been credited, that some of those payments consisted of usury paid to the defendant, that the plaintiff has offered to pay to the defendant whatever amount might be justly due him, and still offers to pay all that is justly due on the mortgage, etc., is sufficient. The plaintiff need offer to pay only what is justly due to the defendant after deducting the usurious interest. Perrine *v.* Poulson, 53 Mo. 309.

An allegation "that the defendant has been in possession of said premises and has taken the income of the same, which amounted to a large sum, the amount of which plaintiff does not know, and that he has since the time for redemption expired, to wit, *March 17th*, 1875, demanded of the defendant an account of the amount due and of the rents and profits, and the same has not been delivered to him; that so soon as the amount shall be determined, he always has been, now is and hereafter will be ready and desirous, in such reasonable time as the court shall determine, to pay and will pay the same to the defendant in satisfaction thereof and the discharge of said farm," is sufficient. Watkins *v.* Watkins, 57 N. H. 462.

Where the bill alleges that complainant is ignorant of the amount due the purchaser and prays that it may be ascertained, and if not paid that the land may be sold for its satisfaction, it is sufficient. Lock *v.* Edmundson, 1 Baxt. (Tenn.) 282.

Insufficient Averment. — An averment of the demand of an account "in order that the complainants might pay," or a prayer to be "let in to redeem on payment," etc., is not a sufficient offer to pay what may be found due. Kennebec, etc., R. Co. *v.* Portland, etc., R. Co., 54 Me. 173.

Payment Into Court — *Generally.* — It is generally held not essential to the maintenance of a bill to redeem from a mortgage that the money therein tendered be paid into court. McCalley *v.* Otey, 90 Ala. 302; Watkins *v.* Watkins, 57 N. H. 462.

Excuse for Not Making Tender. — Where, in statutory redemption, the bill states an excuse for a failure to make tender before suit, payment of the money into court is essential. Long *v.* Slade, 121 Ala. 267; Beebe *v.* Buxton, 99 Ala. 117; Lehman *v.* Collins, 69 Ala. 127; Brown *v.* Lawton, 87 Me. 83.

Where plaintiff relies on tender to stop interest, he must not only aver tender in his bill, but must bring the money into court. Shields *v.* Lozear, 22 N. J. Eq. 447; Shank *v.* Groff, 45 W. Va. 543. See also Simmons *v.* Marable, 11 Humph. (Tenn.) 436.

Uncertainty as to Amount Due. — Where there is uncertainty as to the amount due and the action of the court is necessary to ascertain what sum is to be paid, it has been held that the plaintiff need not bring the money into court until the amount due shall be ascertained. Freeman *v.* Jordan, 17 Ala. 500; Schwarz *v.* Sears, Harr. (Mich.) 440; Kline *v.* Vogel, 90 Mo. 239.

Prayer. — The court may treat a bill in equity as a bill to redeem, although it contains no prayer for redemption, the reason being that equity having once acquired jurisdiction may retain it to give such further relief as will finally dispose o the controversy. Drayton *v.* Chandler, 93 Mich. 383; Beach *v.* Cooke, 28 N. Y. 508. And a bill to set aside a statutory foreclosure sale must be considered as a bill to redeem, whether such specific relief is prayed for or not. Huyck *v.* Graham, 82 Mich. 353.

Where a mortgagor files a bill to cancel a mortgage overdue, and which his adversary seeks to foreclose, and the court finds the mortgage to be valid, the proper decree is a decree for a redemption, although there was no prayer for redemption. Such a bill is regarded as in the alternative a bill to redeem, upon the principle that a complainant seeking equity must be pre-

Form No. 17281.[1]

(Conn. Prac. Act, p. 147, No. 252.)

[(*Commencement as in Form No. 5912.*)]

1. On *June 10th*, 1878, the plaintiff executed to the defendant a mortgage of certain land in *Meriden*, described as follows (*describing*

pared to do equity. Goodenow *v.* Curtis, 33 Mich. 505.

Verification. — A bill to redeem is not regarded as technically one for discovery, and verification is not necessary. Baker *v.* Atkins, 62 Me. 205; Hilton *v.* Lothrop, 46 Me. 297.

Multifariousness — *Generally.* — In order for the bill to be multifarious, the different grounds of the suit must be wholly distinct, and each ground must be sufficient as such to sustain a bill. So a bill to redeem, which sets forth a series of transactions not separate and entirely distinct, but forming one course of dealing, is not multifarious. Kennebec, etc., R. Co. *v.* Portland, etc., R. Co., 54 Me. 173.

Common-law and Statutory Redemption. — The common-law right of redemption is essentially different from the right to redeem given by the statute, which can but seldom if ever come into existence until the common-law right has been barred by a sale under the decree of the court of equity or under a power of the mortgage; and if it be possible in any case that the two rights can co-exist and that the creditor may have an election to exercise either, they cannot be blended in the same bill, even if the bill be filed in a double aspect or in the alternative, because the relief which could be granted in one aspect would be materially variant from that which could be granted in the other. Cramer *v.* Watson, 73 Ala. 127.

Redemption and Accounting. — That a bill for redemption and for an accounting may be maintained see Perdue *v.* Brooks, 85 Ala. 459; Commercial Real Estate, etc., Assoc. *v.* Parker, 84 Ala. 298; Smith *v.* Conner, 65 Ala. 371; Franks *v.* Jones, 39 Kan. 236; Johnson *v.* Loftin, 111 N. Car. 319; Swegle *v.* Belle, 20 Oregon 323; Greene *v.* Harris, 10 R. I. 382; Posten *v.* Miller, 60 Wis. 494.

Redemption and to Have Instrument Declared a Mortgage. — That a bill may be maintained to redeem, and also to have a deed absolute on its face declared to be a mortgage, see Perdue *v.* Brooks, 85 Ala. 459; Cline *v.* Robbins, 112 Cal. 581; Hollingsworth *v.* Campbell, 28 Minn. 18; Morrow *v.* Jones, 41 Neb. 867; Newman *v.* Edwards, 22 Neb. 248; Swegle *v.* Belle, 20 Oregon 323.

Several Mortgages. — Where the bill is to redeem lands covered by several mortgages to the same defendant, and to have canceled a deed executed by the sheriff under an execution sale, the judgment debt having been paid, and to have canceled a deed from the mortgagee defendant to his sister, which was made without consideration, the bill is not subject to the objection of multifariousness. The court having jurisdiction for one purpose will settle all questions necessary to granting the relief prayed upon proper proof. Lyon *v.* Dees, 101 Ala. 700. And where a bill is to redeem two distinct mortgages of different dates and held by different titles, it is not necessarily multifarious. Robinson *v.* Guild, 12 Met. (Mass.) 323. But where the bill sought a redemption and account under a mortgage executed to the defendants by the complainant's deceased brother, on lands which had also been mortgaged to the complainant, who claimed the right to redeem as a junior mortgagee, and also a redemption and account under a mortgage on another tract of land, which the complainant had executed to defendant, and also sought the specific execution of a parol contract under and pursuant to which it was alleged the defendants redeemed the latter tract of land from the purchasers at sheriff's sale under execution against the complainant for the benefit of complainant, and to allow complainant to redeem on the repayment of the amount so advanced by them, with interest in addition to the mortgage debt, it was held to be multifarious. Junkins *v.* Lovelace, 72 Ala. 303.

Where plaintiff claims under different titles, the statement of them in the same bill will not render it multifarious. So it is held that where a widow, who is administratrix of her husband's estate, brings a bill to redeem real estate mortgaged by him, the bill is not multifarious because she claims to maintain her suit in both capacities. Robinson *v.* Guild, 12 Met. (Mass.) 323.

1. See, generally, *supra*, note 2, p. 814.

it): conditioned to secure the payment of a book debt for $*1,000* in *one* year, with interest at *six* per cent. per annum, payable half yearly.

2. On *June 10th*, 1879, he tendered to the defendant $*1030*, being the principal of said mortgage, with the interest due to that time, and also tendered to him a proper release deed of said mortgaged premises, and requested him to execute and acknowledge the same; but he refused to accept the money, or execute and acknowledge the deed.

The plaintiff claims,

1. That he be allowed to redeem said mortgage, upon paying to the defendant said amount due thereon;

2. That, upon such payment, the defendant execute a proper release deed of said premises.

[(*Concluding as in Form No. 5912.*)]

Form No. 17282.[1]

(*Title of court and cause, and address as in Form No. 4267.*)

Humbly complaining showeth unto your honor, *John Doe*, of *Kent* county, state of *Delaware*, as follows:

I. That on the *third* day of *January*, 1898, complainant, to secure a certain note given by complainant to *Richard Roe*, of *Dover*, in said county of *Kent*, executed and delivered to said *Richard Roe* a deed of a certain piece of land, of which complainant was then well seised and possessed, in fee simple, situated in said city of *Dover*, and described as follows, to wit: (*describing land*), which deed was duly executed and acknowledged, and on said *third* day of *January* was recorded in the office of the recorder of deeds of said county of *Kent*, on page *249* of Mortgage Record *A*, in the office of said recorder, and to which record complainant begs leave to refer; that to said deed was annexed the following condition in writing, to wit: (*setting forth condition*).

II. Complainant further showeth that on the *tenth* day of *July*, 1900, complainant offered to pay to the said *Richard Roe* the amount then due as principal and interest upon said note secured by said mortgage, but that the said *Richard Roe* refused to receive the same.

III. Complainant further showeth that he is now ready and willing and hereby offers to bring into court for the said *Richard Roe* the full amount justly due upon said note.

Complainant prays as follows:

1. That this honorable court order and decree that the complainant have leave to deposit said money in the hands of the clerk of this court in full satisfaction and discharge of the said note, and that thereupon the legal title to said tract of land shall be vested in the complainant.

2. That complainant may have such further and other relief as the nature of the case may require.

3. That a subpœna may issue for the said *Richard Roe* as defendant in this case.

Jeremiah Mason,
Solicitor and of Counsel for Defendant.

1. See, generally, *supra*, note 2, p. 814.

(2) And for an Accounting.[1]

Form No. 17283.

(Precedent in Stillwell *v.* Hamm, 97 Mo. 581.)[2]

Dixon Stillwell, plaintiff,
vs.
Jacob S. Hamm, *Jacob Hamm*, *Adam Durkes* and *Benj. Bonifant*, defendants.
} In the *Circuit* Court of *Platte* County, *Missouri*.

Plaintiff states that on the *twenty-sixth* day of *August*, 1870, he was the owner, by fee-simple title, of the following described lands, lying and being situate in the county of *Platte* in the state of *Missouri*, viz.: The west half of the southwest quarter of section *two* (2), in township *fifty-three* (53), in range *thirty-six* (36), containing *eighty* acres more or less.

Plaintiff states that said land was at said time and ever since has been worth the sum of *three thousand* dollars.

That said land was the homestead whereon lived this plaintiff with his family, consisting in part of himself and his wife, *Susan Stillwell*.

Plaintiff states that on the *twenty-sixth* day of *August*, 1870, this plaintiff borrowed of defendant *Jacob Hamm* the sum of *two hundred* dollars.

Plaintiff states that when the negotiations were made for said loan with *Jacob Hamm*, at the request of said *Jacob Hamm*, this plaintiff signed a note to *Jacob S. Hamm*, defendant herein, who is a son of

1. **Precedent.**—In Haskins *v.* Hawkes, 108 Mass. 379. where the heirs of the mortgagee had entered on the mortgaged premises and remained in possession, the bill, which made these heirs and also the administrator of the mortgagee parties, and which was sustained, prayed as follows: "that the defendants may each answer the premises; that an account may be taken of what, if anything, is due for principal and interest on the mortgage. and an account may also be taken of the rents and profits of the mortgaged premises, which have been possessed or received by the defendants or either of them, or by any other person by their order or for their use, or which without their wilful default or neglect might have been received; that in taking said account rests may be made from time to time when the money received by the defendants for rent shall appear to have exceeded the interest in arrear, and if it shall appear that the said rents and profits have been more than sufficient to satisfy the principal and interest of the mortgage, then that the residue thereof be paid over to the plaintiff; that the plaintiff may be permitted to redeem the premises, he being ready and willing, and hereby offering, to pay what, if anything, shall appear to remain due in respect to the principal and interest on the mortgage; and that the defendants may be decreed to assign and deliver up possession of the mortgaged premises to him, or to such person as he shall direct, free from all incumbrances made by them or any person claiming under them, and deliver over to him all deeds and writings in their custody or power relating to the mortgaged premises."

2. On demurrer, this petition was sustained, and the court commented upon and approved the general form of it. It was held that the facts set forth were sufficient to sustain the action; that there was no misjoinder of causes of action, because the petition was in the main a bill to redeem and the other relief sought was merely incidental thereto; and that the petition showed sufficient grounds for joining Durkes and Boniface as defendants.

See also, generally, *supra*, note 2, p. 814.

said *Jacob Hamm.* Plaintiff states that said note was given for said sum of *two hundred* dollars, and was made payable *one* year after date, and bearing *ten* per cent. per annum interest from date; said interest, if not paid at the end of each year, to become as principal and bear the same rate of interest.

Plaintiff states that, at the request of said *Jacob Hamm*, he gave a mortgage on said land above described to secure said note, the same that is recorded in Deed Book *W.*, on page *315* of the records of *Platte* county, *Missouri.*

Plaintiff states that said *Jacob Hamm*, after forfeiture of said mortgage, procured that the same be foreclosed in the name of his said son, *Jacob S. Hamm*; said suit was instituted in the *Weston* court *of common pleas*, in which said suit a judgment was obtained by said *Jacob Hamm*, in the name of his said son, *Jacob S. Hamm*, against this plaintiff for the sum of *two hundred and seventy-six* dollars, at the *spring* term of said *Weston* court *of common pleas*, A. D. 1874, on the *eleventh* day of *March*, 1874.

Plaintiff states that after said time said *Jacob Hamm* caused an execution to be issued purporting to be issued on a judgment for the sum of *two hundred and ninety-six* dollars, whereas, in fact, no such judgment existed.

Plaintiff states that on objections being made by this plaintiff to such sale the said *Jacob Hamm* entered into an agreement with plaintiff as follows:

First. That said *Hamm* (*Jacob*) on his part should purchase said land at such pretended sale, and that the conveyance made pursuant to said sale should be held as a mortgage to secure the debt due from this plaintiff to said *Hamm*, viz.: The said sum of *two hundred and seventy-six* dollars and interest on the same from the date of said judgment, viz., the *eleventh* day of *March*, 1874.

Second. That this plaintiff should have *one* year's time in which to pay said debt, provided this plaintiff would pay the costs of said foreclosure suit in said *Weston* court *of common pleas.*

Plaintiff states that pursuant to said agreement he paid said costs; but when said debt became due he was unable to pay the same according to said agreement.

Plaintiff states that upon his failure to pay said debt and the interest thereon, the said *Hamm* afterwards, viz., on the ——— day of *January*, 1876, took possession of said land and proceeded to collect all rents and profits of same, and has collected the same to this date.

Plaintiff states that on the *first* day of *January*, 1882, said rents so collected by said *Hamm* were sufficient to pay said debt and interest and all necessary improvements and the taxes on said land and that this plaintiff is now entitled to have the possession of the same.

Plaintiff states that defendant *Jacob S. Hamm* still claims to have some interest in said land, wherefore he is made a defendant herein that his rights, if any, may be determined.

Plaintiff states that defendants *Adam Durkes* and *Benjamin Bonifant* claim to have some interest in said land, but said *Bonifant* and *Durkes* have at all times had full knowledge and notice of the rights and

interests of this plaintiff, and that any interest they may claim to have was taken subject to the rights and interests of this plaintiff.

Wherefore, the plaintiff prays the court to cause said *Jacob Hamm* to render strict account of all rents and profits derived from said land, to ascertain and declare that said debt from this plaintiff to said *Jacob Hamm* has been fully satisfied and paid off, and that the court will render their decree divesting defendants of all title and claim to said land, and vesting all title to the same in plaintiff, and that the court will grant all other proper or different relief.

[*Jeremiah Mason*,
Attorney for Plaintiff.][1]

Form No. 17284.[2]

To His Honor *Theodore Runyon*, Chancellor of the State of *New Jersey*:

Humbly complaining, showeth unto your honor, your orator, *John Doe*, of the city of *Jersey City*, in the county of *Hudson*, state of *New Jersey*, that on the *tenth* day of *June*, in the year of our Lord one thousand eight hundred and *ninety-four*, being seised in fee of the premises hereinafter mentioned and described, and having occasion to borrow the sum of *one thousand* dollars, your orator did apply to *Richard Roe*, of the city of *Jersey City*, in said county of *Hudson* and state of *New Jersey*, to lend him said sum of money upon the security of the said premises, which the said *Richard Roe* consented to do, and accordingly advanced the said sum of *one thousand* dollars to your orator, and that in order to secure the redemption thereof, with interest, your orator did execute and deliver to the said *Richard Roe* an indenture of mortgage, bearing date on or about the *tenth* day of *June*, in the year of our Lord one thousand eight hundred and *ninety-four*, which was made between your orator of the one part and the said *Richard Roe* of the other part, and by the said indenture your orator, for and in consideration of the sum of *one thousand* dollars to him in hand paid by the said *Richard Roe*, did grant, bargain, sell and convey unto the said *Richard Roe*, his heirs and assigns, the premises above mentioned and described in the said indenture as follows: (*describing premises*). To have and to hold the said premises unto the said *Richard Roe*, his heirs, executors, administrators and assigns, subject to a proviso or condition of redemption by your orator on the payment of the said sum of *one thousand* dollars with interest on the *tenth* day of *June* in the year of our Lord one thousand eight hundred and *ninety-nine*, as in and by the said indenture of mortgage now in the custody of the said *Richard Roe*, when produced, will more fully and at large appear.

And your orator further showeth unto your honor that he has paid all the interest on the said sum of *one thousand* dollars to the said *Richard Roe* from the date of said mortgage until the *tenth* day of *June*, in the year of our Lord one thousand eight hundred and *ninety-*

1. The matter enclosed by [ ] will not be found in the reported case. This form is set out in 3 Barb. Ch. Pr. 317.

2. See, generally, *supra*, note 2, p. 814.

nine, and that he has always been and still is ready to pay the said *Richard Roe* what is due to him for principal and interest of the said mortgage and costs, and did actually on or about the *tenth* day of *September*, in the year of our Lord one thousand eight hundred and *ninety-nine*, tender and offer to pay the said *Richard Roe* the said sum of *one thousand* dollars, together with the interest then due thereon and the costs. And your orator had hoped that the said defendant would have received the said several sums of money so tendered and offered to be paid to him by your orator as aforesaid, and that he would either have delivered up unto your orator the said indenture of mortgage to be canceled or have reassigned the same to your orator as in justice and equity he ought to have done.

But now so it is, may it please your honor, the said *Richard Roe*, combining and confederating to and with divers other persons at present unknown to your orator, but whose names when discovered your orator prays may be inserted herein with proper and apt words to charge them, he, the said *Richard Roe*, in order to deprive and defeat your orator of the benefit of redeeming the said mortgaged premises, does pretend and give out that your orator did not borrow of him, the said *Richard Roe*, the said sum of *one thousand* dollars, nor execute the said indenture of mortgage to the said *Richard Roe* for securing the redemption thereof with interest as aforesaid, but does pretend that the said sum of *one thousand* dollars was paid to your orator in consideration of the absolute purchase of the said premises; and at other times he does admit that a deed of the same date as above mentioned and between the same parties, was executed by your orator, but that your orator did thereby absolutely dispose of and convey the said premises without any proviso or condition of redemption as above mentioned, whereas your orator charges the contrary of such pretenses to be the truth; and at other times the said *Richard Roe* admits that said indenture of mortgage was executed as above mentioned, but pretends that at the time of the tender above mentioned, great arrears of interest were due and owing from your orator to the said *Richard Roe*, amounting to *two hundred* dollars over and above the sum tendered by your orator, whereas your orator charges the truth to be that not more than *fifteen* dollars was due and owing from your orator to the said *Richard Roe* for the interest upon the said *one thousand* dollars and the costs at the time of said tender. And upon the pretenses aforesaid the said *Richard Roe* refuses to come to any manner of account with your orator or to reconvey the said premises to him.

All which actings, doings and pretenses of the said *Richard Roe* and his confederates are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator.

In tender consideration whereof and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law and is only relievable in a court of equity where matters of this nature are properly cognizable and relievable. To the end therefore that the said *Richard Roe* and his confederates may respectively full, true, direct and perfect answers make upon their respective corporal oaths according to the best of their respective knowledge, informa-

tion and belief, to all and singular the matters and charges aforesaid (*or, if answer on oath is waived, omit the words* "upon their respective corporal oaths," *and insert here:* "your orator hereby waiving, pursuant to the statute, the necessity of the answer of such defendants being put in under the oaths of the said defendants or the oath of either of them"), and that as fully and particularly in every respect as if the same were here again repeated and they thereunto particularly interrogated, and more especially that the said *Richard Roe* may set forth whether your orator did not, and when, apply to him to borrow the said sum of *one thousand* dollars or any other sum of money, and whether such indenture of mortgage was not executed by your orator to the purport and effect and upon the condition or proviso above mentioned, and whether your orator has not paid the interest upon the said sum of *one thousand* dollars to the said *Richard Roe* from the date of the said mortgage until the *tenth* day of *September*, in the year of our Lord one thousand eight hundred and *ninety-nine*, or until some other and what time, and whether your orator did not make such tender of such several sums of money as above mentioned to the said *Richard Roe* or how otherwise, and that the said *Richard Roe* may set forth what was due and owing to him on the said mortgage for principal and interest and costs at the time of the said tender, and that he may set forth why and for what reasons he refused to receive the said several sums of money so tendered as aforesaid, and that an account may be taken by and under the decree and direction of this honorable court of what is now due and owing to the said *Richard Roe* for principal and interest in the said mortgage and costs, and that your orator may be at liberty to redeem the said mortgaged premises upon payment of what, if anything, shall be found to be due the said *Richard Roe*, which your orator hereby offers to pay, and that thereupon the said *Richard Roe* may be decreed to surrender and deliver up the possession of said mortgaged premises to your orator free and clear of all incumbrances done by him, or by any person claiming by, from or under him, and that he may be ordered to acknowledge satisfaction of the said mortgage and discharge the same of record. And that your orator may have such other and further relief in the premises as the nature of the case may require and as to your honor shall seem meet.

May it please your honor, the premises considered, to grant unto your orator the state's writ of subpœna (*concluding as in Form No. 4277*).

Form No. 17285.[1]

(*Title of court and cause as in Form No. 5926.*)

The complaint of the above named plaintiff respectfully shows to the court:

That on the *third* day of *January*, 1897, this plaintiff having made to defendant a bond under his hand and seal dated on said *third* day of *January* and conditioned to pay (*Here state condition of bond*), and being the owner in fee (*or otherwise, as the case may be*) of the premises hereinafter described, the plaintiff made to the defendant a mortgage

1. See, generally, *supra*, note 2, p. 814.

dated the said *third* day of *January* to secure the payment of said bond, and whereby the plaintiff granted, bargained and sold unto the defendant the said premises upon condition nevertheless that (*Here state condition of the mortgage*); that said premises are situated in the town of *Huntington*, in said county of *Suffolk*, and described as follows, to wit: (*describing the lands*).

That plaintiff has paid said defendant all the interest due on said *one thousand* dollars from the *third* day of *January*, 1897, up to the *third* day of *July*, 1899, that on the *third* day of *January*, 1900, when (or *and after*) the aforesaid mortgage became due plaintiff tendered to defendant the said sum of *one thousand* dollars, together with all interests and costs due thereon up to said *third* day of *January*, and has ever since been ready and willing to pay the same, but the said defendant refused to receive the same or to deliver up said mortgage to be canceled.

Wherefore plaintiff demands judgment that an account be taken of the amount now due the defendant on said bond and mortgage, for principal, interest and costs, and that the plaintiff may be at liberty to redeem said mortgaged premises upon the payment to defendant of whatever shall be found so due, and that upon the payment thereof the said defendant acknowledge satisfaction of the said mortgage, and discharge the same of record, and for such other and further relief as may be necessary.

(*Signature and office address of attorney, address and verification as in Form No. 11457.*)

(3) From Deed Absolute in Form.[1]

1. Precedents. — A complaint which seeks a decree compelling the defendants to reconvey to the plaintiff a certain city lot formerly conveyed by plaintiff to the defendants by a deed absolute in form, and which alleges that the plaintiff understood that the conveyance was given as security for a certain sum of money, and "that this plaintiff never intended to make or execute a conveyance absolute to defendants or to either of them, but was led to believe by them that such paper, while purporting to be a deed, as aforesaid, was simply a mortgage to secure the said payment of said *four hundred* dollars to defendants, as aforesaid," is sufficient. Gumpel *v.* Castagnetto, 97 Cal. 15.

In Dryden *v.* Hanway, 31 Md. 254, the bill, which was for the purpose of declaring an absolute deed to be a mortgage, alleged in substance that on the seventh day of July, 1862, the executors of Thomas Street, by virtue of a power contained in the will of their testator, offered at public sale, at the Exchange salesroom, in the city of Baltimore, a certain house and lot on East Fayette street, in the occupancy of the complainant, at the date of filing the bill; that, on the day said property was advertised to be sold, the complainant, and one Franklin Hanway (since deceased), the brother of the complainant's wife, attended said sale; that the complainant bid in the property for the price of two thousand four hundred dollars, and signed the memorandum of sale on the auctioneer's book, the said Hanway having previously agreed to lend the complainant money sufficient to pay for the property, the complainant to pay interest on said loan, at the rate of six per cent. per annum, until the principal should be repaid; that in accordance with said agreement the said Hanway loaned the complainant the amount of the purchase-money; that, subsequently, the executors of Thomas Street, who were his two sons, David and Charles Street, reported the sale of said property to the Orphans Court of Baltimore City as having been

(*a*) *In General.*

Form No. 17286.[1]

To the *Circuit* Court of the County of *Wayne*,

In *Chancery.*

John Doe, of *Detroit*, in the county of *Wayne* and State of *Michigan*, brings this bill as plaintiff against *Richard Roe*, of the same place, as defendant.

made to the said Hanway, which sale was duly confirmed by the court; and thereupon, on the twelfth day of August, 1862, the said executors executed an absolute deed of the property to Hanway. The bill further stated that, as soon as the sale was consummated, the complainant and his family moved into the house, occupied it during the life of Hanway (which terminated in August, 1864), and had continued to occupy it up to the time of filing the bill, paying therefor at the rate of six per centum on the two thousand four hundred dollars, to the said Hanway during his life, and the same amount to his estate since his decease. The bill alleged further that, notwithstanding the report of sale declared it to be the purchase of Hanway, and that the deed was made to him, as of an absolute purchase, yet that the true agreement between the complainant and Hanway (which agreement, it was admitted, was only by parol), was that the complainant should have the property, and a deed therefor from Hanway, whenever he, the complainant, should pay to Hanway the sum of two thousand four hundred dollars, and all interest due thereon; which he averred his willingness and desire to do.

The bill further alleged that the executors of Thomas Street were aware of this agreement, although they reported the sale was made to Hanway, and made the deed to him; that the deed was prepared in the form above stated, at the suggestion of the complainant, and that the proper paper to accompany the absolute deed, and to operate as a defeasance thereof on the repayment of the said loan, was omitted, as well by mistake as because of the confidence reposed by the complainant in said Hanway; that, however, the deed was only intended to operate as a security by way of mortgage for the repayment to Hanway, by the complainant, of the sum of two thousand four hundred dollars, and interest thereon.

The bill also alleged that the complainant, after taking possession of the premises, treated and considered them as his own, paying the taxes and making the repairs at his own expense; and that Hanway always acknowledged this to have been the character of the complainant's possession.

The bill then prayed the court to declare that the deed from Street's executors to Franklin Hanway was designed to operate only as a security, by way of mortgage, for the payment of the two thousand four hundred dollars and interest, and that upon its repayment, with all accrued interest thereon, said property should be conveyed, in fee simple, to the complainant. The defendant Susan, the widow of Franklin Hanway, filed her answer, denying the allegations of the bill, in so far as the same set up any contract or agreement against the deed, and also relied upon the statute of frauds; the defendant Mary, the daughter of the said Franklin Hanway, being an infant, answered by guardian in the usual way.

The circuit court dismissed this bill, but on appeal the decree below was reversed and the cause remanded, the court holding that the facts established a resulting trust and that the deed to Hanway must be treated as a mortgage between the parties.

A bill by a guardian of an insane person, to compel a reconveyance of land made by his ward, which alleged that although the deed was absolute in form it was intended by the parties only as a mortgage to indemnify the defendant against loss on a bond executed by him as a part of the same transaction, and conditioned for the payment of debts and legacies mentioned in a certain will of the obligee of said ward in case the estate of the latter should not be sufficient to pay them at the time of his decease, was held to allege sufficiently that the deed was a mortgage. Warfield *v.* Fisk, 136 Mass. 219.

1. See, generally, *supra*, note 2, p. 814.

And thereupon plaintiff avers:

I. That on the *first* day of *June*, 1889, the plaintiff was and for many years prior to said date had been, the owner in fee simple of the following described real property, to wit: (*describing the premises*).

II. That on said *first* day of *June*, 1889, plaintiff, by reason of the appointment of a special guardian for him, whereby his money and property were tied up, was in need of money, and on said *first* day of *June* secured as a loan from the said *Richard Roe*, the defendant herein, the sum of *one thousand* dollars, and to secure the same, with interest thereon at the rate of *six* per cent. per annum, plaintiff on said day, by an absolute deed of conveyance, bearing date the said *first* day of *June*, conveyed to the said defendant, *Richard Roe*, in fee simple, the aforesaid described real property, which said deed was duly recorded on the *second* day of *June*, 1889, in the office of the recorder of deeds of said county of *Wayne*, as by said deed, now in the possession of the said *Richard Roe*, will more fully appear, a copy of which is hereto annexed, marked "Exhibit *A*," and made a part of this bill.

III. Plaintiff further says that said deed, although it appears to be absolute on its face, was not intended by plaintiff and by the said defendant, *Richard Roe*, to be such, but it was at the time of the making of said deed expressly understood and agreed between this plaintiff and the said *Richard Roe*, that said deed and the premises conveyed thereby were to be held by the said *Richard Roe* as security simply for the payment of said sum of *one thousand* dollars, with interest thereon as aforesaid. And it was further agreed between this plaintiff and the said *Richard Roe*, that upon the payment of the said sum of *one thousand* dollars, and all interest due at the time of said payment to said *Richard Roe*, the said *Richard Roe* should reconvey to plaintiff the said premises by an absolute deed.

IV. Plaintiff further says that on the *third* day of *June*, 1889, the said defendant, *Richard Roe*, entered into the possession of the aforesaid described premises and the rents and profits thereof, and the same still retains.

V. Plaintiff further says that he has paid all interest due upon said sum of *one thousand* dollars to the said defendant from the date of said deed, to wit, the *first* day of *June*, 1889, until the *first* day of *June*, 1892, at which time the said defendant refused to receive from plaintiff further interest thereon.

VI. Plaintiff further says that he has always been and still is ready to pay to the said *Richard Roe* what is due to the said *Richard Roe* as principal and interest on said sum.

VII. Plaintiff further says that the said *Richard Roe*, in order to deprive and defeat plaintiff of the benefit of redeeming the aforesaid premises, pretends and states that the aforesaid deed of conveyance was not given as security for the repayment of the said sum of *one thousand* dollars, with interest as aforesaid, but that the said sum of *one thousand* dollars was paid by the said *Richard Roe* to plaintiff, in consideration of the absolute purchase of the aforesaid described premises, and that it was not intended between plaintiff and the said *Richard Roe* that said deed was to be security merely for the repay-

ment of said sum and interest, and the said defendant refuses to in any manner account to this plaintiff, or to reconvey to him the aforesaid premises, although plaintiff has often applied to defendant for that purpose, and has offered to pay the defendant whatever, if anything, should be found due to the said defendant upon an account being taken with reference to the transaction aforesaid.

Wherefore plaintiff prays:

1. That the defendant may answer this bill without oath, answer under oath being waived.

2. That an account may be taken under the direction of this honorable court of what is now due and owing to said defendant for the principal sum and interest.

3. That an account may be taken of the rents and profits of the aforesaid premises, received by said defendant or by any person for him, or which without his wilful default or neglect might have been received by him; that in taking said account rests may be made from time to time when the moneys received by defendant from the rents and profits shall appear to have exceeded the interest in arrear, and if it shall appear that the said rents and profits have been more than sufficient to satisfy the principal and interest due upon said principal sum, then that the residue thereof be paid over to plaintiff.

4. That plaintiff may be permitted to redeem the aforesaid premises, he being ready and willing and hereby offering to pay what, if anything shall appear to remain due in respect to the principal sum aforesaid, and interest thereon, and that defendant be decreed to surrender and deliver up to plaintiff the possession of said premises; that defendant be compelled to reconvey said premises by sufficient and proper deeds of conveyance, in fee, to plaintiff, and that defendant be compelled to surrender all deeds, writings and tax receipts relating to the aforesaid premises to plaintiff.

5. That plaintiff may have such other and further relief as may be agreeable to equity.

6. May it please the court to grant a writ of subpœna in usual form, directed to said defendant, commanding him to appear and answer this bill of complaint, to stand to and abide the order and decree of the court in the premises.

And this plaintiff will ever pray, etc.

Jeremiah Mason, Solicitor for Plaintiff.

Form No. 17287.

(Precedent in Brown *v.* Sumter Bank, 55 S. Car. 52.)[1]

[(*Commencement as in Form No. 5932.*)][2]

I. That the defendant the *Bank of Sumter* is a corporation duly created under and by the laws of the State of *South Carolina.*

II. That at the times hereinafter mentioned the plaintiffs were,

1. On appeal from an order of the trial court overruling demurrers to the answers of defendants, it was held that the demurrers were properly overruled, and that the complaint showed that the deed was not a mortgage, but an absolute conveyance.

See also, generally, *supra*, note 2, p. 814.

2. The matter to be supplied within

and now are, for the purposes of liquidation, copartners doing business under the firm name of *A. S. & W. A. Brown.*

III. That the defendant *Marion Moise* was at the times hereinafter mentioned, and now is, one of the directors, and vice-president, of the corporation the *Bank of Sumter.*

IV. That on the *26th* day of *March*, 1895, the plaintiffs, under their firm name of *A. S. & W. A. Brown*, by their notes discounted in said bank or otherwise, were indebted to the *Bank of Sumter* in a considerable sum, the items of which they are unable to state, amounting to $*13,500*, and claimed by said bank to be $*14,500*; that said indebtedness was secured by several mortgages, to wit, one of the "*Providence* Place," the individual property of *A. S. Brown*; one of the "*Du Bose* Land," the joint property of *Albertus S. Brown* and *W. Alston Brown*; one of the "*Rocky Pine*" place, the individual property of *W. Alston Brown*; one of the interest of *Albertus S. Brown* in certain lots of land in the city of *Sumter*; and a mortgage given by the said *Albertus S. Brown* to *W. F. B. Haynsworth*, and assigned to said bank.

V. That the said *A. S. & W. A. Brown*, as copartners, being thus indebted to the said the *Bank of Sumter*, and heavily indebted to other creditors of the said firm, on the *26th* day of *March*, 1895, and being desirous of securing said bank with their property above referred to, and on conditions hereinafter stated, executed a conveyance to the said the *Bank of Sumter* of the following described lands: (*describing realty*). The consideration mentioned in the deed was $*10,000*, but said land was conveyed and held as security for the whole indebtedness of the said *A. S. & W. A. Brown* to the said the *Bank of Sumter*, and by the express terms of the said conveyance the said mortgages above referred to were not satisfied, but were left open to protect the grantee and its successors and assigns against all incumbrances and dower.

VI. That on the same day, to wit, on the *26th* day of *March*, 1895, the defendant the *Bank of Sumter* executed a written agreement, under the seal of the corporation, through *W. F. B. Haynsworth*, its president, and through *W. F. Rhame*, its cashier, and by authority of the same, as follows, to wit: (*setting out agreement in full*).[1]

[ ] will not be found in the reported case.

1. **Agreement referred to** in the text was as follows: "On the *26th* day of *March*, 1895, the same as the date hereof, *Albertus S. Brown* and *W. Alston Brown* conveyed to the *Bank of Sumter* the following parcels of land, viz: (*describing realty*). * * * At the same time as aforesaid the said *Albertus S. Brown*, delivered and indorsed to the *Bank of Sumter* $2,000 of a note made to him by *Brown, Cuttino & Delgar*, dated *January 18*, 1895; for $2,500, due *January 1st*, 1896, with interest at *seven* per cent. And the said *Albertus S. Brown* and *W. Alston Brown*, as copartners as *A. S. & W. A. Brown*, are largely indebted unto the *Bank of Sumter*, and they are contemplating making a deed of assignment for the benefit of their creditors, and the said *Albertus S. Brown* holds a rent obligation for the year 1895 against *Scarborough & Raffield*, payable in cotton, *fifteen* bales of which has been assigned to the *Bank of Sumter*, as well as all the rent for 1895 on the '*Du Bose* Land' and '*Rocky Pine*' place. Now, it is agreed by the *Bank of Sumter* as follows, in consideration of all the matters aforesaid, viz.: 1. That the sum of $10,000 is to be entered as a credit as of this date upon the indebtedness of said *A. S. & W. A. Brown*

VII. That the said conveyance and agreement executed on the *26th* day of *March*, 1895, constitute a mortgage to secure the indebtedness of the plaintiffs to the defendant the *Bank of Sumter*; and if the Court shall hold that a power of sale is conferred on the mortgagee by said instruments, these plaintiffs allege that the amount of the debt has not been established by a Court of competent jurisdiction, nor has the amount of the debt been

to the *Bank of Sumter* for the lands so conveyed as of this date. 2. That the proceeds of the said *fifteen* bales of cotton and the rents from said two places shall, when realized, be entered as a credit upon said indebtedness of *A. S. & W. A. Brown* to said *Bank of Sumter*. 3. That when the said $2,000 and interest is paid on the note of *Brown, Cuttino & Delgar*, the same shall be entered as a credit upon the said indebtedness of *A. S. & W. A. Brown* to the said bank, and when it is paid the *Bank of Sumter* is to release, satisfy and discharge a mortgage made by the said *Albertus S. Brown* and *W. Alston Brown* to *W. F. B. Haynsworth*, dated the *8th* day of *December*, 1893, and now held by the *Bank of Sumter*; the said mortgage covering the store and lot of land at the corner of *Maine* and *Liberty* streets, in the city of *Sumter, S. C.*, now occupied by *Brown, Cuttino & Delgar*. 4. That the *Bank of Sumter* is to participate in the assignment to be made by *A. S. & W. A. Brown* to the amount of $2,000 of its claims against them, and apply any dividends to be received to the credit of their indebtedness to the bank, after deducting all costs and expenses. 5. That the said *Albertus S. Brown* and *W. Alston Brown*, or either of them, and the heirs, executors, or administrators of either of them, may at any time, as long as the same may be owned by the *Bank of Sumter*, purchase all the real estate so conveyed as aforesaid from the bank, at a sum equal to their present indebtedness to the bank (before any of said credits hereinbefore mentioned were applied), with interest and taxes and all costs expenses added, the bank to allow credit for everything received in the meantime; and, as long as the same is owned by the bank, it will convey any of said property to *Albertus S. Brown* or *W. Alston Brown*, the heirs, executors or administrators of either of them, at the following sums respectively, adding interest as if said credits had been made, taxes, costs and expenses, and giving credits for rents and profits received and payments made, if any, viz: The '*Providence* Place' at $8,000, the '*Du Bose* Lands' at $1,500, and the '*Rocky Pine*' place at $2,000, and the interest of *Albertus S. Brown* in the lots of land in the city of *Sumter* at $1,000. That should none of said lands be so purchased, the *Bank of Sumter*, in any event, agrees to pay to the said *Albertus S. Brown*, or his heirs, executors or administrators, as to the land conveyed by him; and to *W. Alston Brown*, his heirs executors or administrators, as to the land conveyed by him; and to *Albertus S. Brown* and *W. Alston Brown*, their heirs, executors or administrators, as to the land conveyed by them, any sum or sums of money that it may realize from a sale or sales of said land in excess of their indebtedness to the bank as aforesaid, giving credit for rents and profits and income, and price or prices realized from lands, and deducting their indebtedness, interest, taxes, and all expenses. The interest referred to in this agreement, to which the *Bank of Sumter* is to be entitled, is to be on the indebtedness above specified and detailed, as if the said credits had not been made, calculated with quarterly or quarter-yearly rests, at the rate of *eight* per centum per annum on the principal and interest when due, said expenses to include attorneys' fees paid by or charged to the *Bank of Sumter* aforesaid. In witness whereof, the *Bank of Sumter* has, by its president and cashier, and under its seal, signed, sealed and delivered this agreement. [Signed] *The Bank of Sumter*, per *W. F. B. Haynsworth*, president; and per *W. F. Rhame*, cashier. [L. s.] Signed, sealed and delivered in presence of (the words 'as if said credit had not been made,' and the words and figures at $1,500 and at $2,000, first interlined, and the words and figures each at '$1,500' quarterly first interlined) *G. D. Ricker*."

consented to in writing by the debtor subsequent to the maturity of the debt.

VIII. That the said *$2,000* of the note of *Brown, Cuttino & Delgar* referred to in said agreement has been paid to the said the *Bank of Sumter*, and the mortgage to *W. F. B. Haynsworth* given up.

IX. That the said *A. S. & W. A. Brown* executed a deed of assignment on the *28th* day of *March*, 1895, in which *Moultrie R. Wilson* was appointed assignee, and *I. C. Strauss* was made agent of creditors, and the said the *Bank of Sumter* duly executed and filed an acceptance of its terms and a release of *$2,000* of their debts, and said acceptance and release extinguished *$2,000* of said indebtedness, and the same is no longer a charge upon the mortgaged premises or against these plaintiffs.

X. That the defendant the *Bank of Sumter* received as rent on said lands for the year 1895 the sum of *$1,132*, and as rent on said land for the year 1896 the sum of *$1,180*, as plaintiffs are informed and believe.

XI. They allege on information and belief that on the *5th* day of *November*, 1896, the *Bank of Sumter* conveyed to its co-defendant, *Marion Moise*, the *four* parcels of land above described by a deed, in which the consideration was alleged to be *$12,000*. That for some time previous to the said last mentioned conveyance, negotiations had been going on with *H. T. Edens* for a sale of the "*Providence* Place" at and for a consideration of *$10,000*; that the defendant *Marion Moise* had notice of the terms and conditions on which the said the *Bank of Sumter* held title to said land; that on the *10th* day of *November*, 1896, the said *Marion Moise* conveyed said "*Providence* Place" to the said *H. T. Edens* for the sum of *$10,000*, and the said *Marion Moise* still holds the other *three* parcels of land, claiming them as his own.

XII. These plaintiffs allege that the sums of money paid to the said the *Bank of Sumter* and *Marion Moise* have paid all the said indebtedness of the said *A. S. & W. A. Brown* to the said *Bank of Sumter*, and said debt secured by the said mortgage is paid in full, and said mortgage is satisfied. But, if any amount is found due thereon, these plaintiffs are ready to pay the same.

Wherefore the plaintiffs demand judgment: 1. That said conveyance and agreement may be adjudged a mortgage. 2. That the defendant, the *Bank of Sumter*, may establish its mortgage debt and account for the rents and profits of said several parcels of land. 3. That if said mortgage debt has been paid, the Court shall order that the said *Marion Moise* shall reconvey to the plaintiffs, according to their respective rights, the several parcels of land held by him, and, if any portion of the mortgage debt remains unpaid, that these plaintiffs may be allowed to pay the same, or, in default thereof that the same shall be sold by the master and the proceeds applied to the mortgage debt, and any portion not thus sold be conveyed to the plaintiffs. 4. If the court shall hold that the conveyance made to the defendant, *Marion Moise*, is a valid conveyance, then that the said *Bank of Sumter* shall account for and pay over to the plaintiffs any amount it may be found to have received over the mortgage debt.

5. That the plaintiffs may have such other and further relief as to the Court may seem just, and for their costs.

[(*Signature of attorney and verification.*)][1]

(*b*) *Quitclaim Deed and Defeasance.*

Form No. 17288.[2]

(Precedent in Snow *v.* Pressey, 85 Me. 408.)[3]

[(*Address and introduction as in Form No. 4271.*)][1]

I. That on the *third* day of *March*, 1874, the complainant was seised in fee of *seven undivided eighth* parts of a certain parcel of real estate therein described, situate in *Rockland*.

II. That on said *third* day of *March*, the complainant executed and delivered a mortgage of said real estate to one *G. W. Candee* and the defendant to secure payment of the sum of $4,000 in *four* equal payments of $1,000 each, in *four*, *eight*, *twelve* and *sixteen* months from the date thereof with *seven* per cent. interest, according to the tenor of *four* promissory notes of the same date given by the complainant to said *Candee* and the defendant.

III. That on the *first* day of *May*, 1884, one *Julius A. Candee*, executor of said *G. W. Candee*, then deceased, conveyed and assigned to the defendant all the interest which said *G. W. Candee* had at his decease, and which said executor then had in and to said mortgage and notes.

IV. That on the *16th* day of *August*, 1878, the complainant conveyed to the defendant all his right, title and interest in and to said premises, by his quitclaim deed and of that date appearing on its face to be absolute, and that the defendant then and as part of the same transaction executed and delivered to the complainant a separate instrument of defeasance of the tenor following, to wit: "Know all men by these presents, that I, *Andrew Pressey* of *Brooklyn*, *Kings* county, *New York*, in consideration of a conveyance of certain real estate this day made to me by *George L. Snow* of *Rockland*, in the county of *Knox* and State of *Maine*, to wit, a quitclaim of all of said *Snow's* interest in and to the premises described in a mortgage deed from said *Snow* to said *Pressey* and another, recorded in *Knox* registry of deeds in book *36*, page *252*, I do hereby covenant and agree with the said *Snow* and his heirs or legal representatives that on the receipt of the amount of the said mortgage claim of *G. W. Candee* of *New York* city and said *Andrew Pressey*, or an amount equal thereto, together with the interest thereon, with the amount of all other legal claims due said *Candee* and *Pressey*, I will reconvey the premises

1. The matter to be supplied within [ ] will not be found in the reported case.

2. This case was twice before the supreme court; first on appeal from a decree in favor of plaintiff after hearing on the bill (Snow *v.* Pressey, 82 Me. 552). It was then held that the instrument executed by defendant contained all the essential elements of a defeasance, and necessarily converted the absolute deed into a mortgage. On exception to the master's report (Snow *v.* Pressey, 85 Me. 408), the report and decree sustaining the bill were affirmed.

3. See, generally, *supra*, note 2, p. 814.

aforesaid to the said *George L. Snow*, his heirs or legal representatives, by a good and sufficient deed, including the interest of said *G. W. Candee* therein.

In witness whereof I have hereunto set my hand and seal this *16th* day of *August*, A. D. 1878. *Andrew Pressey.* (SEAL)"

V. That the defendant in the year 1878 entered into said premises and took possession, by complainant's consent, of an undivided portion thereof, to wit: *one* lime-kiln, a portion of the lime sheds and other buildings and structures, and wharves, and has remained in possession thereof ever since; and has received rents from other portions thereof.

VI. That on the *11th* day of *November*, 1887, the complainant demanded, in writing, of the defendant a true account of the amount due on each of said mortgages, and of the rents and profits, money expended in repairs and improvements, if any, and also the strip and waste committed upon the premises.

VII. That the complainant has frequently requested the defendant to render such an account, and to pay over the amount received by the defendant above the amount due him, and to surrender said premises, all of which the defendant has refused to do.

[Wherefore your orator prays][1] that an account may be taken; that the defendant pay over such sum, if any, that he has received above the amount due him; that compensation be decreed for strip and waste; that the complainant may be allowed to redeem; that the defendant surrender said premises to the complainant, and release the same to him, on payment of the complainant of such amount, if any, as may be found to be due the defendant, and for other and further relief.

[*Simonds & Robinson*, Attorneys for Plaintiff.][1]

(4) To Stay Foreclosure and to Redeem, Where Account Rendered was Untrue.

Form No. 17289.

(Precedent in Currier *v.* Webster, 45 N. H. 226.)[2]

[In the *Supreme Judicial* Court.
Rockingham County, ss.][1]

William A. Currier, of *Exeter*, in said county of *Rockingham*, and *John W. Currier*, of *East Kingston*, in said county, complain against *Benjamin F. Rowe* and *George B. Webster*, both of *East Kingston*, aforesaid, *William F. Sanborn*, of Kingston, in said county, and *George R. Perkins*, of *Sharon*, in the county of *Hillsborough*, and say, that, on the *fourth* day of *May*, A. D. 1859, said *Rowe*, one *Reuben W. Currier*,

1. The matter enclosed by [ ] will not be found in the reported case.

2. The case was heard upon the bill, answer and proofs. It was held that the allegation in the bill that the account rendered was erroneous was well founded, irrespective of the mistake in computation, which the court said was so patent that it should not be held to have any effect. The case was sent to a master to find the amount due upon the mortgage, plaintiffs to have their costs.

and said *W. A. Currier*, entered into an agreement to purchase certain lands, mill privilege, and the mills thereon, situated in said *Sharon*, then owned and occupied by one *William E. Young*, each to pay an equal share of the consideration therefor, and each to have an equal interest in said property and in the proceeds arising from the working of said mill; and, in pursuance of said agreement, said *Rowe*, *R. W. Currier*, and said *W. A. Currier* purchased said premises, and, on the same *fourth* day of *May*, 1859, received to themselves in fee simple a conveyance of said property from said *Young* for the consideration of *eighteen hundred* dollars, of which sum about *nine hundred and twenty-five* dollars was paid and secured to said *Young*, and the balance was to be paid to said *George R. Perkins*.

And the said grantees, on the same day, mortgaged the said premises to said *Perkins* to secure the payment of *four* notes, by them signed, bearing that date, and made payable to said *Perkins* or order, in bobbins. The first of said notes being for $275; the second for $200, payable *Dec. 1st*, 1859; the third for $200, payable *Dec. 1st*, 1860, and the fourth for $200, payable *Nov. 1st*, 1861. The said notes, with the payment to said *Young*, making up the full amount of the said consideration of $1800.

The first of said notes to said *Perkins* was paid by said grantees in equal shares, either in cash or in bobbins, or some other property belonging jointly to said promissors.

The said grantees, on the day of said purchase, took possession of said premises, and commenced running the same, the profits whereof were to be for their joint benefit in equal shares.

On the *7th* day of *May*, A. D. 1859, said *Reuben W. Currier* conveyed his interest in said premises to his son, *John W. Currier*, one of the plaintiffs, for the nominal consideration of $600; but said conveyance was in fact a gift from said *Reuben* to said *John*, and the said *John* was to assume and pay all the liabilities of said *Reuben* in the premises.

On the *12th* day of *October*, 1859, said *W. A. Currier* made a conveyance of all his legal title to said property to said *John W. Currier*, but his equitable interest did not pass by said deed, there being no consideration therefor; and the said conveyance being made as a matter of convenience, and for the sole and only purpose of enabling said *John* to make a legal title to the interest of said *W. A. Currier* in said premises to one *Franklin T. Snow*, who was proposing to purchase said premises; and, on the *29th* day of the same *October*, said *John W. Currier* and said *Rowe* did convey the whole of said premises to said *Snow* in fee simple, for the consideration of $2,000 paid and to be paid as follows: Said *Snow* paid in cash $400 and gave his *two* notes to said *Rowe* and *John W. Currier* — *one* for $400 and *one* for $600, secured by mortgages of said property; and further agreed to pay and take up the last *three* of the notes before mentioned, given by said *R. W. Currier*, *Rowe* and said *W. A. Currier*, to said *Perkins*, for $200 each, being the balance of said consideration of $2,000.

Said *Snow* entered into possession of said premises, and occupied the same until about the time of the service of the writ of possession hereinafter mentioned, when he abandoned the same, and has never

paid any part of his said notes to said *Rowe* and *J. W. Currier*; nor did he pay any part of the said notes to said *Perkins*, except the sum of $*50*, which was endorsed on that which became due on the *1st* day of *December*, 1*859*, under the date of *Dec. 21st*, 1*859*.

On the *11th* day of *December*, 1*860*, a suit was brought by said *Perkins* against said *W. A. Currier*, said *Rowe and R. W. Currier*, upon one of said notes which became due *Dec. 1st*, 1*860*, which was entered and is still pending in the *Supreme Judicial* Court for the county of *Cheshire*, unless judgment has been rendered therein.

On the *18th* day of *August*, 1*860*, said *Perkins* brought his writ of entry against said *Snow*, in the *Supreme Judicial* Court for the County of *Hillsborough*, to obtain possession of said premises under his said mortgage, which was duly entered in said Court; and such proceedings were had therein, that on the *4th* day of *September*, A. D. 1*861*, a writ of possession issued out of said Court, upon which possession of said premises was delivered to said *Perkins* on the *20th* day of *November*, 1*861*; a conditional judgment having been rendered in said suit on the *15th* day of *February*, 1*861*, for $*167.91* debt, and costs taxed at $*12.08*.

On the *20th* day of *November*, A. D. 1*861*, said *Perkins* conveyed to said *Webster* and *Sanborn* all his interest in the said premises; and on the same day said *Rowe* conveyed to said *Webster* and *Sanborn* all his interest in the same. And said *Perkins* at the same time conveyed to said *Webster* and *Sanborn* all his interest in the note and suit in *Cheshire* County.

And the plaintiffs aver and believe that possession of said premises was taken under the said writ of possession for the purpose of enabling said *Webster* and *Sanborn* to hold the same by virtue of said mortgage, and to bar the plaintiffs from their rights in the same; and the said suit in *Cheshire* County has been, since said *20th* day of *November*, prosecuted for the benefit of said *Webster* and *Sanborn*, and for the purpose of compelling said *W. A. Currier* to pay said note, when in equity and good conscience he ought not to pay any part thereof.

On or about the *first* day of *November*, 1*861*, the said *W. A. Currier*, being threatened with a suit upon the one of said notes falling due on that day, paid the same with the costs thereon to said *Perkins*, or his attorneys, to prevent said suit.

On the *22d* day of *May*, 1*862*, the plaintiffs made a demand in writing upon the said *Webster* and *Sanborn* and said *Rowe*, for a just and true account of all their demands secured by any and all mortgages upon said premises, and of all damages and costs incurred, and of all rents and profits received therefrom. And on the *6th* day of *June*, A. D. 1*862*, said *Webster* and *Sanborn* made their return in writing, setting forth the assignment from said *Perkins* to them of his said mortgage, and also that said *Rowe*, being mortgagee in a second mortgage, had released and quitclaimed all his interest in said premises to them; and said *Rowe* certifies that said statement, so far as he is concerned therein, is true, and said parties annex the following as a just and true account of their claim, to wit:

1861, *Nov. 20,*	To paid *George R. Perkins* for assignment of mortgage, etc.	$440 36
	Half expense of conveyances $1, recording 42	1 42
	Ames Sheriff, service of writ of possession	5 04
	Taxes (in part)	2 80
	Interest on above to date	14 83
	Trouble and expense in going to *Peterboro'* and *Sharon*, 5 days in all, at $2 each, including expenses	20 00
	Horse and wagon and expenses	7 50
	Dearborn and Scott counsel in *Cheshire* Co. say	12 00
	Tuck and French counsel, say	10 00
	Sundry correspondence and postage	4 00
		$517 15
Cr. 1862, *May 24,*	By cash received for rent of mill by *George R. Perkins*	20 00
	Balance due mortgagees	$597 95

And the said plaintiffs aver that said account is not just and true, but is false and untrue. And said *W. A. Currier* says that he has paid his full share and proportion of the amount due upon said mortgage and has done all that, in equity and good conscience, he ought to be compelled to do; but both of said plaintiffs are ready and willing to pay whatever sum may be justly and legally due from them.

And they further aver that they believe the said *Webster* and *Sanborn* are prosecuting the said suit for the purpose of compelling the plaintiffs or said *R. W. Currier* to pay the same, in order that they may obtain said premises for a trifling and greatly inadequate consideration, and, by completing the foreclosure of said mortgage, defraud said plaintiffs of their money and rights.

And they further aver that the said assignment and conveyances from said *Perkins* to said *Webster* and *Sanborn* were made by the procurement of said *Rowe*, and, with the conveyance from said *Rowe* to said *Webster* and *Sanborn*, were made by said parties for the purpose of defeating and embarrassing said *W. A. Currier* in the prosecution of his rights in the premises.

And they further aver that they are unable to ascertain what rights, if any, said *Webster* and *Sanborn*, or either of said defendants, claim by virtue of the said several conveyances and assignments, and pray that they may disclose the same, and whether said *Perkins* or said *Rowe* now have or claim any interest in said premises, and, if any, what.

Wherefore they pray that an injunction may issue to restrain said *Perkins*, or said *Webster* and *Sanborn*, in his name from further prosecuting his said suit in *Cheshire* county, and from levying or collecting of the plaintiffs or said *R. W. Currier*, any execution which may have

been, or shall be, issued in said suit, during the pendency of this bill, and until the final decision of the matters therein contained; that the foreclosure of the said *Perkins'* mortgage may be stayed, that the amount justly due upon said mortgage may be determined, that the plaintiffs may bring the same into court, if bound so to do, and have said mortgage discharged, or that said *Rowe*, or said *Webster* and *Sanborn* may be decreed to contribute their proportion of the same, as their respective rights may be, and for such other relief as may be just.

[(*Signatures of complainant and solicitor as in Form No. 4276.*)][1]

b. By Administrator of Mortgagor.

Form No. 17290.[2]

(*Title of court and cause as in Form No. 4273.*)

1. By a deed of mortgage dated *April 2d*, A. D. 1887, and recorded with (*stating place of record*), plaintiff's intestate, *Susan Munnigle*, conveyed to *Margaret D. Davis*, of *Boston*, in fee simple, a certain piece of land, with the buildings thereon, in *Cambridge*, and bounded and described as follows: (*description*).

2. In 1878, *Susan Munnigle* died intestate, leaving as her only heirs at law and next of kin *Catherine T. Tripp* and the said *Margaret D. Davis*. On *December 28th*, 1885, plaintiff was duly appointed administrator de bonis non of the estate of the said *Susan Munnigle*.

3. On *July 28th*, 1885, *Margaret D. Davis*, who was then *Margaret D. Kane*, died testate, devising all her real estate to *Henry Kane*, her husband, who was appointed executor of her will.

4. As said executor the said *Henry Kane* assigned the mortgage deed to *George H. Davis*, administrator of *Charles C. Davis*, and *George H. Davis* assigned the same to the defendant *Henry Kane* by deed of assignment dated *April 27*, 1886, and recorded with (*stating place of record*).

5. Default was made in the payment of principal and interest.

6. The said *Margaret D. Kane* for a long time prior to her decease, and the said *Henry Kane* during all the time since her decease, occupied the premises, and neither of them ever accounted to the estate of *Susan Munnigle* for the rents and profits of said premises.

7. On or about *May 8th*, and again on *May 20th*, 1886, the plaintiff requested the defendant, through *E. B. Goodsell*, his attorney duly authorized to represent him in the matter, to render individually and as executor of *Margaret D. Kane* an account of the amount due on the mortgage, and of the rents and profits, but the defendant refused to do either.

8. The value of said premises is greatly in excess of the amount due on said mortgage.

1. The matter to be supplied within [ ] will not be found in the reported case.

2. This form is the bill in the case of Dary *v.* Kane, 158 Mass. 376, and is copied from the records in the case. The court held that the interest and title of the plaintiff were sufficiently set forth in the bill and that the bill followed the form given in Mass. Stat. (1883), c. 223, § 17, as closely as possible.

9. The plaintiff offers to pay to the defendant what shall be found due on said mortgage.

10. At or about the time of making said request for an account, the plaintiff told the defendant, through his counsel *E. B. Goodsell*, Esq., who was duly authorized to represent him in the matter, that he wished to pay the amount due on the mortgage if said *Kane* would render to him an account thereof. It was then agreed by and between the plaintiff and the said *Goodsell* that the matter should be deferred till the said *Goodsell* should return from Europe in *September* of the present year, and that the said plaintiff should not take any steps in the sale of said premises as administrator for the payment of debts, and that the said *Kane* should take no steps for the foreclosure of the mortgage during said interval, and that no such steps should be taken by either party without giving the other actual notice thereof. But notwithstanding said agreement, the said *Kane*, before said *September*, and before the return of said *Goodsell*, and without notice to the plaintiff, caused a notice to be published in some newspaper, at present unknown to the plaintiff, that the said premises would be sold for the purpose of foreclosing said mortgage on *Saturday*, *September 11th*, at *ten* o'clock A. M.

The plaintiff had no actual notice of the intended sale until the *10th* day of said *September*.

And the plaintiff prays:

1. That an account may be taken of what is due to the defendant for principal and interest.

2. That an account may be taken of the rents and profits of the said premises which have been received, and which were received by said *Margaret D. Kane*, by the defendant, or by any other person, by his order or for his use, or which might but for his willful default have been so received, and that what shall appear to be due to the plaintiff in taking the account of rents and profits be deducted from what shall appear to be due to the defendant for principal and interest.

3. That it may be decreed that upon the plaintiff paying to the defendant the sum (if any) which shall so be found due upon the mortgage, the defendants be ordered to discharge said mortgage.

4. That an injunction be issued by said court enjoining the said defendant, his servants, agents and attorneys, from making said sale or any sale or conveyance of said premises during the pendency of this suit.

George A. Dary, Administrator De Bonis Non.
Samuel Hoar, Plaintiff's Solicitor.

(*Verification.*)

c. By Heir-at-Law of Mortgagor.

(1) In General.

Form No. 17291.[1]

(Curt. Eq. Prec. 87.)

(*Address as in Form No. 17284.*)

Humbly complaining, showeth unto your honors your orator *John Doe*, of the city of *Jersey City*, in the county of *Hudson* and state of

1. See, generally, *supra*, note 2, p. 814.

New Jersey, that *John Doe*, the elder, late of said city of *Jersey City*, in said county of *Hudson* and state of *New Jersey*, but now deceased, was seised in fee simple of or otherwise well entitled to a certain piece or parcel of real estate, situated in said city of *Jersey City*, in the county of *Hudson* and state of *New Jersey*, and described as follows, to wit: (*describing the premises*). And your orator further showeth that the said *John Doe*, the elder, in or about the year one thousand eight hundred and *ninety-four*, made some conveyance and assignment of the said premises unto *Richard Roe*, of the city of *Jersey City*, in said county of *Hudson* and state of *New Jersey*, the defendant hereinafter named, by way of mortgage for securing the repayment of a certain sum of money, with interest, then advanced to the said *John Doe* by the said *Richard Roe* (or *by Samuel Short, then of said city of Jersey City, and county of Hudson, on the part of and as agent of the said Richard Roe*). And your orator further showeth unto your honor that the said *Richard Roe*, upon or soon after the making of the said security, entered into the possession of the said mortgaged premises, or into the receipts of the rents and profits thereof, and hath ever since continued in such possession and receipt. And your orator further showeth that the said *John Doe*, the elder, departed this life in or about the year one thousand eight hundred and *ninety-six*, leaving your orator his sole heir-at-law, who thereupon became entitled to the equity of redemption of the said mortgaged premises. And your orator has frequently applied to the said *Richard Roe* and requested him to come to an account for the rents and profits of said premises so received by him, and to pay over to your orator what he should appear to have so received beyond the amount of the principal and interest due to him, and to deliver up the possession of the said mortgaged premises; and your orator well hoped that the said defendant would have complied with said requests as in justice and equity he ought to have done, but that the said *Richard Roe*, acting in concert with divers persons unknown to your orator, refuses to comply therewith. To the end therefore that the said *Richard Roe* and the rest of the confederates when discovered, may upon their several and respective corporal oaths, full, true, direct and perfect answer make to all and singular the matters hereinbefore stated and charged (or *to all and singular the premises* or *to all and singular the charges and matters aforesaid*); (*or, if answer on oath is waived, omit the words* "upon their several and respective corporal oaths," *and insert here:* "your orator hereby waiving, pursuant to the statute, the necessity of the answer of such defendants being put in under the oaths of the said defendants, or the oath of either of them"), as fully and particularly as if the same were hereinafter repeated and they thereunto distinctly interrogated (or *as fully in every respect as if the same were here again repeated and they thereunto again particularly interrogated*), and that not only as to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information, hearsay and belief (or *according to the best of their respective knowledge, information and belief*), and more especially that they may answer and set forth whether (*Here set out the interrogatories to be answered by the defendants*).

And that the said defendant may answer the premises, and that an account may be taken of what, if anything, is due to the said defendant for principal and interest on the said mortgage, and that an account may also be taken of the rents and profits of the said mortgaged premises which have been possessed or received by the said defendant or by any other person or persons by his order or for his use, or which without his wilful default or neglect might have been received, and that if it shall appear that the said rents and profits have been more than are sufficient to satisfy the principal and interest of the said mortgage, then that the residue may be paid over to your orator, and that your orator may be permitted to redeem the said premises, your orator being ready and willing and hereby offering to pay what, if anything, shall appear to remain due in respect to the principal and interest on the said mortgage, and that the said defendant may be decreed to deliver up possession of the said mortgaged premises to your orator or to such person as he shall direct, free from all incumbrances made by him or any person claiming under him, and may deliver over to your orator all deeds and writings in his custody or power relating to the said mortgaged premises, and that your orator may have such further and other relief in the premises as the nature of his case may require, and as to your honors shall seem meet.

May it please your honors, the premises considered, to grant unto your orator the state's writ of subpœna (*concluding as in Form No. 4277*).

(2) To Set Aside a Decree of Foreclosure Fraudulently Obtained, and for a Redemption.

Form No. 17292.[1]

(Curt. Eq. Prec. 89.)

(*Address as in Form No. 17284.*)

Humbly complaining showeth unto your honors, your orator, *John Doe*, of the city of *Jersey City*, in the county of *Hudson* and state of *New Jersey*, that *William Doe*, late of the city of *Jersey City*, in the county of *Hudson* and state of *New Jersey*, deceased, your orator's late father, during his life and on or about the *tenth* day of *June*, one thousand eight hundred and *eighty*, was seised in his demesne as of fee of and in the hereditaments hereinafter particularly mentioned, and by indenture of that date made between the said *William Doe* of the one part, and *Richard Roe*, of the city of *Jersey City*, in the county of *Hudson* and state of *New Jersey*, of the other part; the said *William Doe*, in consideration of *one thousand* dollars, granted, bargained, sold and demised unto the said *Richard Roe*, his executors, administrators and assigns, for the term of *one thousand* years, all of that certain piece and parcel of land, situate and being in said city of *Jersey City*, in the county of *Hudson* and state of *New Jersey*, described as follows, to wit, (*describing the premises*), subject to redemption on

1. See, generally, *supra*, note 2, p. 814.

payment of the said principal money and lawful interest at the time therein mentioned and long since past, as by the said indenture, reference being thereunto had, will more fully appear. And your orator further showeth unto your honors that the said *William Doe* departed this life on or about the *tenth* day of *September*, one thousand eight hundred and *eighty-five*, leaving your orator his heir-at-law and only child, then an infant under the age of *twenty-one* years, that is to say, of the age of *seven* years or thereabouts, him surviving. And your orator further showeth unto your honor that during your orator's minority, and on or about the *tenth* day of *March*, one thousand eight hundred and *eighty-eight*, the said *Richard Roe* filed his bill of complaint in this honorable court, against your orator, for a foreclosure of your orator's right and equity of redemption in the said mortgaged premises, but your orator was not represented in said bill to be then an infant, and the said *Richard Roe* caused and procured one *Samuel Short*, since deceased, who acted in the management of the affairs of your orator's said father, to put in an answer in the name of your orator, and without ever acquainting your orator or any of his friends or relations thereof, in which said answer a much greater sum was stated to be due from your orator on the said mortgage security to the said *Richard Roe* than in fact was really owing to him, and for which it was also untruly stated that the said mortgaged premises were an insufficient security, and in consequence of such answer being put in, the said *Richard Roe* afterwards, in conjunction with the said *Samuel Short*, on or about the *tenth* day of *April*, one thousand eight hundred and *eighty-nine*, obtained an absolute decree of foreclosure against your orator, which your orator has only lately discovered, and of which your orator had no notice and in which said decree no day is given to your orator, who was an infant when the same was pronounced, to show cause against it when he came of age, as by the said proceedings now remaining as of record in this honorable court, reference being thereunto had, will more fully appear. And your orator further showeth unto your honors that your orator, on the *fifth* day of *April last*, attained the age of *twenty-one* years, and shortly afterwards, having discovered that such transactions had taken place during his minority as aforesaid, by himself and his agents represented the same to the said *Richard Roe*, and requested him to deliver up possession of the said mortgaged premises to your orator on being paid the principal money and interest, if any, actually and fairly due thereon, which your orator offered and has at all times been ready to pay, and which would have been paid by the personal representatives of the said *William Doe* out of his personal assets during your orator's minority had any application been made for that purpose. And your orator hoped that the said *Richard Roe* would not have insisted on the said decree of foreclosure so fraudulently obtained as aforesaid, but would have permitted your orator to redeem the said mortgaged premises as he ought to have done. But now so it is, may it please your honors, the said *Richard Roe*, combining and confederating with divers persons at present unknown to your orator, whose names when discovered your orator prays he may be at liberty to insert herein, with apt words to charge them as par-

ties defendant hereto, and contriving how to wrong and injure your orator in the premises, he, the said *Richard Roe*, absolutely refuses to comply with such request, and he pretends that the said decree of foreclosure was fairly and properly obtained, and that a day was therein given to your orator when of age to show cause against the same, and that your orator has neglected so to do, and that your orator is not entitled to redeem or to travel into the said accounts, whereas your orator charges the contrary thereof to be true, and that your orator only attained the age of *twenty-one* years on the *fifth* day of *April last*, and that he has since discovered the several matters aforesaid by searching in the proper offices of this honorable court, and your orator expressly charges that under the circumstances aforesaid the said decree so fraudulently obtained as hereinbefore mentioned ought to be set aside and your orator ought not to be precluded thereby or in any other manner from redeeming the said mortgaged premises of which the said *Richard Roe* has possessed himself by such means as aforesaid. To the end, therefore, that the said *Richard Roe* and the rest of the confederates when discovered may, upon their several and respective corporal oaths, full, true, direct and perfect answer make to all and singular the matters hereinbefore stated and charged (or *to all and singular the premises* or *to all and singular the charges and matters aforesaid*); (*or, if answer on oath is waived, omit the words* "upon their several and respective corporal oaths," *and insert here:* "your orator hereby waiving, pursuant to the statute, the necessity of the answer of such defendants being put in under the oaths of the said defendants, or the oath of either of them"), as fully and particularly as if the same were hereinafter repeated and they thereunto distinctly interrogated (or *as fully in every respect as if the same were here again repeated and they thereunto particularly interrogated*), and that not only as to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information, hearsay and belief (or *according to the best of their respective knowledge, information and belief*), more especially that they may answer and set forth whether (*Here set forth the interrogatories to be answered by the defendant*), and that the said decree of foreclosure may, for the reasons and under the circumstances aforesaid, be set aside by this honorable court, and declared to be fraudulent and void, and that an account may be taken of what, if anything, is now due to the said *Richard Roe* for principal and interest on the said mortgage, and that an account may also be taken of the rents and profits of said mortgaged premises which have or might have been received by or on behalf of the said *Richard Roe*, and if the same shall appear to have been more than the principal and interest due on said mortgage, then that the residue thereof may be paid over to your orator, and that your orator may be at liberty to redeem the said mortgaged premises on payment of the principal and interest, if any, remaining due on the said security, and that the said *Richard Roe* may be decreed, on being paid such principal money and interest, to deliver up possession of the said mortgaged premises free from all incumbrances to your orator, or as he shall appoint, and to deliver all title deeds and writings relative thereto, and that your

orator may have such further and other relief in the premises as the nature of his case shall require and to your honors shall seem meet.

May it please your honors to grant unto your orator the state's writ of subpœna (*concluding as in Form No. 4277*).

d. By Junior Mortgagee.[1]

Form No. 17293.[2]

(*Title of court and cause as in Form No. 4273.*)

1. By a deed of mortgage, dated the *eighth* day of *April*, 1885, and recorded with (*stating place of record*), one *Oliver Gay*, of *Boston*, conveyed to one *Lyman Hollingsworth*, trustee, of said *Boston*, in fee simple, a certain piece of land situated at *Nantasket Beach*, in the town of *Hull*, in the county of *Plymouth*, in the commonwealth of *Massachusetts*, and bounded and described as follows: (*description*).

2. By his deed of assignment, dated the *thirtieth* day of *September*, 1887, said *Hollingsworth*, trustee, assigned said mortgage deed and the real estate thereby conveyed, and the debt thereby secured, to the defendant, which assignment is recorded with (*stating place of record*).

3. By his deed, dated the *tenth* day of *April*, 1885, recorded with (*stating place of record*), said *Gay* conveyed to one *Pauline A. Hayward*, of *Lowell*, in the county of *Middlesex*, said real estate, in fee simple, subject, however, to the aforesaid mortgage.

4. By her deed of mortgage, dated the *tenth* day of *April*, 1885, and recorded with (*stating place of record*), the said *Hayward* conveyed to said *Oliver Gay*, in fee simple, but subject, however, to said mortgage given as aforesaid to *Hollingsworth*, said piece of land described as aforesaid.

5. By his deed of assignment, dated the *ninth* day of *November*, 1885, and recorded with (*stating place of record*), said *Gay* assigned his said mortgage deed and the debt thereby secured to the plaintiff.

6. Default was made in the payment of the principal sum of the

1. Bill by a Junior Mortgagee. — A junior mortgagee may file a bill against the mortgagor and the senior mortgagee, asking an account of the mortgage debts and a sale of the property for the payment of the sums ascertained to be due on them, and he may offer in his bill to redeem from the senior mortgagee and have the property sold for the satisfaction of the entire amount then due to him, or have the property sold for both debts, and the proceeds of sale first applied to the older mortgage. Davis *v.* Cook, 65 Ala. 617.

Where before a decree of foreclosure the mortgagor executed a second mortgage, which was not recorded, and after the decree, but before the sale, executed another mortgage to the same party, which was recorded, a complaint by the junior mortgagee which contains no allegation that the holder of the senior mortgage had notice of the unrecorded mortgage, or any averment that the purchaser had any such notice, is demurrable, because the recorded mortgage given after the decree does not entitle the plaintiff to redeem. Harlock *v.* Barnhizer, 30 Ind. 370.

2. This form is the bill in the case of Long *v.* Richards, 170 Mass. 120, and is copied from the records. In the superior court, the bill was sustained and a decree entered for the plaintiff, which was affirmed on appeal and report to the supreme court.

See also, generally, *supra*, note 2, p. 814.

mortgage first above named, but the said interest was duly paid to *April, 8, 1887.*

7. On or about *February, 1, 1888*, the defendant took possession of the premises comprised in said mortgage, and has ever since continued in possession and in receipt of the rents and profits of the said premises.

8. The plaintiff offers to pay the defendant what shall be found due on the mortgage.

The plaintiff prays:

1. That an account may be taken of what is due to the defendant for principal and interest on his said mortgage.

2. That an account may be taken of the rents and profits of the said premises which have been received by the defendant or by any other person by his order or for his use, or which might, but for his wilful default, have been so received, and that what shall appear to be due to the plaintiff in taking the account of rents and profits and other sums received by the defendant be deducted from what shall appear to be due to the defendant for principal and interest.

3. That it may be decreed that upon the plaintiff paying to the defendant the sum (if any) which shall be found equitably due the defendant, the plaintiff shall have possession of the premises comprised in said mortgage to hold the same discharged of the said mortgage, and for such other and further relief as to the court may seem meet.

William H. Long,
By his attorney and solicitor, *D. C. Linscott.*

e. By Lessee of Mortgagor.[1]

1. Precedent. — In Bacon *v.* Bowdoin, 2 Met. (Mass.) 591, the bill by the lessee of the mortgagor, which was sustained, contained the following averments: That John Bowdoin, on the twenty-second day of June, 1836, conveyed to Joshua Shaw several tracts of land in Belchertown, and a gristmill and the carding machines in the mill, and the ground on which the gristmill then stood, and "*one* undivided half of the mill yard," (setting forth the boundaries), "with *one* undivided half of the water power;" and that Shaw, on the same day, mortgaged the same premises to Bowdoin, to secure promissory notes and sums of money which he owed to Bowdoin: That said Shaw, on the fourteenth day of July, 1837, by indenture, which was duly recorded, demised to the plaintiff a certain building and the land on which it stood, and still stands, with water power, etc., for the term of ten years from the first day of September, 1837 — said demised premises being part of the estate which Shaw, before said demise, had mortgaged to Bowdoin, and the plaintiff not knowing, at the time of the demise, that the demised premises were so mortgaged: That the plaintiff entered into possession, under said demise, and continued in possession until interrupted as hereinafter set forth: That the plaintiff, on the nineteenth day of October, 1838, conveyed his interest in said demised premises to Homer Bartlett, in mortgage, to secure to him the sum of $500, and that Bartlett, on the twenty-fifth day of April, 1840, released his right under said mortgage to the plaintiff, who has ever since had all the rights conveyed to him by the indenture aforesaid, executed by J. Shaw: That on the twenty-third day of May, 1839, Bowdoin conveyed to Town & Ferry, the other defendants, all his right in the premises mortgaged to him by Shaw, and that Shaw, on the same day, released to them all his right therein; they having, at the time, knowledge of the demise from Shaw to

Form No. 17294.[1]

(*Title of court and cause as in Form No. 5926.*)

The complaint of the above named plaintiff respectfully shows to this court,

That on the *tenth* day of *July*, 1896, the defendant *Samuel Short*, being the owner in fee of the premises hereinafter described, by an indenture dated on that day, a copy of which is hereto annexed and made a part of this complaint, marked "Exhibit *A*," leased said premises to plaintiff; that by virtue of said lease this plaintiff, on said *tenth* day of *July*, entered upon and ever since has been and still is in possession of said premises, and is vested with the unexpired term thereof, which said premises are bounded and described as follows, to wit, (*describing the premises*).

That on the *third* day of *January*, 1897, the said defendant *Samuel Short* made to the defendant *Richard Roe* a bond under his hand and seal, dated on said day, and conditioned to pay (*Here state condition of bond*), and to secure the payment of said bond, on said *third* day of *January*, made and executed to the said defendant *Richard Roe* a mortgage upon the aforesaid premises, payable on the *third* day of *January*, 1901.

That on said *third* day of *January*, 1901, said mortgage became due but has not been paid, and the said defendant *Richard Roe* has commenced an action in the *Supreme* Court of the state of *New York*, in said county of *Suffolk*, to foreclose said mortgage for such default.

That on the *tenth* day of *January*, 1901, this plaintiff tendered to the said *Richard Roe* the sum of *eight hundred and seventy-two* dollars, being the amount due on said bond, with interest and the costs of said action up to that time, in redemption of said mortgage, and this plaintiff has ever since been ready and willing to pay the same, and did then and there request said defendant *Richard Roe* to assign to him, said plaintiff, the said mortgage, but he, the said *Richard Roe*, refused so to do.

Wherefore plaintiff demands judgment that he be allowed to redeem said mortgage upon the payment to the defendant *Richard Roe* of the amount due upon said bond, with interest and costs of said action, and that upon such payment the said defendant *Richard Roe*, by an assignment duly executed and acknowledged by him, assign said bond and mortgage to this plaintiff, and for such other and further relief as may be proper.

(*Signature and office address of attorney, address and verification as in Form No. 11457.*)

the plaintiff: That said Town & Ferry, on the same twenty-third day of May, mortgaged said premises to Bowdoin, to secure (*inter alia*) the money before secured by the mortgage made to Bowdoin by Shaw: That Shaw, on the twenty-fourth day of May, 1839, indorsed on said last mentioned mortgage a certificate that Town & Ferry, on that day, and with said Shaw's consent, entered upon and took possession of the mortgaged premises, for condition broken; which certificate was, within the next thirty days, recorded in the registry of deeds. That the three defendants deny the plaintiff's right to redeem the mortgage made by Shaw to Bowdoin, and threaten to eject him from the premises demised to him by Shaw, and have deprived him of the use of the water power, etc.

1. See, generally, *supra*, note 2, p. 814.

2. Answer.[1]

1. Requisites of Answer, Generally. — For the formal parts of an answer in a particular jurisdiction see the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799; ANSWERS IN EQUITY, vol. 1, p. 854.

Precedents — *Tender Made Too Late.* — In Haley *v.* Young, 134 Mass. 364, where the bill was dismissed for the reason that it was not brought within the three years limited by statute, the plea alleged that the foreclosure became absolute on February 19, 1882, and "that at no time prior to the *20th* day of *February*, 1882, was any tender of the amount due on said mortgage or any other sum made to her by the plaintiff, or by any other person, nor was any demand or request made upon her for an account of rents or profits of the mortgaged premises or of the amount due on the mortgage, nor had she any notice of the intention or desire on the part of the plaintiff, or of any person, to redeem the premises from said mortgage."

That Instrument was a Deed Absolute. — In Brown *v.* Sumter Bank, 55 S. Car. 51, the complaint sought to have a deed absolute on its face declared a mortgage. To this complaint two answers were filed. The first, filed by the defendant bank, omitting formal parts, was as follows:

"The defendant the *Bank of Sumter*, answering the complaint herein, admits the allegations to be true which are contained in the paragraphs of the complaint designated *I*, *II*, *III*, *VI*, *VIII*, and all of paragraph *IV*, except the allegation therein contained that the plaintiffs were indebted to the *Bank of Sumter*, at the time alleged, only in the sum of $*13,500*. This defendant, on information received from its cashier, and belief, alleges that at that time the indebtedness of the plaintiffs to the defendant amounted to the sum of $*14,500*, and was secured by the mortgages referred to in said paragraph *IV*. This defendant admits the allegations in paragraph *V*, except the allegation therein that the land therein referred to 'was conveyed and held as security for the whole indebtedness of the said *A. S. & W. A. Brown* to the said the *Bank of Sumter*,' which allegation this defendant denies, and alleges to the contrary thereof that the said conveyance was not intended or accepted by this defendant as or to be a security for said indebtedness; but was regarded and accepted by this defendant as a bona fide sale and conveyance to this defendant of said lands in fee-simple absolute. This defendant admits the truth of the allegations in paragraph *VII* of the complaint, except the allegations therein, 'that the said conveyance and agreement executed on the *26th* day of *March*, 1895, constituted a mortgage to secure the indebtedness of the plaintiffs to the defendant, the *Bank of Sumter*,' which allegation this defendant denies. This defendant admits that, as stated in paragraph *IX* of the complaint, the said *A. S. & W. A. Brown* executed a deed of assignment; and that in compliance with a clause of the agreement set out in the complaint in paragraph *VI*, this defendant participated in the assignment by presenting a claim for $*2,000* against the assigned estate. But this defendant alleges that by the express terms of said agreement only the dividends to be received therefrom were to be applied to the credit of the indebtedness of the plaintiffs to this defendant, after deducting all costs and expenses, and this defendant denies that $*2,000* of said indebtedness was thereby extinguished, and denies that the said $*2,000* is, as alleged in paragraph *IX*, no longer a charge upon the mortgaged premises against the plaintiffs. This defendant alleges, upon information and belief, that only about the sum of $*136.66* has been received by this defendant as dividends from the said assigned estate. This defendant denies, on information and belief, that the sums of money alleged in paragraph *X* of the complaint to have been received by this defendant for rents of said lands were received. This defendant, on information and belief (having been so informed by its cashier), alleges that the rents received for said lands were smaller than the sums stated in the said paragraph *X*. This defendant, on information and belief (having been so informed by its cashier), denies that the amount of the proceeds of the sale by this defendant of the said lands and of the rents and dividends received by this defendant, and of the $*2,000* on the note of *Brown, Cuttino & Delgar*, referred to in complaint, did altogether

equal the amount of the indebtedness of the plaintiffs to this defendant."

The defendant Moise filed a separate answer, which, omitting formal parts, was as follows:

"The defendant *Marion Moise*, by his answer, which is hereby amended as of course, answering the complaint herein: I. Denies each and every allegation of the same, except such as may be hereinafter admitted. II. The said defendant, further answering said complaint, admits the allegations contained in paragraphs numbered *I*, *II*, *III*, *VI*, *VIII*, and all of paragraph *IV*, except the allegation therein contained to the effect that the plaintiffs were only indebted to the *Bank of Sumter*, at the time alleged, in the sum of $*13,500*. This defendant alleges, on information and belief, that the said plaintiffs were indebted to the said bank at the time in the sum of $*14,500*; and this defendant admits all of paragraph *V*, except the allegation therein contained to the effect that the conveyance referred to was taken and held by the bank as security for the whole indebtedness of the plaintiffs to the bank, which statement this defendant alleges to be untrue; and this defendant admits all of paragraph *XI*, except so much of the allegations therein contained as alleges that, for some time previous to the execution of the conveyance by the plaintiffs to the bank, negotiations had been pending with one *H. T. Edens* for a sale of the *Providence* place. This defendant admits all of paragraph numbered *VII*, except the allegation to the effect that the conveyance and agreement therein referred to constituted a mortgage; and this defendant, answering paragraph *IX* of said complaint, admits that the plaintiffs executed a deed of assignment as therein alleged, but he alleges that the bank has only received a dividend, as he is informed and believes, of about *eight and one-third* per cent., amounting to about $*166.66*; and he denies that the balance of the amount proven against said assigned estate has been extinguished; but on the contrary he alleges that the balance of said debt is a valid and subsisting obligation due to the bank by the plaintiffs, and that the plaintiffs are not entitled to a credit of $*2,000*, as alleged. This defendant admits that the consideration expressed in his deed to *H. T. Edens* is $*10,000*, but he alleges that the true consideration of said deed was an exchange of the *Providence* place for a tract of land in *Marlboro* County, and that the consideration actually received was considerably less than that expressed in said deed. III. This defendant alleges that the conveyance by the plaintiffs to the *Bank of Sumter*, referred to in paragraph *V* of the complaint, represents a bona fide sale and conveyance of all of the premises described therein in fee simple absolute to the bank; that at the time of said conveyance the said bank held bona fide mortgages executed by the plaintiffs to the bank, covering all of the lands described in said conveyance, and in addition thereto one of the mortgages executed by the plaintiffs to *W. F. B. Haynsworth* for the benefit of the bank, covering the storehouse and lot in the city of *Sumter* then occupied by *Brown, Cuttino & Delgar*. This defendant alleges that it was expressly agreed that said city lot should not be sold and conveyed to the bank, but that the bank should release and satisfy its mortgage aforesaid upon said lot of land, upon the payment to it of the sum of $*2,000*, and interest from the day of the date of said conveyance; that the negotiations and sale by the plaintiffs to the bank were conducted with this defendant, and it was not intimated nor contemplated by either of the said parties that the bank was taking a security for a debt, but, on the contrary, it was expressly understood that the bank was making a bona fide purchase; and to that end the liens of the various mortgages covering the lands described in said deed were left open, to perfect the title against dower and all other incumbrances, and thereby make said conveyance effectual. IV. This defendant alleges that in the fall of 1895 the said bank received an offer of purchase for the *Providence* place and as a courtesy to the plaintiff, *A. S. Brown*, notified him of the intended sale; whereupon he asked an option on the place, which the bank granted, and subsequently lost the sale by reason of the urgent request of the said *A. S. Brown* to the bank to hold the property until he, *A. S. Brown*, could realize the money with which to make the purchase; that in the spring of 1896 the plaintiff, *A. S. Brown*, made an offer of purchase to the bank of $*1,000* for the interest he had conveyed the bank in a lot of land in the northwest section of the city, covered by the deed aforesaid, but the

bank declined to make the sale because the said *A. S. Brown* offered *ten* shares of the capital stock of said bank in payment instead of the money, which the bank did not think proper to accept, as it was not buying up its own stock; that on the *13th* day of *August*, 1897, the plaintiff *W. A. Brown*, requested this defendant to sell him a portion of the '*Rocky Pine* Place,' but the offer was declined because the defendant was unwilling to sell the part wanted, for the reason that the sale of that portion of the premises would have rendered the balance of the tract unremunerative. V. This defendant alleges that his principal reason for purchasing the real estate from the bank was to rid it of that class of property, which the bank did not want, could not manage, and could not make yield *eight* per cent. net income without making large expenditures in ditching and draining the land and erecting tenant houses. That all of the tenants on the *Rocky Pine* and *Du Bose* tracts had notified the bank that they could not continue to rent the premises unless new houses were erected, as all of the old ones were in a dilapidated condition. This defendant alleges that the city lot was at the time of the purchase by the bank, and still continues to be, unimproved and unremunerative. This defendant further alleges that in 1895 the tenants upon the *Providence* place notified the bank that it would be necessary to expend a large sum of money to ditch and drain the plantation, as it was then unhealthy by reason of the lack of proper drainage, which was causing much sickness at the time. VI. This defendant alleges that he purchased the property referred to, believing at the time that he was receiving a good title in fee simple; that he has expended considerable sums of money in ditching and draining the lands and building tenant houses upon the *Du Bose* and *Rocky Pine* places, believing that his title thereto was good in fee, and that he is entitled to be fully reimbursed for such expenditures in case the Court should hold that the bank is liable to an accounting to the plaintiffs. This defendant further alleges that he has seen and talked with the plaintiffs frequently since he purchased said property, and that neither of them either said or intimated in any way that his title was not good in fee simple to the premises, but, on the contrary, they stood by and saw this defendant erect improvements upon said property, and have made offers of purchase of the property aforesaid."

A demurrer was filed to both answers, on the ground that they did not state facts sufficient to constitute a defense. It was held that the answers were not demurrable for that reason, but that they might be amended by inserting additional facts to show that the deed in question was not intended to be a mortgage, but was in fact an absolute conveyance.

Valid Sale Under Power in Mortgage. — In Madigan *v.* Workingmen's Permanent Bldg., etc., Assoc., 73 Md. 317, where the decree dismissing a bill to redeem was sustained, part of the answer, which set up a valid sale of the mortgaged premises, was as follows:

"2nd. These defendants further answering, say, that the mortgage aforesaid from the plaintiff to said association contained power and authority to the 'attorney of said association' to sell the said mortgaged premises upon default in said mortgage; that there was default in said mortgage, and that a sale of the premises was made by the attorney of said association named in a separate power of attorney in the year 1872, the said association becoming the purchaser thereof; that the said sale was duly reported to the *Circuit* Court for *Talbot* County, and after objections filed to the same and stubbornly contested, the said sale was finally ratified and confirmed by this Court at the *May* Term of the same, in the year eighteen hundred and *seventy-three*; that said *Madigan* and wife thereupon delivered possession of the same to the purchaser, and never until the filing of this bill made any claim to the property whatsoever."

It was contended in this case that as the mortgage conferred the power to sell upon "the solicitor" of the corporation, without naming the individual solicitor as required by the terms of the statute, it was invalid. It was further claimed that chapter 187 of the acts of 1890 of Maryland, relating to sales made under powers, declaring that every such sale shall "be and the same is hereby made valid and effectual to all intents and purposes as fully as if the person so making said sale had been named in said mortgage," had no application to the case, on the ground

Form No. 17295.

(Precedent in Snow *v.* Pressey, 85 Me. 410.)[1]

[(*Commencement as in Form No. 1448.*)][2]

I. Defendant admits the first and second allegations of the bill.

II. Defendant claims that the mortgage to *Candee* and himself has been forever foreclosed.

III. The defendant admits the third allegation of the bill.

IV. Defendant denies that the quit-claim deed and instrument described in the fourth clause of the bill constituted a mortgage, and alleges that the quit-claim deed of *August 16*, 1878, was an absolute conveyance of the premises.

V. Defendant admits that he has been in possession of the premises and has received the rents and profits thereof since *August 16*, 1878.

VI. Defendant denies that he is under any obligation to account to the complainant.

[*W. H. Fogler*, Attorney for Defendant.][3]

3. Decree or Order.[4]

that the act was passed while the suit in question was pending in the court. It was held that the legislature had power by retrospective curative legislation to provide for such cases, and that the act covered cases pending at the time of its passage.

Waiver of Objections to Redemption. — Where the answer stated that "waiving for the purposes of this suit all objections to the redemption by the plaintiffs of the estate sought to be redeemed by this bill of complaint, they are ready and willing, upon the payment to them by the plaintiffs of all such sums as shall be found due to them, or either of them, and also all claims and liabilities for which said property would be justly holden if the plaintiffs' right to redeem the same were unquestioned, to remise, release and quit-claim the same to the plaintiffs," it was held that this waiver prevented the defendants from thereafter setting up that the mortgage had been foreclosed before the commencement of the suit. Strong *v.* Blanchard, 4 Allen (Mass.) 538.

1. This case was heard upon the bill and answer, and the bill was sustained.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. The matter enclosed by [ ] will not be found in the reported case.

4. Requisites of Decree or Order, Generally. — For the formal parts of a decree or order in a particular jurisdiction see the titles JUDGMENTS AND DECREES, vol. 10, p. 645; ORDERS, vol. 13, p. 356.

The decree must not permit redemption on terms more favorable than prayed for in the bill. Barrett *v.* Short, 41 Ill. App. 25.

Amount Due. — A decree in favor of the complainant should find the precise amount due to the defendant. Stevens *v.* Coffeen, 39 Ill. 148.

Payment of mortgage debt to the mortgagee must be directed, and equity requiring that the mortgagee should have his money no redemption can be decreed on any other ground. Cowles *v.* Marble, 37 Mich. 158. And a decree directing that the mortgaged property be given up before the amount due on the mortgage is paid is erroneous. Reed *v.* Lansdale, Hard. (Ky.) 8; Simmons *v.* Marable, 11 Humph. (Tenn.) 436.

Time for Redemption. — *Generally.* — By the general practice, a decree must provide a reasonable time within which the plaintiff must pay the amount found due. Cline *v.* Robbins, 112 Cal. 581; Chicago, etc., Rolling Mill Co. *v.* Scully, 141 Ill. 408; Sanders *v.* Peck, 131 Ill. 407; Decker *v.* Patton, 120 Ill. 464; Pitman *v.* Thornton, 66 Me. 469; Dennett *v.* Codman, 158 Mass. 371; Stevens *v.* Miner, 110 Mass. 57; Waller *v.* Harris, 7 Paige (N. Y.) 167.

In *Michigan*, the decree should be for redemption by payment of the amount actually due within a specified time. Huyck *v.* Graham, 82 Mich. 353;

a. Interlocutory.

(1) Overruling Demurrer to Answer.

Form No. 17296.

(Precedent in Brown *v.* Sumter Bank, 55 S. Car. 63.)[1]

Meigs *v.* McFarlan, 72 Mich. 194; McKenna *v.* Kirkwood, 50 Mich. 544; Grover *v.* Fox, 36 Mich. 461; Fosdick *v.* Van Husan, 21 Mich. 567.

In *Vermont*, a decree is the same on a bill to redeem as on a bill to foreclose, viz., it provides a time when the money due on the mortgage is to be paid, and, on failure, that the equity of redemption be foreclosed. Smith *v.* Bailey, 10 Vt. 163.

Dismissal of Bill — *Generally.* — The decree should provide that in default of payment by the mortgagor within the time limited the bill or complaint be dismissed. Cline *v.* Robbins, 112 Cal. 581; Chicago, etc., Rolling Mill Co. *v.* Scully, 141 Ill. 408; Sanders *v.* Peck, 131 Ill. 407; Decker *v.* Patton, 120 Ill. 464; Pitman *v.* Thornton, 66 Me. 469; Dennett *v.* Codman, 158 Mass. 371; Stevens *v.* Miner, 110 Mass. 57; Waller *v.* Harris, 7 Paige (N. Y.) 167.

Effect of Dismissal. — A decree dismissing bill is held to work a foreclosure. Shannon *v.* Speers, 2 A. K. Marsh. (Ky.) 311; Pitman *v.* Thornton, 66 Me. 469; Stevens *v.* Miner, 110 Mass. 57; Adams *v.* Cameron, 40 Mich. 506; Goodenow *v.* Curtis, 33 Mich. 505; Martin *v.* Ratcliff, 101 Mo. 254; Perine *v.* Dunn, 4 Johns. Ch. (N. Y.) 140; Wilcox *v.* Balger, 6 Ohio 406. And so a decree which does not provide for a sale, and says that if the amount required by way of redemption is not paid within the time named, then the mortgage shall stand foreclosed, is held to be in effect the same as a decree providing that if the money is not paid within the specified time, then the bill shall be dismissed. Martin *v.* Ratcliff, 101 Mo. 254. But, by virtue of a decree that on default of payment the bill or complaint be dismissed, no title passes to the mortgagee. Tetrault *v.* Labbe, 155 Mass. 497; Bolles *v.* Duff, 43 N. Y. 469. And a final order must be obtained, upon proof of the fact of default, that the complaint stand dismissed. Bolles *v.* Duff, 43 N. Y. 469.

In *Massachusetts*, it has been held that, for the purpose of foreclosing a mortgage and vesting title in the mortgagee, a decree or judgment which in substance terminates the suit upon its merits is sufficient, as, after default, a decree obtained by the mortgagee for his costs. Stevens *v.* Miner, 110 Mass. 57.

Sale of Premises. — *Generally.* — In some jurisdictions, it is held that the decree should direct that, in default of the payment of the amount due within the time specified, the premises be sold as in foreclosure cases. Huyck *v.* Graham, 82 Mich. 353; Meigs *v.* McFarlan, 72 Mich. 194; McKenna *v.* Kirkwood, 50 Mich. 544; Grover *v.* Fox, 36 Mich. 461; Fosdick *v.* Van Husan, 21 Mich. 567; Jones *v.* Porter, 29 Tex. 456; Turner *v.* Turner, 3 Munf. (Va.) 66. In Martin *v.* Ratcliff, 101 Mo. 254, it was held that the decree permitting a redemption need not contain directions that in case of default in payment the premises should be sold.

In *North Carolina*, the decree upon default of payment should be for a sale of the property, and that out of the proceeds the incumbrance be discharged and the surplus paid to the mortgagor. Ingram *v.* Smith, 6 Ired. Eq. (41 N. Car.) 97.

Payment to Assignee. — Where the bill was to redeem a deed absolute in form, and before the filing of the bill the mortgagee had conveyed his interest, it was held the decree should have directed that the amount due be paid to the assignee instead of to the mortgagee. Emerson *v.* Atwater, 12 Mich. 314.

Judgment for deficiency may be granted, and this whether demanded in the prayer for relief or not, if the allegations and proof warrant. Johnson *v.* Loftin, 111 N. Car. 319.

On Bill by Tenant in Common. — In redemption by a tenant in common of land, the court should decree that in default of payment by the other tenants in common of their several portions of the money paid in effecting the redemption, the interest of the co-tenants be sold and the proceeds applied to the extinguishment of the lien upon the interests of such co-tenants acquired by the tenant making the redemption. Calkins *v.* Steinbach, 66 Cal. 117.

1. Upon appeal from an order of the

[State of *South Carolina*, County of *Sumter*. } Court *of Common Pleas.*

Lilie H. Brown and *Robert O. Purdy*, as trustees and representatives of *Albertus S. Brown* and *W. Austin Brown*, individually, and as surviving partner of the firm of *A. S.* and *W. A. Brown*, plaintiffs,
against
Bank of Sumter and *Marion Moise*, defendants. } Judgment on Demurrer.][1]

Upon hearing the complaint in this action, and the answers of the defendants and demurrers of the plaintiffs to said answers, and upon arguments of counsel, it is ordered, upon motion of *Haynsworth & Haynsworth* and *Lee & Moise*, defendants' attorneys, that said demurrer be and the same is hereby ordered overruled, among other reasons, because it appears from the pleadings that the deed of *26th March*, 1895, was not a mortgage, but an absolute conveyance, fairly, intelligently, and voluntarily made by the plaintiffs themselves for a consideration fixed by themselves, and it was a transaction disconnected with the mortgage contract.

[*June 10*, 1898. *R. C. Watts*, Presiding Judge.][1]

(2) That Case be Sent to Master for Accounting.[2]

Form No. 17297.

(Precedent in Snow *v.* Pressey, 85 Me. 410.)[3]

[(*Venue and title of court and cause as in Form No. 12121.*)

This cause came on to be heard this *tenth* day of *December*, 1888, on bill, answer and proof, and was argued by counsel, and thereupon and in consideration thereof

It is ordered, adjudged and decreed as follows, viz.:][4]

That the bill be sustained, and that the defendant account for all rents and profits received by him from the premises described, or by any other person or persons by his order or for his use, or which he without his default might have received, and the case be sent to a

trial court in overruling the demurrers to the answers of the defendants in this case, the order was affirmed and the case remanded to the circuit court for further proceedings.

See also, generally, *supra*, note 4, p. 853.

1. The matter enclosed by [ ] will not be found in the reported case.

2. **Decree for an Accounting.** — Where the bill does not pray for an account, but it is alleged that an account has been previously demanded, and prays for full answer to the bill, and the defendant answers, among other things, that "if the plaintiff should prove his alleged ownership and right to an account, this defendant is ready and willing to render such account as may be directed by the court," it is held that a reference to the master to state the account is proper. Lamson *v.* Drake, 105 Mass. 564.

3. This decree was affirmed in Snow *v.* Pressey, 82 Me. 552, and upon appeal from the report of the master was reaffirmed and the report of the master affirmed.

4. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

master in chancery with directions to hear the parties, determine the amount with which the defendant is to be charged for such rents and profits, and all matters of accounts between the parties in relation to the mortgage debt, and make report thereof, with the amount, if anything, due on the mortgages.

[(*Signature of justice as in Form No. 12121.*)][1]

(3) That Defendant Deliver Up Premises, but with Provision for Further Order.

Form No. 17298.

(Precedent in Gerrish *v.* Black, 109 Mass. 475.)[2]

[(*Venue and title of court and cause as in Form No. 12123.*)][3]

This case having been fully heard and argued by counsel, therefore and upon consideration thereof, it is ordered, adjudged and decreed as follows:

First, that the defendant, upon payment to him by the plaintiff within *sixty* days from the *twentieth* day of *August* last past, of the sum of *twenty thousand four hundred and seven* dollars and *twenty-nine* cents, with interest thereon at the rate of *six* per centum from the *first* day of *June* now last past, shall release and discharge the mortgaged premises described in the plaintiff's bill of complaint from the mortgage therein described and set forth.

Second, that the defendant, upon payment or tender to him of said sum of *twenty thousand four hundred and seven* dollars and *twenty-nine* cents, with interest as aforesaid, by the plaintiff, shall assign,

1. The matter enclosed [ ] will not be found in the reported case.

2. In this case the defendant failed to make the payment within the time specified in the order, and filed a motion in the trial court setting forth the fact of the nonpayment, and that his failure to pay arose from the mistake of himself and his solicitor as to the time within which payment was to be made, that he had the money ready to pay, and prayed that the time for payment might be extended. Upon hearing on this motion, a decree extending the time for payment was made. The authority of the court, upon motion only, to alter the terms of the first decree was questioned by the defendant. It was held that the decree, because of its provisions for a further order, etc., was not a final decree, and that either party might apply for further orders, and that it was proper, on a motion by the plaintiff, to alter and vary the decree so as to extend the time for payment.

The decree extending time for payment was as follows:

"And now, the plaintiff having moved and petitioned the court to alter and vary the decree heretofore made an entered in said cause on the *twenty-eighth* day of *September* last, for the reasons set forth in the plaintiff's motion, and the court having fully heard the plaintiff and defendant and their evidence, thereupon and upon consideration thereof, it is ordered, adjudged and decreed as follows: in that the first clause in said decree made on the *twenty-eighth* day of *September* last be altered, revised and changed, so that the money named therein shall be paid within *sixty* days from the *thirtieth* day of *August* last past, by the plaintiff to the defendant; and if said money named in said first clause of said decree, to be paid by the plaintiff to the defendant, is paid or tendered to the defendant by the plaintiff within *sixty* days from the *thirtieth* day of *August* last past, it shall have the same effect upon the rights of all parties as if the same had been paid within the time named in said decree of *September* the *twenty-eighth.*"

3. The matter to be supplied within [ ] will not be found in the reported case.

transfer and convey to the plaintiff all claims for rent of said mortgaged premises accruing since the *first* day of *April* last past, now uncollected, and shall pay over to the plaintiff all sums received by him for rent of said mortgaged premises accruing since said *first* day of *April*, deducting therefrom, upon such sums so received by him in cash, a commission at the rate of *five* per centum, and also all sums paid by the defendant for repairs of said mortgaged premises since said *first* day of *April* last past; and if said sums so received by the defendant for rents since said *first* day of *April* shall not, after deduction therefrom of said commission of *five* per centum, be equal to the sums paid by him for repairs of said mortgaged premises since said *April first*, then the plaintiff is to pay to the defendant the difference between said sums so received for rents, less said commissions and said sums so paid for repairs by the defendant.

Third, that upon payment to the defendant by the plaintiff of said first mentioned sum of *twenty thousand four hundred and seven* dollars and *twenty-nine* cents, and interest from the *first* day of *June* last past, the defendant is to transfer, give and deliver up to the plaintiff the possession of said mortgaged premises described in the plaintiff's bill of complaint.

Fourth, either party may apply to the court, in case any question shall arise as to carrying the foregoing decrees and orders into execution, for further orders and decrees; and the question as to the right of either party to recover costs against the other is hereby expressly reserved for the further order and decree of the court. But in default of the payment by the plaintiff of the sums aforesaid at the time aforesaid, by him to be paid, the defendant shall hold and retain the premises described in said mortgage as foreclosed, wholly free, clear and discharged of said mortgage.

[(*Date and signature as in Form No. 12123.*)][1]

b. Final.

(1) For Redemption Against Mortgagee in Possession.

Form No. 17299.[2]

(*Title of court and cause as in Form No. 12136.*)

This cause coming on to be heard before the chancellor in open court, in the presence of *Jeremiah Mason*, of counsel for the complainant, and *Oliver Ellsworth*, of counsel for the defendant, and the pleadings and proofs being read and argued and the respective counsel being heard and considered, it is on this *tenth* day of *June*, A. D. 1898, ordered, adjudged and decreed that it be referred to one of the masters of this court to take an account of what is due to the defendant for principal and interest on his mortgage in the bill of complaint mentioned, and to tax his costs of this suit. And the said master is also to take an account of the rents and profits of the said mortgaged premises come to the hands of the said defendant

1. The matter to be supplied within [ ] will not be found in the reported case.

2. See, generally, *supra*, note 4, p. 853. This form is set out in 3 Barb. Ch. Pr. 319.

or of any other person or persons by his order or for his use, or which he without his wilful default might have received; and what shall be coming on the said account of rents and profits is to be deducted out of what shall be found due to the said defendant for principal, interest and costs. And for the better taking of the said account, the parties are to produce before, and leave with, the said master, all deeds, books, papers and writings in their custody or power relating thereto, and are to be examined on oath, as the said master shall direct; and what, upon the balance of the said account, shall be certified to be due to the said defendant, for his principal, interest and costs, it is ordered and decreed that the complainant do pay to the said defendant within *six* months after the said master shall have made his report, and the same shall have been confirmed, and after service of a notice of the order of confirmation and of a copy of the bill of costs as taxed; and that, upon such payment being made, the said defendant do re-surrender the said mortgaged premises unto the said complainant, or unto such person or persons as he shall direct, free and clear of all incumbrances, done by him, or any person claiming by, from, or under him, and deliver unto the said complainant, on oath, all deeds and writings in his custody or power, relating to the said mortgaged premises. But in default of the said complainant's paying unto the said defendant what shall be so certified to be due to him for principal, interest and costs as aforesaid, after such deductions made thereout as aforesaid, at such time and place as aforesaid, it is ordered that the said complainant's bill do from henceforth stand dismissed out of this court, with costs to be taxed. *Theodore Runyon*, Chancellor.

(2) That Bill be Dismissed.

(*a*) *In General.*

Form No. 17300.[1]

(*Venue and title of court and cause as in Form No. 12123.*)

This cause came on to be heard at this term upon bill and answer, and thereupon upon due consideration it was

Ordered, adjudged and decreed that the bill be dismissed with costs.

By the court, *Afred A. Abbott*, Clerk.

(*b*) *Upon Default in Payment of Amount Found Due.*

Form No. 17301.[2]

(*Title of court and cause as in Form No. 12126.*)

The report of the master to whom it was referred to take an account of what was due to the defendant in this cause, for principal

1. This decree is taken from the records in the case of Haley *v.* Young, 134 Mass. 364. On appeal, the decree was affirmed.

See also, generally, *supra*, note 4, p. 853.

2. See, generally, *supra*, note 4, p. 853. This form is set out in 3 Barb. Ch. Pr. 321.

and interest on his mortgage in the bill of complaint mentioned, and to tax his costs in this suit, having been heretofore filed, from which it appears that there was due to the said defendant for principal and interest upon his mortgage, at the date of said report, the sum of *one thousand* dollars, and that the costs of said defendant had been taxed at the sum of *fifty* dollars, and the said report having been duly confirmed on the *tenth* day of *June last*, as appears by the certificate of the register of this court; on reading and filing the said report and certificate and due proof of service upon the said complainant, more than *six* months since, of notice of the order confirming said report and of a copy of the bill of costs as taxed, and on reading and filing the affidavit of the said defendant, showing that the amount reported due to the said defendant for principal, interest, and costs, has not been paid pursuant to the decree of this court, made on the *tenth* day of *June last*, and the said master's report, nor any part thereof, but that the said sum of *one thousand* dollars, and every part thereof, still remains due and owing from the complainant to the said defendant for his principal, interest and costs; on motion of Mr. *Oliver Ellsworth*, of counsel for the defendant, and on hearing Mr. *Jeremiah Mason*, of counsel for the complainant, in opposition, it is ordered and decreed that the bill of complaint in this cause do stand dismissed out of this court with costs of the proceedings subsequent to the filing of the master's report to be taxed; and that the defendant have execution for such costs, together with the costs heretofore taxed by said master as aforesaid. *Theodore Runyon*, Chancellor.

(3) That Defendant Execute to Plaintiff a Discharge of Mortgage.[1]

(*a*) *In General.*

Form No. 17302.

(Precedent in Dary *v.* Kane, 158 Mass. 378.)[2]

[*Supreme Judicial* Court.

Suffolk, ss.

Geo. A. Dary, administrator, v. *Henry Kane, et al.*

This case came on to be heard and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed][3] that there is due to the defendant on said mortgage the principal sum of *one thousand* dollars, and the interest thereon at the rate of *six* per cent. per annum from *July 28*, 1885; that the

1. **Erroneous Decree for Discharge of Mortgage.** — A decree which directs the delivery to the plaintiff of the mortgage and the note, and requires the defendant to discharge the mortgage, was held to be erroneous. Kerse *v.* Miller, 169 Mass. 44. In this case there was no prayer for the discharge of the mortgage, and the court said that it was not in accordance with its practice to order a mortgage to be discharged.

2. Upon appeal to the full bench, the decree was affirmed.

See also, generally, *supra*, note 4, p. 853.

3. The matter enclosed by [ ] will not be found in the reported case.

plaintiff shall pay to the defendant the sum of *one thousand* dollars and interest thereon, reckoned from *July 28, 1885*, to the date of said payment, at the rate of *six* per centum per annum, less the plaintiff's taxable costs, and that thereupon the defendant shall execute and deliver to the plaintiff a discharge of said mortgage.

[By the Court,

February 6, 1892. *John Noble*, Clerk.][1]

(*b*) *Where Execution of Power of Sale was Invalid.*

Form No. 17303.[2]

(*Venue and title of court and cause as in Form No. 12123.*)

This cause came on to be further heard and was argued by counsel, and thereupon upon consideration thereof it is ordered, adjudged and decreed as follows: the sale by the defendant *Codman* on the *ninth* day of *November*, 1891, of the land and premises described in the mortgage from *Herbert E. Dennett* and *Alice H. Dennett* to *John P. Dennett*, dated *September 15*, 1888, and recorded in *Middlesex South* District Registry of Deeds, lib. *1871*, fol. *44*, is declared to be an invalid execution of the power of sale in the said mortgage, and the said sale is set aside so far as the same might otherwise affect the plaintiff's right of redemption.

It is further ordered and decreed that the plaintiffs have leave to redeem the land and premises described in the said mortgage deed upon paying to the defendant *Atkins* within *forty-five* days from the entry of this decree the principal sum of $*9,000* due upon said mortgage and interest on the said sum at the rate of *six* per cent. per annum from the *15th March*, 1891, to the day of payment, and $*375* for interest paid by the defendant *Atkins* on the first mortgage, and $*870.52* for taxes paid by the defendant *Atkins*, and $*199.52* paid by the defendant *Atkins* for necessary repairs on the mortgaged premises, and the costs of this suit to be taxed by the clerk, such taxation to be made as soon as may be, and any question on appeal to be at once brought before me. And that upon the plaintiffs paying the said sum of money within the time aforesaid to the defendant *Atkins*, the said *Atkins* shall execute a discharge of the said mortgage and give up to the plaintiffs possession of the mortgaged premises, free and clear of and from all incumbrances made or suffered by him or any person claiming under him, and shall assign to the plaintiffs his interest in the said policies of insurance subject to the right and interest therein of the first mortgagee, but in default of the plaintiffs so paying the said sums by the time aforesaid, the plaintiffs' bill is to stand dismissed. And it is further ordered and decreed that the costs and expenses incidental to the sale made by the defendant *Codman* be borne by him. And that the plaintiffs pay to the defendant *Atkins* his costs of this suit.

May 20, 1892. *Charles Allen*, J. *S. J.* C.

1. The matter enclosed by [ ] will not be found in the reported case.

2. This form is taken from the records in the case of Dennett *v.* Codman, 158 Mass. 371. The action was brought in the supreme court. At the request

(4) That Instrument of Conveyance is a Mortgage.

Form No. 17304.

(Precedent in Stevens *v.* Coffeen, 39 Ill. 253.)[1]

[(*Commencement as in Form No. 12120.*)][2]

And now come the said parties, by their solicitors, and the said cause is now submitted to the court upon bill, answers and replication, and upon written and oral proofs, and the said court having considered the same, doth find that the said complainant was, previous to the month of *February*, in the year 1860, indebted to the said firm of *M. D. Coffeen & Co.*, and *Minor*, *Andrews* and *White*; that judgments were obtained on the same in the *Champaign Circuit* Court thereon, the *23d* day of *March*, 1859; that the following lands of him, the said orator, were sold to satisfy the same in manner following, that is to say, the N. W. quarter of the N. E. quarter of section *sixteen*, in township *eighteen* north, of range *fourteen* west, was sold by the sheriff of *Champaign* county to *Michael D. Coffeen* and *Samuel Groenendyke*, for the sum of $*396.83*, and that the residue of said quarter section of said land, being *three-fourths* thereof, was sold to *J. D. Minor*, *A. H. Andrews* and *William M. L. White*, for the aggregate sum of $*995.94*, that is to say, for the sum of $*331.98*, the whole amount of said sales being $*1,392.77*.

That to redeem said lands from said several sales, the said complainant applied to the defendant, *Michael D. Coffeen*, for the loan of a sum of money sufficient so to redeem the same; that it was agreed by the said complainant and the said *Coffeen* that the said *Coffeen* should advance the money necessary to redeem said lands from the said sales, made to the said *Minor*, *Andrews* and *White* as aforesaid; that to secure the said money so advanced, amounting to the sum of $*1,090.95*, and to redeem said land also from the sale made to the said *M. D. Coffeen & Co.*, on their said execution, amounting to the sum of $*436.51*, and also to secure the payment of the further sum of $*431.02*, then due and owing from the said complainant to the said *M. D. Coffeen & Co.*, in and upon account, and also the further sum

of the plaintiffs, the case was reported to the full bench, where it was held that the decree was in proper form.

1. At the trial of this case, no decree was entered. The judge made an entry on his docket which did not specify what amount the complainant was to pay. The court held that the entry thus failed to afford sufficient data for the solicitor of the complainant to frame a formal decree. At the next term of court, the above decree was entered of record *nunc pro tunc*. The decree also contained this paragraph: "And it appearing also to the satisfaction of the court, that the said complainant hath failed to pay to the said defendant the said sum of $*2,093.15*, with interest thereon, on or before the *first* day of the present term of this court, according to the requirements of the said decree heretofore rendered herein, it is ordered that the injunction heretofore granted herein be and the same is dissolved, that the said complainant's bill herein be dismissed, and that the said complainants pay to said defendants their costs and charges by them in this behalf expended." On a writ of error, the appellate court held that this paragraph made the decree unjust and improper, because some time, within the discretion of the court, should have been allowed for the complainant to pay the amount stated, and for this reason only the decree was reversed.

2. The matter to be supplied within [ ] will not be found in the reported case.

of $*134.67* for the use and occupation of said land, he, the said complainant, should make and execute, and he did make and execute to the said defendant the deed in said complainant's bill mentioned; and the said court doth further find that the said deed of conveyance from the said complainant to said defendant, *Michael D. Coffeen*, made as aforesaid, though absolute on its face, was made to secure the payment of the said several sums above named, amounting in the aggregate to the sum of $*2,093.15*.

It is therefore ordered and decreed that the said deed be taken and held as a mortgage, and not as an absolute and unconditional conveyance of said lands; that complainants pay to the said defendant on or before the *first* day of the next term of this court, the said sum of $*2,093.15*, with interest thereon, from the *8th* day of *February*, 1*860*, at the rate of *six* per cent. per annum, and that, on the payment of said sum of money and said interest by the said complainant to the said defendant, the defendants make, execute and deliver unto the said complainant a deed for said land with special warranty only, and that the defendant be perpetually restrained from claiming title thereto; that in default of the payment of said sum of money directed to be made as aforesaid, at the time limited for the payment of the same, the injunction herein be dissolved, and that the said bill of said complainant be dismissed at the cost of the said complainant.

Form No. 17305.

(Precedent in Gallagher *v.* Giddings, 33 Neb. 225.)[1]

[In the *Supreme* Court of *Nebraska.*][2]

Edwin Giddings and *C. D. B. Eiseman*,
Plaintiffs and Appellees,
v.
E. F. Gallagher and *Hugh J. Gallagher*,
Defendants and Appellants.

This cause coming on for hearing upon the motion of the plaintiffs to retax costs and the stipulation of the parties to have the final decree entered in this court, and the court, being fully advised in the premises, does find that the deed of conveyance described in the plaintiffs' petition in the original action, signed by *C. D. B. Eiseman*, *Edwin Giddings*, and *Lydia Giddings*, transferring lot No. *16* (*sixteen*), block *17* (*seventeen*), in the village of *O'Neill* and state of *Nebraska*, as the same appears of record in the office of the county clerk of *Holt* county, *Nebraska*, to *E. F. Gallagher*, was given as a mortgage to secure the payment of a note for $*900*, which note was given for borrowed money, which the said *C. D. B. Eiseman* and *Edwin Giddings* borrowed from the said *E. F. Gallagher*, and that the plaintiffs

1. This final decree was rendered by the supreme court upon a submission by the parties to a suit brought in the district court. The money was not paid as the decree ordered, and the district court dismissed the action for non-compliance with the above decree. Gallagher then brought ejectment to obtain the premises, and on demurrer to his petition it was held that the dismissal of the petition to redeem for default in making payments by the day set in the decree, no privilege having been given to bring another action, extinguished the right of redemption.

2. The matter enclosed by [ ] will not be found in the reported case.

herein are indebted to the said *E. F. Gallagher* on said note in the sum of $*795.05*, and that the balance of the $*900* for which said note was given, and which said deed was given to secure, was usurious interest, and that the deed of conveyance described in said petition signed by *E. F. Gallagher*, conveying the lot above described to *Hugh J. Gallagher*, was fraudulent and void, and that the said *Hugh J. Gallagher* had notice of the fact that said deed from *C. D. B. Eiseman*, *Edwin Giddings*, and *Lyaia Giddings* to *E. F. Gallagher* was intended between the parties thereto as a mortgage and was given for the purpose of securing said loan of money as aforesaid, and that the same was never recorded as required by law.

It is therefore ordered, adjudged, and decreed that the plaintiffs herein, *Cyrus D. B. Eiseman* and *Edwin Giddings*, pay to the defendant *E. F. Gallagher* the sum of $*795.05*, and $*200.26* interest thereon, and interest thereon at the rate of *seven* per cent. from the date of this decree, or pay that amount into court for him within *ninety* days from the date of this decree, and that said *E. F. Gallagher* do, within *twenty* days from the payment of said amount as aforesaid, convey the premises as aforesaid to the said *C. D. B. Eiseman* and *Edwin Giddings* by a good and sufficient deed with covenants of warranty against his own acts, and in default thereof, that this judgment have the operation and effect of such deed; that the deed signed by *E. F. Gallagher*, conveying the above described premises to *Hugh J. Gallagher*, be, and the same hereby is, canceled and forever annulled and set aside; that the title to said premises be, and the same hereby is, quieted and confirmed in and to the said *C. D. B. Eiseman* and *Edwin Giddings*; that the cloud upon said premises be, and the same is hereby, forever cleared from the same; that the said *Hugh J. Gallagher*, and all persons claiming through or from him, be forever foreclosed from setting up or in any manner claiming title to or any interest in said premises through or by virtue of the said deed from *E. F. Gallagher* to *Hugh J. Gallagher*, upon the plaintiff herein paying within *ninety* days the sum of $*795.05* and $*200.26* interest thereon, and interest at the rate of *seven* per cent. on said amounts from the date of this decree, and that the defendants pay the costs of the *District* Court taxed at $———, and one-third of the costs of this court taxed at $*47.15*. And in case said plaintiffs neglect or refuse to pay the said sum of money within *ninety* days, as aforesaid, their petition filed in the *District* Court of *Holt* county in this case be dismissed and that the plaintiffs pay all costs in both courts.

[*John Marshall*, Chief Justice.][1]

(5) That Instrument of Conveyance is Not a Mortgage.

Form No. 17306.

(Precedent in De Laigle *v.* Denham, 65 Ga. 485.)[2]

In consideration of the verdict rendered during the present term, in the above stated cause, upon certain questions of fact in dispute,

1. The matter enclosed by [] will not be found in the reported case.

2. This was a bill brought to have an absolute deed declared a mortgage. Upon a motion to have the verdict set aside and new trial granted, the appel-

submitted at the hearing thereof to the jury; and in consideration also of other facts alleged in the pleadings, not in dispute; and upon consideration of the argument presented after said verdict, it is considered, adjudged and decreed: That the instrument of conveyance between said *Nicholas De Laigle* and said *Denham*, bearing date the *sixth* day of *January*, A. D. eighteen hundred and *sixty-eight*, transferring the land in the bill in this cause described to said defendant in fee simple, was and still is a valid conveyance to him of the title thereto, for his own uses and purposes; and was not, in law or in equity, a security or mortgage.

And further adjudged and decreed: That the complainant, in respect to the usury in said deed, is barred by the statue of limitations of all right to said land, or any part thereof, and also to the proceeds of sale of the same; and is not entitled to recover against said defendant either said land, or proceeds of sale thereof, or any part thereof.

It is further decreed: That the proceedings in this case be enrolled among the records of this court, and that the plaintiff do pay the costs therein.

[*Claiborne Snead*, J. *S.* C. *R.* C.

Judgment signed this *seventh* day of *June*, 1*880*.

Jeremiah Mason, Defendant's Attorney.][1]

4. Certificate of Redemption.

a. Where Mortgage was Foreclosed by Action.

Form No. 17307.[2]

I, *Clyde Culp*, sheriff of the county of *Ramsey*, state of *Minnesota*,[3] do hereby certify that on this *twentieth* day of *July*, 19*00*, *Richard Roe*,[4] of the county and state aforesaid, duly presented to me the evidence of his right to make the redemption hereinafter described, as by law required, and at the same time paid to me as such sheriff the sum of *twelve hundred and thirty* dollars,[5] as and for the redemption by him of the hereinafter described real estate from a sale thereof made by the sheriff of said *Ramsey* county on the *tenth* day of *July*, 1*899*, under and by virtue of a judgment and decree of the *District* Court of the state of *Minnesota*, in and for the county of *Ramsey* made, entered and docketed on the *first* day of *June*, 1*899*, in the office of the clerk of said court in said county of *Ramsey* in an

late court found that the evidence warranted the verdict that the transaction was a sale and affirmed the judgment.

1. The matter enclosed by [ ] will not be found in the reported case.

2. *Minnesota.* — Stat. (1894), §§ 6042, 6043, 6065.

See also list of statutes cited *supra*, note 1, p. 814.

3. **By Whom Issued.** — A certificate of redemption must be issued by the person or officer from whom redemption is made. Minn. Stat. (1894), § 6043.

See also list of statutes cited *supra*, note 1, p. 814.

4. **Name of redemptioner** must be stated. Minn. Stat. (1894), § 6043.

See also list of statutes cited *supra*, note 1, p. 814.

5. **Amount paid to redeem** must be stated. Minn. Stat. (1894), § 6043.

See also list of statutes cited *supra*, note 1. p. 814.

action pending in said court, in which *John Doe* was plaintiff and *Richard Roe* was defendant, at which sale said property was sold to *Samuel Short* for the sum of *twelve hundred* dollars.[1]

That the real estate and property redeemed from said sale by said *Richard Roe* by virtue hereof is situated in the county of *Ramsey*, state of *Minnesota*, and is described as follows, to wit: (*describing it*).[2] And such redemption is made by said *Richard Roe* upon the following claim and right, to wit: (*Here state facts showing claimant's right to redeem*).[3]

In witness whereof I have hereunto set my hand and seal this *first* day of *July*, A. D. 19*00*.

Clyde Culp,[4] (SEAL)[5]
Sheriff of *Ramsey* County, State of *Minnesota*.

In the presence of *Richard Fen*.

State of *Minnesota*, } ss.
County of *Ramsey*, }

Be it known that on this *first* day of *July*, A. D. 19*00*, personally appeared before me, *Clyde Culp*, sheriff of the county of *Ramsey*, state of *Minnesota*, to me known to be the person described in and who executed the foregoing certificate, and duly acknowledged that he executed the same as sheriff for the uses and purposes therein expressed, as his free act and deed.

(SEAL) *Norton Porter*, Notary Public,
Ramsey County, State of *Minnesota*.[6]

b. Where Mortgage was Foreclosed by Advertisement.

Form No. 17308.[7]

I, *Clyde Culp*, sheriff of the county of *Ramsey*, state of *Minnesota*, do hereby certify that on this *twenty-first* day of *July*, 19*00*, *Richard Roe*, of the county and state aforesaid, duly presented to me the statutory evidence of his right to make redemption, as hereinafter

1. **Description of the sale** from which the redemption is made must be given. Minn. Stat. (1894), § 6043.
See also list of statutes cited *supra*, note 1, p. 814.

2. **Description of Property** redeemed must be given. Minn. Stat. (1894), § 6043.
See also list of statutes cited *supra*, note 1, p. 814.

3. **Statement of claim of the Redemptioner** must be given. If upon a lien, the amount claimed to be due thereon at the time of redemption must be stated. Minn. Stat. (1894), § 6043.
See also list of statutes cited *supra*, note 1, p. 814.

4. **Signature.** — Certificate must be signed by the officer or person issuing it. Minn. Stat. (1894), § 6043.
See also list of statutes cited *supra*, note 1, p. 814.

5. **Seal.** — Certificate must be under the seal of the officer or person issuing it. Minn. Stat. (1894), § 6043.
See also list of statutes cited *supra*, note 1, p. 814.

6. **Acknowledgment.**—Certificate must be proved or acknowledged and recorded as provided by law for the conveyances of real estate. Minn. Stat. (1894), § 6043.
See also list of statutes cited *supra*, note 1, p. 814.

7. *Minnesota.* — Stat. (1894), §§ 6042, 6043.
See also *supra*, Form No. 17307, and notes thereto, and also list of statutes cited *supra*, note 1, p. 814.

described, and at the same time paid to me as such sheriff the sum of *twelve hundred and ten* dollars, as and for the full redemption by him of the real estate hereinafter described from a sale thereof upon foreclosure by advertisement of a certain indenture of mortgage executed and delivered by said *Richard Roe*, of the county of *Ramsey*, state of *Minnesota*, to *John Doe*, of the county of *Ramsey* and state of *Minnesota*, bearing date the *tenth* day of *January*, 1894, and recorded on the *twelfth* day of *January*, 1894, at *eleven* o'clock in the *fore*noon of said day, in the office of the Register of Deeds of said county of *Ramsey*, state of *Minnesota*, in book *249* of mortgages, at page *963*, which said sale was made on the *tenth* day of *July*, 1899, at *191 West* street, in the city of *St. Paul*, in said county of *Ramsey*, at *ten* o'clock in the *fore*noon of said day, under and by virtue of the power of sale in said mortgage contained and the statute in such case made and provided; and that the property so redeemed from said sale is situated in the county of *Ramsey*, state of *Minnesota*, and is described as follows, to wit: (*describing it*); and at said foreclosure sale was struck off and sold to the following named persons for the following named prices: (*Here set forth the name or names of the purchaser or purchasers, and the amount or amounts paid*), and that such redemption is made by said *Richard Roe*, upon the following claim and right, to wit: (*Here state facts showing the interest of the party seeking to redeem*).

In witness whereof (*concluding as in Form No. 17307*).

II. By Judgment Creditor from Execution Sale.[1]

1. Statutory provisions relating to redemption of land from sale on execution exist in the following states, to wit:

Alabama.— Civ. Code (1896), § 3505 *et seq.*

Arizona. — Rev. Stat. (1901), § 2577.

Arkansas. — Sand. & H. Dig. (1894), § 3113 *et seq.*

California. — Code Civ. Proc. (1897), § 701 *et seq.*

Colorado. — Mills' Anno. Stat. (1891), § 2547 *et seq.*

Idaho. — Rev. Stat. (1887), § 4491 *et seq.*

Illinois. — Starr & C. Anno. Stat. (1896), c. 77, par. 18 *et seq.*

Indiana. — Horner's Stat. (1896), § 768.

Iowa. — Code (1897), § 4045 *et seq.*

Kansas. — Gen. Stat. (1897), c. 95, § 521 *et seq.*

Kentucky. — Stat. (1894), § 1684.

Maine. — Rev. Stat. (1883), c. 76, § 25 *et seq.*

Massachusetts. — Pub. Stat. (1882), c. 172, § 31 *et seq.*

Michigan. — Comp. Laws (1897), §§ 9179–9184, 9231.

Minnesota. — Stat. (1894), §§ 5472–5475.

Montana. — Code Civ. Proc. (1895), § 1234 *et seq.*

Nebraska. — Comp. Stat. (1899), § 6088.

Nevada. — Comp. Laws (1900), §§ 3327–3331.

New Hampshire.— Pub. Stat. & Sess. L. (1900), c. 233, §§ 14–18, 26, 30–32.

New Mexico. — Comp. Laws (1897), § 3126.

New York. — Code Civ. Proc., §§ 1446–1470.

North Dakota. — Rev. Codes (1895), § 5540 *et seq.*

Ohio. — Bates' Anno. Stat. (1897), § 5398*a*.

Oregon. — Hill's Anno. Laws (1892), § 300 *et seq.*

South Dakota. — Dak. Comp. Laws (1887), § 5150 *et seq.*

Tennessee. — Code (1896), § 3811 *et seq.* 4814.

Utah. — Rev. Stat. (1898), § 3261 *et seq.*

Vermont. — Stat. (1894), § 1829 *et seq.*

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 5295.

1. Affidavit.[1]

a. By Judgment Creditor.

Form No. 17309.[2]

State of *Indiana*, } ss.
County of *Posey*. }

Samuel Short,[3] being duly sworn, upon his oath, says:

That on the *tenth* day of *January*, 1898, *Richard Roe* was the owner in fee of the following described real estate, situate in the county of *Posey* and state of *Indiana*, to wit, (*describing it*);

Wisconsin. — Stat. (1898), § 3001 *et seq.*

Compliance with Statute. — Right of redemption from a judicial sale being a creation of the statute, the requirements of the statute must be strictly complied with. Haskell *v.* Manlove, 14 Cal. 54; Paddack *v.* Staley, 13 Colo. App. 363; Oldfield *v.* Eulert, 148 Ill. 614; Herdman *v.* Cooper, 138 Ill. 583; Wooters *v.* Joseph, 137 Ill. 113; Littler *v.* People, 43 Ill. 188; Eiceman *v.* Finch, 79 Ind. 511; Case *v.* Fry, 91 Iowa 132; Teabout *v.* Jaffray, 74 Iowa 28; Whiting *v.* Butler, 29 Mich. 122; Gosmunt *v.* Gloe, 55 Neb. 709; Waller *v.* Harris, 20 Wend. (N. Y.) 555; Chandler *v.* Sawtell, 22 Vt. 318; Prescott *v.* Everts, 4 Wis. 314.

1. Necessity for Affidavit. — The affidavit required by the statute cannot be dispensed with. Tinkcom *v.* Lewis, 21 Minn. 132. And a computation made by the sheriff and the lien-holder of the amount due on the latter's lien cannot take the place thereof. Tinkcom *v.* Lewis, 21 Minn. 132.

Requisites of Affidavit — Generally. — For the formal parts of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

For statutory requisites see list of statutes cited *supra*, note 1, p. 866.

By Whom Filed — *Generally.* — Affidavit may be filled by the judgment creditor. *Ex p.* Monroe Bank, 7 Hill (N. Y.) 177; *Ex p.* Shumway, 4 Den. (N. Y.) 258.

See also list of statutes cited *supra*, note 1, p. 866.

By Agent or Attorney.—That deponent is agent or attorney for the creditor must be stated. Merely naming him as such in the affidavit is not sufficient. *Ex p.* Monroe Bank, 7 Hill (N. Y.) 177; *Ex p.* Shumway, 4 Den. (N. Y.) 258.

Where after the title of the suit the affidavit commenced, "*Columbia* County, ss. *Martin Van Dusen*, the attorney of the above named plaintiff, being duly sworn, saith," etc., the affidavit was held insufficient. *Ex p.* Shumway, 4 Den. (N. Y.) 258; *Ex p.* Monroe Bank, 7 Hill (N. Y.) 177.

Attorney of record cannot make affidavit. It must be made by the attorney or agent employed in making the redemption under the statute. *Ex p.* Shumway, 4 Den. (N. Y.) 258.

Amount Due — *Generally.* — The amount due or to become due on judgment over and above all payments must be stated, and this fact must be stated positively and not upon belief. People *v.* Becker, 20 N. Y. 354; *Ex p.* Monroe Bank, 7 Hill (N. Y.) 177. And where the affidavit states the sum due "as claimed by this deponent," it is insufficient. People *v.* Becker, 20 N. Y. 354.

Overstating amount due on judgment by mistake, though the mistake be casual and not fraudulent, is fatally defective. People *v.* Becker, 20 N. Y. 354.

When affidavit is made by agent of judgment creditor, affiant's means of knowledge as to the sum due must be stated. *Ex p.* Monroe Bank, 7 Hill (N. Y.) 177.

2. *Indiana.* — Any judgment creditor authorized to redeem the real estate sold on execution, who shall desire to redeem from the purchaser at such sale, must file with the clerk of the court in whose office the certificate of purchase is required to be recorded a verified statement. Horner's Stat. (1896), § 772.

See also list of statutes cited *supra*, note 1, p. 866; and, generally, *supra*, note 1, this page.

3. By Whom Made. — The affidavit may be made by the judgment creditor or by his agent or attorney. Horner's Stat. Ind. (1896), § 772.

See also list of statutes cited *supra*, note 1, p. 866; and, generally, *supra*, note 1, this page.

That on said *tenth* day of *January*, 1898, *John Doe* recovered a judgment in the *Posey Circuit* Court in a suit therein pending wherein the said *John Doe* was plaintiff and the said *Richard Roe* was defendant, against the said *Richard Roe*, for the sum of *five hundred* dollars;

That on the *twentieth* day of *January*, 1898, an execution was issued upon said judgment by the clerk of said *Circuit* Court, directed to the sheriff of said *Posey* county;

That by virtue of said execution *John Lynch*, the then sheriff of said *Posey* county, levied upon the lands above described;

That on the *fifth* day of *April*, 1898, the said sheriff, by virtue of said execution and the levy made thereon, sold said described property to one *William West* for the sum of *seven hundred* dollars;[1]

That on the *tenth* day of *September*, 1898,[2] affiant recovered a judgment in said *Circuit* Court[3] in an action therein pending wherein this affiant was plaintiff and the said *Richard Roe* was defendant,[4] against the said *Richard Roe*, for the sum of *eight hundred* dollars;[5]

That said judgment was, on the *fifteenth* day of *September*, 1898, duly recorded in order book *K* of said *Circuit* Court on page *200*, and which said judgment is a junior lien upon the aforesaid described property to that of the said *John Doe*;

That no part of said judgment has been paid, and there is now due and unpaid thereon the sum of *eight hundred and thirty* dollars, principal and interest, and *twenty* dollars costs;[6]

That said described real estate, or any part thereof, has not been redeemed by the said *Richard Roe* from said sale, nor has the interest of the said *John Doe* in said property been acquired by anyone.

This affiant, therefore, now makes application to redeem said real estate sold at said sale as aforesaid for the sum of *seven hundred* dollars, and tenders for the purpose of said redemption the sum of *seven hundred and forty-six* dollars.

(*Signature and jurat as in Form No. 827.*)

1. Description of Sale. — The sale from which creditor desires to redeem must be stated. Horner's Stat. Ind. (1896), § 772.

See also list of statutes cited *supra*, note 1, p. 866; and, generally, *supra*, note 1, p. 867.

2. Date of judgment must be given. Horner's Stat. Ind. (1896), § 772.

See also list of statutes cited *supra*, note 1, p. 866; and, generally, *supra*, note 1, p. 867.

3. Court in Which Judgment was Rendered. — The affidavit must state the court in which the judgment of the affiant was rendered. Horner's Stat. Ind. (1896), § 772.

See also list of statutes cited *supra*, note 1, p. 866; and, generally, *supra*, note 1, p. 867.

4. Parties to the judgment must be stated. Horner's Stat. Ind. (1896), § 772.

See also list of statutes cited *supra*, note 1, p. 866; and, generally, *supra*, note 1, p. 867.

5. Amount of judgment must be stated. Horner's Stat. Ind. (1896), § 772.

See also list of statutes cited *supra*, note 1, p. 866; and, generally, *supra*, note 1, p. 867.

6. Amount due and unpaid on judgment must be stated. Horner's Stat. Ind. (1896), § 772.

See also list of statutes cited *supra*, note 1, p. 866; and, generally, *supra*, note 1, p. 867.

Redemption of Part of Property. — If creditor desires to redeem less than the whole property, he must state the part or parcels thereof which he desires to redeem. Horner's Stat. Ind. (1896), § 772.

See also list of statutes cited *supra*, note 1, p. 866; and, generally, *supra*, note 1, p. 867.

b. By Assignee of Judgment Creditor.[1]

Form No. 17310.[2]

Suffolk County, ss.

John Doe, being duly sworn, says,

That he is the person to whom the above described judgment was assigned, and who is named as assignee in the above assignment;

That the said assignment is the original assignment of said judgment made to affiant, and under which affiant claims the right to redeem;

That no part of said judgment has been paid, and at the date of the making of this affidavit there is due and owing upon said judgment the sum of *six hundred and thirty-four* dollars and *thirty-eight* cents principal and interest, and *twenty-eight* dollars costs.

John Doe.

Sworn to before me this *seventh* day of *October*, A. D. 1899.

Norton Porter,
Notary Public, *Suffolk* County.

2. Certified Copy of Docket of Judgment.[3]

1. Requisites of Affidavit — Generally. — See *supra*, note 1; p. 867.

Identification of Assignment. — The assignment must be identified in the affidavit as the assignment executed to affiant and under which he claims. Hall *v.* Thomas, 27 Barb. (N. Y.) 55.

Precedent. — In Rice *v.* Davis, 7 Lans. (N. Y.) 393, this affidavit is set out:

"*Oneida* County, ss.:

On this *16th* day of *March*, 1862, before me came *La Mott Thomson*, to me known to be the person described, and, being by me duly sworn, deposes and says that he resides in the city of *Utica*, *Oneida* county, *N. Y.*; that he is the person to whom the above described several judgments are assigned, and that the same are true copies of the original assignments of such judgments to me; that he has carefully compared them with such original assignments, and that they are in every respect true copies of such original assignments to me. And this deponent further saith that there is due upon the several above described judgments assigned to me, at this date, the sum of *six hundred and thirty-four* dollars and *thirty-eight* cents ($634.38), to wit: Upon the first described judgment, marked No. *1*, there is due the sum of $236.58; upon the second described judgment, marked No. *2*, there is due the sum of $123.99; upon the third described judgment, marked No. *3*, there is due the sum of $169.31; upon the fourth described judgment, marked No. *4*, there is due the sum of $104.50, making a total of $634.38."

In this case the original affidavit had been lost and the form above set forth is that of a copy. It was held that the copy substantially complied with the statute and was sufficient.

2. *New York.* — Code Civ. Proc., §§ 1450, 1464.

See also list of statutes cited *supra*, note 1, p. 866; and, generally, *supra*, note 1, this page.

3. Copy of Docket of Judgment. — To entitle a creditor to redeem land sold under execution, the requirements of the statute as to the evidence to be produced by him, showing his right to redeem, must be strictly complied with, and within the time prescribed by the statute he must produce a copy of the docket of the judgment. Haskell *v.* Manlove, 14 Cal. 54; Waller *v.* Harris, 20 Wend. (N. Y.) 555. And a copy of the judgment is not sufficient. Haskell *v.* Manlove, 14 Cal. 54.

Where the creditor omitted to produce within the time prescribed by the statute a copy of the docket of the judgment, it was held that though a deed was executed to him by the sheriff his title was defective. Waller *v.* Harris, 20 Wend. (N. Y.) 555.

Who may Certify. — A copy of the docket of the judgment rendered in

Form No. 17311.[1]

(Precedent in Rice *v.* Davis, 7 Lans. (N. Y.) 398.)[2]

Supreme Court.

Parties against whom judgments are obtained.	Parties in whose favor judgments are obtained.	Judgments, where perfected.
Carlton Rice	*Samuel S. Abbott* and *Ira M. Moore*	*Madison* County

Damages.	Costs.	Judgment, when perf.	When docketed.	Attorney.
$229.61	$10.61	1857, *Jan. 16*	1857, *Jan. 16*, 11 A. M.	*Abbott* and *Moore* in pers.

State of *New York*,
Madison County,
Clerk's Office. } ss.:

I certify the foregoing is a true copy of the docket of a judgment entered in this office; and having compared the same with said docket, I find it to be a correct transcript therefrom and of the whole of the docket of said judgment. In testimony whereof, I hereunto set my hand, this *16th* day of *January*, 1857.

Chas. L. Kennedy, Deputy Clerk.

3. Assignment of Judgment to Redemptioner.[3]

the supreme court and docketed in a county clerk's office is properly certified by the clerk of the county in which the judgment was docketed. Woolsey *v.* Saunders, 3 Barb. (N. Y.) 301.

Seal of Clerk. — The clerk's certificate authenticating a copy of the docket need not be under seal. People *v.* Ransom, 4 Den. (N. Y.) 145 (*affirmed* 2 N. Y. 490).

1. *New York.* — Code Civ. Proc., § 1464.

See also list of statutes cited *supra*, note 1, p. 866; and, generally, *supra*, note 3, p. 869.

2. This was held to be a duly certified copy of a docket of the judgment. In this case the judgment creditor made affidavit of his right to redeem under four judgments assigned to him. The court said that if one of these judgments was duly certified it would entitle him to redeem, and the others might be disregarded as unnecessary for that purpose.

3. Assignee may Redeem.—An assignee of a judgment is deemed a judgment creditor, and as such is entitled to redeem. Sweezey *v.* Chandler, 11 Ill. 445.

See also list of statutes cited *supra*, note 1, p. 866.

Requisites of Assignment — Generally. — An assignment of a judgment is held sufficient if it correctly state the title of the suit, though it does not give any particular description of the judgment as to the amount or the time when or the court in which it was recovered. People *v.* Fleming, 4 Den. (N. Y.) 137.

Slight variations in the form of the assignment of a judgment will not be regarded as fatal. Rice *v.* Davis, 7 Lans. (N.Y.) 393; Aylesworth *v.* Brown, 10 Barb. (N. Y.) 167.

Omission of middle letter of plaintiff's name is immaterial. Aylesworth *v.* Brown, 10 Barb. (N. Y.) 167.

Precedent. — In Rice *v.* Davis, 7 Lans.

Form No. 17312.[1]

State of *New York*, }
County of *Suffolk*. }

Know all men by these presents, that I, *John Doe*, of *Huntington*, county of *Suffolk* and state of *New York*, in consideration of the sum of *five hundred* dollars to me in hand this day paid by *Samuel Short*, do hereby transfer and assign unto the said *Samuel Short* a certain judgment recovered by me against *Richard Roe* in the *Supreme* Court of the state of *New York* in and for the county of *Suffolk*, at a term of said court held at *Riverhead*, in said county, on the *tenth* day of *September*, 1898, for the sum of *seven hundred* dollars and costs of suit, a transcript of which judgment is hereto attached, and all right, title and interest, claim and demand therein, with full authority to the said *Samuel Short* to demand and receive the amount of said judgment and costs to his own use, and upon the payment of said judgment or any part thereof to give unto the said *Richard Roe* a discharge thereof, and I, the said *John Doe*, do hereby authorize the said *Samuel Short* to sue out execution and all other legal process necessary to the enforcement of the said judgment, the same to be done at his own cost.

And I, the said *John Doe*, do hereby covenant with the said *Samuel Short* that there is now due on the aforesaid judgment the sum of *seven hundred and fifteen* dollars principal and interest and *twenty* dollars costs, and that I, the said *John Doe*, have not received and will not receive the amount due upon said judgment or any part thereof, and that I will not discharge or release said judgment, and that I have not done nor will do anything to hinder or prevent the said *Samuel Short* from enforcing said judgment.

Witness my hand and seal the *tenth* day of *March*, A. D. 1899.

John Doe. (SEAL)

In the presence of *Francis Fern.*

County of *Suffolk*, ss.

On this *tenth* day of *March*, in the year 1899, before me personally appeared *John Doe*, to me known to be the individual described

(N. Y.) 393, the assignment was as follows:

"For value received from *La Mott Thomson*, we do hereby sell, transfer, assign and set over unto said *La Mott Thomson* the judgment, a transcript of which is hereto attached, and all our right, title and interest, claim and demand therein, together with the execution and levy made thereunder, with full power to collect said judgment in our names or otherwise, for his own use and benefit; and we do also, for a valuable consideration, sell, transfer and assign unto said *La Mott Thomson* the attached personal mortgage against *Carlton Rice*, and all our right, title, interest, claim and demand thereto.

Witness our hands and seals, this *28th March*, 1857.

Samuel S. Abbott. (SEAL)
Ira M. Moore. (SEAL)

County of *Madison*, ss.:

On this *30th* day of *March*, 1857, before me personally came *Samuel S. Abbott* and also *Ira M. Moore*, well known to me to be the individuals described in and who executed the within assignment, and they severally acknowledged that they executed the same. *J. Mason*,
Justice of the peace."

This assignment was held to be duly executed.

1. *New York.* — Code Civ. Proc., § 1450.

in and who executed the above assignment and acknowledged that he executed the same for the purposes therein mentioned.

Norton Porter,
Notary Public, *Suffolk* County.

4. Venditioni Exponas by Last Redemptioner.

Form No. 17313.[1]

(*Venue and address as in Form No. 8869.*)

Whereas on the *tenth* day of *January*, 1898,[2] *John Doe* recovered judgment against *Richard Roe* in a suit then pending in the *Posey Circuit* Court in the state of *Indiana*,[3] wherein the said *John Doe* was plaintiff and the said *Richard Roe* was defendant,[4] for the sum of *five hundred* dollars and costs of suit,[5] as appears of record in said court; and that on the *twentieth* day of *January*, 1898,[6] an execution was issued upon said judgment by the clerk of said court, directed to the sheriff of said *Posey* county, as further appears of record in said court; and that on the *twenty-second* day of *January*, 1898, the sheriff of said *Posey* county, by virtue of said execution, levied upon certain real estate hereinafter described, as the property of the said *Richard Roe*; and that on the *twentieth* day of *May*, 1898,[7] said sheriff, by virtue of said execution, sold said real estate, which said real estate is described as follows, to wit, (*describing it*); that at said sale *Samuel Short* became the purchaser of the aforesaid real estate for the sum of *eight hundred* dollars.[8]

And whereas it appears of record in said court that on the *thirtieth* day of *June*, 1898,[9] *William West* paid to the clerk of said court the sum of *five hundred and thirty-six* dollars[10] in redemption of the aforesaid real estate from said sale, and *five* dollars costs of such redemp-

See also list of statutes cited *supra*, note 1, p. 866; and, generally, *supra*, note 3, p. 870.

1. *Indiana.* — Horner's Stat. (1896), § 773.
See also list of statutes cited *supra*, note 1, p. 866.

2. **Date of judgment** must be stated. Horner's Stat. Ind. (1896), § 773.
See also list of statutes cited *supra*, note 1, p. 866.

3. **Court in which original judgment was rendered** must be named. Horner's Stat. Ind. (1896), § 773.
See also list of statutes cited *supra*, note 1, p. 866.

4. **Parties to original judgment** must be named. Horner's Stat. Ind. (1896), § 773.
See also list of statutes cited *supra*, note 1, p. 866.

5. **Amount of judgment** must be stated. Horner's Stat. Ind. (1896), § 773.
See also list of statutes cited *supra*, note 1, p. 866.

6. **Date of execution** must be stated. Horner's Stat. Ind. (1896), § 773.
See also list of statutes cited *supra*, note 1, p. 866.

7. **Date of sale** must be stated. Horner's Stat. Ind. (1896), § 773.
See also list of statutes cited *supra*, note 1, p. 866.

8. **Purchase price** must be stated if sold in one body, or if sold in parcels the amount paid for each parcel must be stated. Horner's Stat. Ind. (1896), § 773.
See also list of statutes cited *supra*, note 1, p. 866.

9. **Date of payment** of redemption money must be stated. Horner's Stat. Ind. (1896), § 773.
See also list of statutes cited *supra*, note 1, p. 866.

10. **Amount of redemption paid** must be stated. Horner's Stat. Ind. (1896), § 773.
See also list of statutes cited *supra*, note 1, p. 866.

tion,[1] which said sums so paid were the amounts necessary to redeem the said real estate from said sale; that said redemption so made by the said *William West* is the last redemption appearing of record.

And whereas on the *tenth* day of *June*, 1898, in an action then pending in the said *Posey Circuit* Court, wherein the said *William West* was plaintiff and the said *Richard Roe* was defendant, the said *William West* recovered judgment against the said *Richard Roe* for the sum of *five hundred* dollars and costs,[2] with interest on said judgment from the said *tenth* day of *June*, 1898, at the rate of *eight* per cent. per annum, and that upon said judgment there is now due the sum of *five hundred* dollars,[3] principal and interest thereon, from said *tenth* day of *June*, the date of the rendition thereof, at *eight* per cent. per annum, and costs of suit accrued to this date; and that the said *William West*, under and by virtue of said judgment last described, made said redemption of said real estate as above stated, as appears of record.

And whereas the year allowed by law for the redemption of said real estate has expired, you are therefore commanded[4] to sell said real estate so redeemed by said redemptioner and above described, to the highest bidder, as required by law, and after payment of the costs of said sale, apply the proceeds thereof first to the payment to said redemptioner, *William West*, of the amount by him paid as aforesaid in redemption of said real estate, with interest thereon at the rate of *eight* per cent. per annum from the date of such payment, together with the costs of such redemption, and the amount of the judgment, principal and interest and costs, recovered by the said *William West* and in this writ last above recited; and if after the money received from said sale has been applied in the manner above directed, the said money has not been exhausted, you are commanded to pay the residue into the office of the clerk of said *Posey Circuit* Court; but if after the money received from said sale has been applied in the manner above directed, and exhausted, the judgment, principal, interest and costs, last aforesaid, or any part thereof, remain unsatisfied, you are further commanded to levy the amount due on said judgment last above recited of any of the property of the said *Richard Roe* in your county subject to execution, and have you said money at the clerk's office of said *Posey Circuit* Court to satisfy said judgment, interest and costs, and return this writ within *one hundred and eighty* days from the date hereof, with your doings thereon.

In witness (*concluding as in Form No. 8869*).

1. **Costs of redemption** must be stated. Horner's Stat. Ind. (1896), § 773.

See also list of statutes cited *supra*, note 1, p. 866.

2. **Judgment of redemptioner** under which the redemption was made must be stated. Horner's Stat. Ind. (1896), § 773.

See also list of statutes cited *supra*, note 1, p. 866.

3. **Amount due on judgment** of redemptioner must be stated. Horner's Stat. Ind. (1896), § 773.

See also list of statutes cited *supra*, note 1, p. 866.

4. **Command of execution** must be for the sheriff to sell the real estate, interest therein, or parcels thereof, redeemed by the redemptioner, to the highest bidder, and after paying the costs of sale and paying to the redemptioner his redemption money, with interest

5. Certificate of Redemption.[1]

Form No. 17314.[2]

Whereas at the *May* term, A. D. 1899, of the *Circuit* Court of *Greene* county, *John Doe* did recover a judgment (or *decree*) against *Richard Roe* for the sum of *five hundred* dollars and costs of suit, upon which judgment an execution was issued, dated the *tenth* day of *May*, A. D. 1899, directed to *Clyde Culp*, the then sheriff of said *Greene* county, to execute, by virtue of which execution the said *Clyde Culp* as said sheriff levied upon the following premises as the property of the said *Richard Roe*, to wit, (*describing premises*);

And whereas on the *twentieth* day of *July*, A. D. 1899, the above described premises were exposed to sale at public vendue by the said sheriff under the aforesaid execution, and the time and place having

thereon at the rate of eight per cent. per annum, and his costs of redemption, and the amount of principal, with interest and costs due on the judgment, to pay the residue into the office of the clerk issuing the execution. Horner's Stat. Ind. (1896), § 773.

See also list of statutes cited *supra*, note 1, p. 866.

1. Certificate of Redemption — Generally. —In many jurisdictions, a certificate of redemption must be issued to the person effecting the statutory redemption from an execution sale. Chiles *v.* Davis, 58 Ill. 411.

And see also list of statutes cited *supra*, note 1, p. 866.

In *California*, it is held that the issuance by the sheriff of a certificate of redemption is not necessary to perfect the redemption. Phillips *v.* Hagart, 113 Cal. 552.

Paying the requisite sum to the purchaser without taking a certificate of redemption may create an equitable right which a court of chancery will recognize and enforce, but not being the mode prescribed by the statute it cannot be set up or relied upon at law to defeat the sale and conveyance by the sheriff. Chiles *v.* Davis, 58 Ill. 411.

Certificate of redemption is, however, only evidence of the deposit of redemption money. It is not evidence of the right to redeem. Henrichsen *v.* Hodgen, 67 Ill. 179.

By Whom Issued — *Generally.* — Statutes commonly require a certificate of redemption from an execution sale to be issued by the purchaser at the execution sale or by the sheriff who made the sale. See statutes cited *supra*, note 1, p. 866. And the certificate may be made by the sheriff, although the money paid to redeem is paid direct to the purchaser. Sprandel *v.* Houde, 54 Minn. 308.

By Deputy Sheriff. — Certificate may be made by a deputy sheriff while in charge of the office of sheriff during the latter's absence. Willis *v.* Jelineck, 27 Minn. 18.

Sheriff's Receipt as Certificate. — A receipt given by a sheriff, stating all the facts necessary to show a redemption, although not formally stated to be a certificate, will be treated as such. Livingston *v.* Arnoux, 56 N. Y. 507; Elsworth *v.* Muldoon, (Supreme Ct. Spec. T.) 46 How. Pr. (N. Y.) 246.

2. *Illinois.* — Where land is sold under an execution, judgment, order or decree, and redemption is not made by the judgment debtor, any decree or judgment creditor, his executors, administrators or assigns, may, after the expiration of twelve months and within fifteen months after said sale, redeem the premises in the following manner: Such creditor, his executors, administrators or assigns, may sue out an execution upon his judgment or decree, and place the same in the hands of the sheriff or other proper officer to execute the same, who shall indorse upon the back thereof a levy of the premises desired to be redeemed, and the person desiring to make such redemption shall pay to such officer the amount for which the premises to be redeemed were sold, with interest thereon at the rate of six per cent. per annum from the date of the sale, for the use of the purchaser of such premises, his executors, administrators or assigns, whereupon such officer shall make and file in the office of the recorder of the county in which the premises are situated, a certificate of such

been duly advertised according to law, the said premises were struck off and sold to *William West* for the sum of *five hundred* dollars, he, the said *William West*, being the highest bidder for said premises and said sum being the highest sum bid therefor, and he, the said *William West*, did then and there receive from said sheriff a certificate of sale stating that he, the said *William West*, as purchaser as aforesaid, would be entitled to a deed from the sheriff of said county of said premises on the *twentieth* day of *July*, A. D. 19*00*, unless said premises were sooner redeemed according to law;

And whereas *twelve* months and less than *fifteen* months have elapsed since said sale, and the said premises have not been redeemed by said defendant *Richard Roe*, or by his heirs, administrators or assigns, or by any person interested therein through or under the said *Richard Roe* or otherwise;

And whereas on the *tenth* day of *June*, A. D. 19*00*, at the *June* term, A. D. 19*00*, of the *Circuit* Court of said *Greene* county, *Richard Fern* recovered a judgment against the said *Richard Roe* for the sum of *five hundred* dollars and costs of suit, in an action then pending in said court, wherein the said *Richard Fern* was plaintiff and the said *Richard Roe* was defendant, and sued out an execution upon his said judgment, which execution was dated the *first* day of *July*, A. D. 19*00*, and directed to the sheriff of said county of *Greene*, and which execution the said *Richard Fern* placed in my hands, as sheriff of said county of *Greene*, to execute, and I have, as such sheriff, endorsed upon the back of such execution the levy of the above described premises, which said premises the said judgment creditor desires to redeem;

And whereas the said *Richard Fern* has this day, in accordance with the statute in such case made and provided, paid to me, as such sheriff, the sum of *five hundred and thirty* dollars and *sixteen* cents, the same being the amount for which the said premises were sold as aforesaid with interest on the principal sum thereof, at the rate of *six* per cent. per annum from the date of said sale to this time, for the use of said purchaser of said premises, his executors, administrators and assigns, and the same being in full for the redemption of said premises from said sale.

Now, therefore, I, *Clyde Culp*, sheriff of said county, do hereby certify that the said premises above described have this day been redeemed from said sale by said judgment debtor in accordance with the provisions of the statute.

Given under my hand and seal this *tenth* day of *July*, A. D. 19*00*.

Clyde Culp, (SEAL)
Sheriff of *Greene* County.

Form No. 17315.[1]

I, *Clyde Culp*, sheriff of the county of *Richland*, state of *North Dakota*, do hereby certify that *Richard Fern*, of the county of *Richland* and state of *North Dakota*, has this day paid to me the sum of

redemption. Starr & C. Anno. Stat. (1896), c. 77, par. 20.

See also list of statutes cited *supra*, note 1, p. 866; and, generally, *supra*, note 1, p. 874.

1. *North Dakota.*— Rev. Codes (1895), §§ 5545, 5854, 5881.

See also list of statutes cited *supra*, note 1, p. 866; and, generally, *supra*, note 1, p. 874.

five hundred and eighty-two 50-100 dollars, in redemption of the real estate and property hereinafter described, from a sale thereof made by the sheriff of said *Richland* county, on the *tenth* day of *July*, 1899, under and by virtue of an execution, duly issued upon a judgment of the *District* Court of the state of *North Dakota*, in and for the county of *Richland*, in an action pending in said court, in which *John Doe* was plaintiff and *Richard Roe* was defendant, at which sale said property was sold to *Samuel Short* for the sum of *five hundred and fifty* dollars.

The real estate and property redeemed from said sale by said *Richard Fern* by virtue hereof is situate in the county of *Richland*, state of *North Dakota*, and is described as follows, to wit: (*describing it*).

And such redemption is made by said *Richard Fern* upon the following claim or right: (*Here set forth the redemptioner's right to redeem*).

In witness whereof, I have hereunto set my hand and affixed my seal this *tenth* day of *August*, 1900.

Signed, sealed and delivered in presence of *William West.* } *Clyde Culp*, (SEAL) Sheriff of *Richland* County, *N. D.*

State of *North Dakota*, } ss.
County of *Richland.* }

On this *tenth* day of *August*, 1900, before me, a justice of the peace, personally appeared *Clyde Culp*, sheriff of the county of *Richland*, state of *North Dakota*, to me known to be the same person described in and who executed the foregoing certificate of redemption, and to me duly acknowledged that he executed the same, as such sheriff, for the uses and purposes therein expressed.

Abraham Kent,
Justice of the Peace, *Richland* County.[1]

6. Complaint.[2]

Form No. 17316.[3]

(*Title of court and cause as in Form No. 5937.*)

The above named plaintiff, by *Jeremiah Mason*, his attorney, complains of the above named defendants and alleges:

That on the *nineteenth* day of *January*, 1898, one *Richard Roe* was, and for a long time previous thereto had been, the owner in fee simple of certain lands in the city of *Milwaukee*, in the county of *Milwaukee* and state of *Wisconsin*, situated and described as follows, to wit, (*describing the lands*); that on said *nineteenth* day of *January*, 1898, one *Samuel Short*, in an action then pending in the *Circuit* Court of said county of *Milwaukee*, between the said *Samuel Short* as plaintiff and the said *Richard Roe* as defendant, recovered a judgment against the said *Richard Roe*, for the sum of *one thousand* dollars damages and costs, as appears by the judgment roll on file in the office of the clerk of the *Circuit* Court of the said county of *Mil-*

1. **Acknowledged.** — The certificate of redemption must be acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. N. Dak. Rev. Codes (1895), § 5545.

See also list of statutes cited *supra*, note 1, p. 866.

2. **For the formal parts** of a complaint in a particular jurisdiction see the title COMPLAINTS, vol. 4, p. 1019.

3. *Wisconsin.* — Stat. (1898), § 3007 *et seq.*

See also list of statutes cited *supra*, note 1, p. 866.

waukee; that said judgment was duly docketed in the said county of *Milwaukee* on the said *nineteenth* day of *January*, as appears by the files in the office of the clerk of the *Circuit* Court for said county of *Milwaukee*; that on the *tenth* day of *February*, 1*898*, the defendant *William West* was and now is the duly elected, qualified and acting sheriff of said county of *Milwaukee*; that on said *tenth* day of *February* a writ of execution was issued upon the aforesaid judgment, directed to the said sheriff of the county of *Milwaukee*, commanding him, the said sheriff, to satisfy the aforesaid judgment out of the personal property of the said *Richard Roe* in said county, or if sufficient personal property could not be found, then out of the real property of the said *Richard Roe* in said county of *Milwaukee*, owned by the said *Richard Roe* on the said *nineteenth* day of *January*, the date upon which said judgment was docketed as aforesaid; that on said *tenth* day of *February* the said *William West*, as such sheriff of said county of *Milwaukee*, received said execution issued on said judgment as aforesaid; that on the *eleventh* day of *February*, 1*898*, the said *William West*, as such sheriff, by virtue of said execution, levied upon the lands of the said *Richard Roe* hereinbefore described; that on the *seventh* day of *April*, 1*898*, the said *William West*, as such sheriff, by virtue of said execution, and after giving due notice of said sale as required by law, at the front door of the court-house in said county of *Milwaukee*, sold the aforesaid described property at public auction to the defendant *Francis Fern* for the sum of *one thousand and twenty-seven* dollars, and on said *seventh* day of *April* the said defendant *William West*, as such sheriff, executed duplicate certificates of said sale, one of which certificates was delivered to the said *Francis Fern* and the other of said certificates was, within *ten* days from the time of said sale, to wit, on the *fifteenth* day of *April*, 1*898*, filed in the office of the register of deeds of said county of *Milwaukee*, as by the files now in the office of said register will appear; that on the *tenth* day of *October*, 1*898*, and within *fifteen* months from the time of said sale, plaintiff, in an action in the *Circuit* Court of said *Milwaukee* county, wherein this plaintiff was plaintiff and the said *Richard Roe* was defendant, recovered a judgment against the said *Richard Roe* for the sum of *nine hundred* dollars damages and costs, as appears by the judgment roll on file in the office of the clerk of the *Circuit* Court of said county of *Milwaukee*, and on said *tenth* day of *October*, 1*898*, said judgment was duly docketed in the clerk's office of said *Circuit* Court, as by the files in said office will appear; that no part of said judgment has been paid and there is now due thereon the said sum of *nine hundred* dollars principal and interest, and *eighteen* dollars costs, which judgment became and is now a junior lien upon the aforesaid described premises to that of the said *Samuel Short*; that on the *fifteenth* day of *October*, 1*898*, plaintiff presented to the said defendant, *Francis Fern*, at the said *Francis Fern's* office in the city of *Milwaukee* in said county of *Milwaukee*, a copy of the record and docket of said judgment, duly certified by the clerk of said *Circuit* Court of said county of *Milwaukee*, together with the plaintiff's affidavit, as required by law, in which affidavit plaintiff stated the amount due upon said judgment, and tendered to the said defendant the amount of money, to wit, the sum of *one thousand and twenty-seven*

dollars paid by him, the said *Francis Fern*, for the aforesaid described property at said sale by said sheriff, together with interest at the rate of *ten* per cent. per year from the date of said sale, to wit, the *seventh* day of *April*, 1*898*, to the date of the making of said offer, to wit, the *fifteenth* day of *October*, 1*898*, being the sum of *one thousand and eighty* dollars and *seventy-four* cents, which said principal sum and interest so tendered, together with the certified copy of said record and docket of said judgment and affidavit, the said *Francis Fern* refused to receive, the said certified copy of record and docket, and affidavit being attached hereto, marked "Exhibit *A*;" that on said *fifteenth* day of *October* this plaintiff gave notice to the said *William West*, as such sheriff, that plaintiff had tendered to the said *Francis Fern* the amount paid by him at said sale as aforesaid, with interest thereon as aforesaid, and that the said *Francis Fern* had refused to receive the same; and that said plaintiff then, on said *fifteenth* day of *October*, tendered to the said *William West*, as such sheriff, the said principal sum so paid by the said defendant *Francis Fern*, together with the said interest as aforesaid, together with a copy of the docket of said judgment duly certified by the clerk of said *Circuit* Court of said county of *Milwaukee*, and the aforesaid affidavit of said plaintiff, and demanded of said sheriff that he transfer to this plaintiff the title of the original purchaser, the said *Francis Fern*, to the said lands as required by law; that said sheriff refused to receive said tender of the principal amount and interest aforesaid, and to transfer the title of the said purchaser to plaintiff as requested; that said certified copy of record and docket of said judgment, and said affidavit, are hereto annexed, marked "Exhibit *A*;" that the lands so sold by the said sheriff as aforesaid have never been redeemed by the said *Richard Roe* or by anyone for him, nor has the interest of the said *Francis Fern* in said property been acquired by anyone except this plaintiff; that said *William West*, as such sheriff as aforesaid, at the expiration of *fifteen* months from the date of said sale, to wit, on the *seventh* day of *July*, 1*899*, executed a deed of the said lands so sold as aforesaid to the said *Francis Fern*, the purchaser at the aforesaid sale, and refused to execute a deed of said lands to this plaintiff, although requested by said plaintiff so to do; that said deed was executed by the said *William West*, as such sheriff, with fraudulent intent on the part of him, the said *William West*, to deprive this plaintiff of his rights in the premises; that plaintiff has ever been and is now willing to pay to the said *Francis Fern* the aforesaid principal sum and interest, and now offers to pay the same, and has deposited the aforesaid principal sum and interest with the clerk of this court.

Wherefore plaintiff prays that the said *William West* may be compelled, as sheriff of said county of *Milwaukee*, to make a conveyance to this plaintiff of the aforesaid premises upon the payment unto him, the said sheriff, of the aforesaid principal sum and interest, and that the aforesaid deed executed by the said *William West*, as such sheriff, to the said *Francis Fern* be declared void and be canceled, and for such other relief as may be proper and for his costs and disbursements in this action.

Jeremiah Mason, Plaintiff's Attorney.

(*Verification.*)

III. Of Land from Tax Sale.[1]

1. Notice of Expiration of Statutory Time of Redemption.

a. The Notice.[2]

1. **Statutory provisions** relating to redemption of land sold for taxes exist in the following states, to wit:

Alabama. — Civ. Code (1896), §§ 2964, 4090 *et seq.*

Arizona. — Rev. Stat. (1891), §§ 488, 578, 3923.

Arkansas. — Sand. & H. Dig. (1894), §§ 4596, 4641 *et seq.*, 6615 *et seq.*

California. — Pol. Code (1897), §§ 3780, 3781.

Colorado. — Mills' Anno. Stat. (1891), 3905 *et seq.*

Florida. — Rev. Stat. (1892), app. c. 4011, § 5 *et seq.*

Georgia. — 1 Code (1895), §§ 733, 909, 910.

Idaho. — Rev. Stat. (1887), §§ 1541, 1549 *et seq.*

Illinois. — Starr & C. Anno. Stat. (1896), c 24, par. 157; c. 120, par. 212 *et seq.*

Indiana. — Horner's Stat. (1896), § 6459 *et seq.*

Iowa. — Code (1897), § 1436 *et seq.*

Kansas. — Gen. Stat. (1897), c. 158, § 184 *et seq.*

Kentucky. — Stat. (1894), §§ 4152, 4156, 4160, 4161.

Maine. — Rev. Stat. (1883), c. 6, § 75.

Maryland. — Pub. Gen. Laws (1888), art. 81, § 56.

Massachusetts. — Stat. (1888), c. 390, §§ 46, 51, 55-59, 65, 76.

Michigan. — Comp. Laws (1897,) § 3897.

Minnesota. — Stat. (1894), §§ 1142, 1590, 1600-1603, 1616, 1644.

Mississippi. — Anno. Code (1892), §§ 3823, 3853, 3862.

Montana. — Pol. Code (1895), §§ 3889, 3890.

Nebraska. — Comp. Stat. (1899), §§ 982, 4402-4405, 4496.

Nevada. — Comp. Laws (1900), § 1126.

New Hampshire. — Pub. Stat. & Sess. L. (1900), c. 61, § 10.

New Jersey. — Gen. Stat. (1895). p. 3352, § 326; p. 3354, § 338; p. 3358, § 367; p. 3365, § 390; p. 3409, §§ 567-569.

New York. — Heydecker's Gen. L. & Rev. Stat. (1901), c. 24, §§ 127, 128, 137, 139, 152.

North Carolina. — Code (1883), §§ 3695, 3697, 3699.

North Dakota. — Rev. Codes (1895), §§ 1264-1266, 1283.

Ohio. — Bates' Anno. Stat. (1897), § 2889 *et seq.*

Oklahoma. — Stat. (1893), §§ 5661, 5664, 5665.

Oregon. — Hill's Anno. Laws (1892), § 2820.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 1995, § 196; p. 2059, § 39 *et seq.*; p. 2063, § 56.

Rhode Island. — Gen. Laws (1896), c. 48, § 16.

South Dakota. — Dak. Comp. Laws (1887), §§ 1631, 1635-1637.

Tennessee. — Code (1896), §§ 902, 3811.

Texas. — Rev. Stat. (1895), arts. 5187-5196, 5232*m*, 5232*n*.

Utah. — Rev. Stat. (1898), §§ 2627, 2655.

Vermont. — Stat. (1894), §§ 488, 500, 541.

Virginia. — Code (1887), §§ 649-652; Code (Supp. 1898), § 650 *et seq.*

Washington. — Ballinger's Anno. Codes & Stat. (1898), § 1755.

West Virginia. Code (1899), c. 31, §§ 15, 16, 30, 33, 36, 38; c. 105, § 17.

Wisconsin. — Stat. (1898), § 1165 *et seq.*

Compliance with Statute. — The right of redemption of land sold for taxes is entirely statutory and the requirements of the statute must be strictly complied with. Quinn *v.* Kenney, 47 Cal. 147; Logansport *v.* Case, 124 Ind. 254; State *v.* Nord, 73 Minn. 1; Western Land Assoc. *v.* McComber, 41 Minn. 20.

2. **Necessity for Notice.** — Notice of the expiration of the statutory time of redemption must be given, although the name of the owner of the property is stated in the assessment book as unknown and there is no person in the actual possession of the premises. State *v.* Halden, 62 Minn. 246.

And see list of statutes cited *supra*, note 1, this page.

Requisites of Notice — Generally. — The notice of the expiration of the time for redemption must substantially comply with the statute. Blackistone *v.* Sherwood, 31 Kan. 35.

To Whom Addressed — *Person Assessed.* — The notice should be addressed to the person in whose name the lands are assessed at the time the notice is issued, and failure so to do is fatal. Eide *v.* Clarke, 57 Minn. 397; Mitchell *v.* McFarland, 47 Minn. 535; Sperry *v.* Good-

(1) By County Auditor or Treasurer.

win, 44 Minn. 207; Wakefield *v.* Day, 41 Minn. 344; Western Land Assoc. *v.* McComber, 41 Minn. 20. But it is not fatal to the validity of the notice that it also contains the name of the person in whose name the land was assessed at the time the tax was levied. Sperry *v.* Goodwin, 44 Minn. 207.

Unknown Persons. — Where the persons to whom the land should be assessed are unknown, a notice addressed to persons "Unknown" is sufficient. Hoyt *v.* Clark, 64 Minn. 139.

Where land was assessed in the name of "*Anna S. Howard* and *C. Ingles*," a notice directed to "*Anna S. Howard* and *Cordelia Ingles*" was held sufficient. Snyder *v.* Ingalls, 70 Minn. 16.

Description of Property. — Where the description of the property is such that no one owning or having any interest therein can be misled or fail to understand the location of the property specified in the notice, it is sufficient. Sperry *v.* Goodwin, 44 Minn. 207.

Where the notice described the property as "*Penniman's* addition, lot *8*, block *4*," without mention of city, county or state, it was held that Penniman's addition to the city of Minneapolis was at the time of the notice an old and well-known platted tract, and the only subdivision in the city or county platted or known by any name embracing the name "Penniman" or any similar word, and was commonly known and designated by the inhabitants of that city as "Penniman's addition," and that the description was sufficient. Reimer *v.* Newel, 47 Minn. 237.

Where the notice describes the premises as situated upon the west side of a certain street, when in fact they are situated on the east side, it is insufficient. Clason *v.* Baldwin, 152 N. Y. 204.

Ownership of Property. — Where in the column headed "To whom assessed," the only words appearing are "William Pearsall," it does not comply with the statute requiring a detailed statement of the ownership of the property taxed, as it does not show what William Pearsall was in relation to the premises, whether owner or lessee. Franklin *v.* Pearsall, 53 N. Y. Super. Ct. 271.

Where under the heading "In whose name assessed" appears the word "unknown," and below this word and opposite the description of the land in question are ditto-marks, it is a sufficient designation of the fact that the name of the owner of the land is unknown. Hoyt *v.* Clark, 64 Minn. 139.

Time when right to redeem will expire must be stated clearly and directly in the notice. Gahre *v.* Berry, 82 Minn. 200; State *v.* Nord, 73 Minn. 1; State *v.* Halden, 62 Minn. 246; Kenaston *v.* Great Northern R. Co., 59 Minn. 35; Hennessey *v.* Volkening, (N. Y. Super. Ct. Tr. T.) 30 Abb. N. Cas. (N. Y.) 100; Willis *v.* Gehlert, 34 Hun (N. Y.) 566. And where the day on which the right of redemption expires is left uncertain by the notice, the notice is insufficient. Willis *v.* Gehlert, 34 Hun (N. Y.) 566. But the precise day on which the period of redemption will expire need not be stated. Parker *v.* Branch, 42 Minn. 155.

A notice is not invalid for the reason that the day named as the last day of redemption is a Sunday; and the tax deed will not be set aside unless the owner of the land shows that he was misled by the notice and that he offered to redeem on the last day named in the notice, or, if the last day named was Sunday, on the next day. Hicks *v.* Nelson, 45 Kan. 47. But see Hill *v.* Timmermeyer, 36 Kan. 252, wherein it was held that where the last day specified in the notice for redemption was Sunday the notice was invalid, as the owner was not thereby given the statutory time in which to redeem.

Where a sale was made on the 11th day of September, 1875, a notice that "on and after *September 9, 1878*," a deed would be issued to the purchaser, was held to be insufficient, as it did not give the full statutory time. Hollenback *v.* Ess, 31 Kan. 87.

Where land was sold for taxes of the year 1875, an the notice stated that the land would be deeded to the purchasers "on and after *September 5th*, 1879, or within *three* years from the day of sale," it was held that the notice was not specific, definite or correct, and that a deed based thereon was invalid. Blackistone *v.* Sherwood, 31 Kan. 35.

A notice which recited that the "real estate was sold on the *13th* day of *May*, 1873, for delinquent taxes of the year 1871, and that the *three* years allowed by law for the redemption of the same expired on the *14th* day of *May*, 1875,"

(*a*) *In General.*

Form No. 17317.[1]

County Treasurer's Office, *Alma*, *Wabaunsee* County, *Kansas*, *February 13*, 1885.

Notice is hereby given that the lands described in the following list, situate in the county of *Wabaunsee* and state of *Kansas*, were sold on the *fifth* day of *September*, 1882, for the unpaid taxes of 1881, and costs and charges thereon.

The period of redemption under said sale will expire in *three* years from the day of said sale, to wit, on the *sixth* day of *September*, 1885;[2] the sum set opposite the several tracts includes the taxes, interest, and charges up to the last day of redemption.

Now, therefore, unless the said lands shall be redeemed on or

was held to be insufficient. Long *v.* Wolf, 25 Kan. 522.

Where the notice stated that "the time allowed by law for redemption from said sale will have expired after *sixty* days have elapsed after service of this notice shall have been made and proof thereof filed in this office," it was held to be insufficient. It should have stated that the time to redeem would expire at the end of sixty days. Gahre *v.* Berry, 82 Minn. 200.

The notice must comply strictly with the statute as to the time of redemption, and must contain no mistake in dates. So, where the time fixed in the notice was ninety instead of sixty days as required, it was held that the notice was void. State *v.* Nord, 73 Minn. 1.

That the period for redemption will expire "*sixty* days after service of the notice, in the manner prescribed by statute," is insufficient. State *v.* Halden, 62 Minn. 246.

Where the notice was served on the twelfth day of July, and stated that the time for redemption would expire "on the *9th* day of *September*, 1888, or within *sixty* days after the service of this notice," it was held to be insufficient, because it fixed in the alternative two different dates. Had the notice simply stated that the time for redemption would expire sixty days after the service of the notice, it would have been sufficient. Peterson *v.* Mast, 61 Minn. 118.

Where the time of redemption does not expire until sixty days after both service of the notice and filing of proof of such service, a notice stating that the time of redemption will expire "*sixty* days after the service of the notice," without the further words required by the statute, "and after filing of proof thereof," is insufficient. Kenaston *v.* Great Northern R. Co., 59 Minn. 35.

That the redemption must be made "on or before the expiration of *two* years," which was specifically stated to be the twenty-eighth day of December, 1888, is sufficient. Hennessey *v.* Volkening, (N. Y. Super. Ct. Tr. T.) 30 Abb. N. Cas. (N. Y.) 100.

Inaccuracy as to amount necessary to be paid to redeem will not invalidate the notice. Western Land Assoc. *v.* McComber, 41 Minn. 20.

That Lands will be Conveyed Unless Redeemed. — Where the notice fails to state that unless the lands are redeemed by a day named therein they will be conveyed to the purchaser, it is insufficient. Simonton *v.* Hays, 32 Hun (N. Y.) 286.

1. *Kansas.* — Gen. Stat. (1897), c. 158, § 196.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

This is substantially the notice in Hicks *v.* Nelson, 45 Kan. 47. Objection was made to that notice for the reason that it stated that the period of redemption would expire in three years from the date of the sale, or on the sixth day of September, and that therefore the date was not definitely fixed. It was held that as the date of the sale was given in the notice a computation would show when the three years would expire. The form given in the text has been changed to obviate this objection.

2. **Day limited for redemption** must be stated in the notice. Kan. Gen. Stat. (1897), c. 158, § 196.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

before the *sixth* day of *September*, 1885, they may be conveyed to the purchaser thereof, on and after the *sixth* day of *September*, 1885.[1]

Joseph Fields, County Treasurer.

(*Here follows a description of each tract or lot as the same is described on the tax roll*,[2] *the name of the person to whom assessed*,[3] *and the amount of taxes, charges and interest to the last day of redemption due on each parcel.*)[4]

Form No. 17318.[5]

State of *Minnesota*, } Office of County Auditor,
County of *Ramsey*. } *February 1*, 1900.

Public notice is hereby given, as required by chapter 194, general laws of 1885, that each piece or parcel of the real property hereinafter described was sold at the tax sale on the *tenth* day of *May*, 1897, pursuant to the real estate tax judgment entered in the *District* Court, in the county of *Ramsey*, on the *fifth* day of *March*, 1897, in proceedings to enforce the payment of taxes remaining delinquent upon real estate on the *first Monday* in *January*, 1897, for taxes of 1896, and the penalties and costs accrued thereon, and that the period of redemption of said real property from said sale will expire on the *eleventh* day of *May*, 1900,[6] under the provisions of the general tax law of 1878, and amendments thereto; and the amount stated opposite each description is the amount which will be required to redeem such description from said sale on the *tenth* day of *May*, 1900, including *twenty-five* (*25*) cents for each description for publishing this notice. The real property above referred to is described as follows: (*Here insert a description of each tract or lot as the same is described on the tax roll*,[7] *the name of the person to whom assessed*,[8] *the amount of taxes, charges and interest to the last day of redemption due on each parcel.*)[9]

1. That land will be conveyed to purchaser unless redeemed on or before the day limited therefor must be stated. Kan. Gen. Stat. (1897), c. 158, § 196.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

2. List of all unredeemed lands, describing each tract or lot as the same was described on the tax roll, must be given. Kan. Gen. Stat. (1897), c. 158, § 196.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

3. Name of person to whom land is assessed, if any, must be stated. Kan. Gen. Stat. (1897), c. 158, § 196.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

4. Amount of taxes, charges and interest, calculated to the last day of redemption, due on each parcel, must be stated. Kan. Gen. Stat. (1897), c. 158, § 196.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

5. *Minnesota.* — Stat. (1894), § 1655.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

6. The date on which the time for redemption will expire must be given. Minn. Stat. (1894), § 1655.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

7. List of all unredeemed lands, specifying each tract or lot, must be stated. Minn. Stat. (1894), § 1655.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

8. Name of owner, if known, must be stated, and if the owner be unknown such fact must be stated. Minn. Stat. (1894), § 1655.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

9. Amount required to redeem, calculated to the last day of redemption, due

Given under my hand and official seal this *first* day of *February*, 19*00*.

(SEAL) *Charles Atwood*, County Auditor,
Ramsey County.

(*b*) *To Person in Whose Name Land is Assessed.*

Form No. 17319.[1]

(Precedent in Knight *v.* Knoblauch, 77 Minn. 10.)[2]

Notice of Expiration of Redemption.

In whose name assessed.	Subdivision of section, lot, or block.	Section.	Township.	Range.	No. acres.	Amount sold for.	Interest, penalty, and costs.	Total amount required to redeem.
Anton Knoblauch.....	S. W. *1-4*	*14*	*102*	*39*	*160*	$*16.70*	$*14.40*	$*31.10*

Office of County Auditor, *Nobles* County, *Minnesota.*

To *Anton Knoblauch*:[3]

You are hereby notified that pursuant to the tax judgment entered in the *district* court in the county of *Nobles*, state of *Minnesota*, on the *22nd* day of *March*, 1*889*, the land hereinbefore described, assessed in your name, was sold for tax of 1*887* on the *6th* day of *May*, 1*889*, and that the time of redemption from said sale allowed by law will expire *60* days after service of this notice and proof of the service thereof has been filed with the county auditor.[4] In addition to the amount above stated as necessary to redeem from said sale, the cost of service of this notice must be paid.

Witness my hand and seal at *Worthington*, in said county of *Nobles*, this *26th* day of *March*, 1*896*.

(SEAL) *John J. Kendlen*, County Auditor.

on each parcel, lot or tract of land, must be stated. Minn. Stat. (1894), § 1655.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

1. *Minnesota.* — Stat. (1894), § 1654.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

2. The court held that this notice was sufficient, and that the body of the notice referred to and adopted the description, etc., stated in the heading.

Description of land must be given in the notice. Minn. Stat. (1894), § 1654.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

Amount for which land was sold must be stated. Minn. Stat. (1894), § 1654.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

Amount required to redeem land from sale, exclusive of the costs to accrue upon the notice, must be stated. Minn. Stat. (1894), § 1654.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

3. To Whom Given. — Notice must be given to the person in whose name the lands are assessed. Minn. Stat. (1894), § 1654.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

4. Time when redemption period will expire must be stated. Minn. Stat. (1894), § 1654.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

Notice of Expiration of Redemption.

In whose name assessed.	Subdivision of section, lot or block.	Sec.	Town.	Range.	No. of acres.	Year tax levied.	Date of judgment. Mon. Day. Y'r.	When sold. Mon. Day. Y'r.	Amount sold for. $ Cts.	Interest, penalty and costs. $ Cts.	Total amount required to redeem. $ Cts.
Anna S. Howard & Cordelia Ingalls..	Und'd *1-2* of N. *1-2* N. W. *1-4*	*33*	*35*	*20*	*40*	1883	*Aug. 11*, 1884	*Sept. 15*, 1884	*3 08*	*5 64*	*8 72*
Anna S. Howard & Cordelia Ingalls..	Und'd *1-2* of S. E. *1-4* of N. W. *1-4*.....	*33*	*35*	*20*	*20*	1883	*Aug. 11*, 1884	*Sept. 15*, 1884	*1 61*	*2 95*	*4 56*
Anna S. Howard & Cordelia Ingalls..	Und'd *1-2* of S.W. *1-4*..	*28*	*35*	*20*	*80*	1883	*Aug. 11*, 1884	*Sept. 15*, 1884	*5 99*	*10 96*	*16 95*

Office of County Auditor.

To *Anna S. Howard* and *Cordelia Ingalls*: *Chisago* County, *Minnesota*.

You are hereby notified that, pursuant to tax judgment entered in the *district* court in the county of *Chisago*, State of *Minnesota*, as above stated, the land herein described, assessed in your name, was sold for tax as above stated, and that the time of redemption from said sale allowed by law will expire within *sixty* (*60*) days after service of this notice and proof thereof has been filed. In addition to the amount above stated as necessary to redeem from said sale, the cost of service of this notice must be paid, together with such interest as may accrue from and after this date.

Witness my hand and official seal at *Centre City*, in said county of *Chisago*, this *22nd* day of *November*, 1894.

(SEAL) *J. P. Nord*, County Auditor.

1. *Minnesota*. — Stat. (1894), § 1654.

See also *supra*, Form No. 17319, and notes thereto; and, generally, *supra*, note 2, p. 879.

2. It was held that as the notice stated separately and distinctly a description of each tract, date of sale, amount sold for, interest, and the amount required to redeem each tract, with such clearness that no one could possibly be misled, both in form and substance it was sufficient.

Form No. 17320.[1] (Precedent in Snyder *v.* Ingalls, 70 Minn. 18.)[2]

Form No. 17321.[1]

State of *North Dakota*, } ss.
County of *Richland*. }

Whereas on the *tenth* day of *April*, 1900, the holder of tax certificate No. *699*, duly presented the same to the subscriber; Now therefore, notice is hereby given to *Richard Roe*,[2] the person in whose name the lands hereinafter described were assessed for taxation in the year 1897, and to all persons in any way concerned therein, that the statutory period for the redemption of said lands from the sale of the same for taxes of the year 1897, which said lands were at such sale sold for the sum of *forty-two* dollars and *fifty* cents,[3] will expire on the *eleventh* day of *July*, 1900;[4] that the amount necessary to redeem said lands from said sale, at the date of this notice, exclusive of the costs of publication and the service of the same, is the sum of *forty-six* dollars and *eighty* cents; that the amount necessary to redeem the same on the said *eleventh* day of *July*, 1900, the date when said period of redemption will expire, exclusive of said costs, will be the sum of *forty-seven* dollars and *sixty* cents;[5] the said lands, situate and being in the county of *Richland* and state of *North Dakota*, are described as follows, to wit, (*describing them*).[6]

Dated *April 10*, 1900.

(SEAL)[7]

Charles Atwood,
County Auditor of *Richland* County, *N. D.*[8]

(*c*) *To Registered Owner.*

Form No. 17322.[9]

To *Richard Roe*,[3] whose post-office is *Chicago*, County of *Cook* and

1. *North Dakota*. — Laws (1890), c. 132, § 103.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

2. **To Whom Given.** — Notice must be given to the person in whose name the lands are assessed. N. Dak. Laws (1890), c. 132, § 103.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

3. **Amount for which land was sold** must be stated in the notice. N. Dak. Laws (1890), c. 132, § 103.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

4. **Time when redemption period will expire** must be stated. N. Dak. Laws (1890), c. 132, § 103.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879

5. **Amount required to redeem** land from sale, exclusive of the costs to accrue upon the notice, must be stated. N. Dak. Laws (1890), c. 132, § 103.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

6. **Description of land** must be given in the notice. N. Dak. Laws (1890), c. 132, § 103.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

7. **Seal.** — Notice must be under the seal of the county auditor. N. Dak. Laws (1890), c. 132, § 103.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

8. **Signature.** — The notice must be signed by the county auditor. N. Dak. Laws (1890), c. 132, § 103.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

9. *Minnesota*. — Stat. (1894), §§ 1657, 1659.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

10. **To Whom Given.** — A separate notice must be sent to each person or

State of *Illinois*,[1] and to *Oliver Ellsworth*,[2] a person who resides at (or *The Central Trust Co., a corporation which has an office and place of business at*) *St. Paul*, in the County of *Ramsey* and State of *Minnesota*, Greeting:

You are hereby notified that on the *tenth* day of *May*, A. D. 1897, in proceedings to enforce the payment of delinquent taxes pursuant to that real tax judgment which was entered in the *District* Court in and for the county of *Ramsey*, in the *Second* Judicial District of the state of *Minnesota*, on the *fifth* day of *March*, A. D. 1897, for the delinquent taxes for the year 1896, the following described piece and parcel of land, which is situated in *Ramsey* county, in the state of *Minnesota*, to wit, (*describing it*),[3] was sold to satisfy the amount for which it was adjudged liable in said judgment, with interest and costs, for the sum of *nine hundred* dollars;[4] that the amount required to redeem said piece or parcel of land from such sale is *nine hundred* dollars and interest on said amount at the rate of *twelve* per cent. per annum from said *tenth* day of *May*, A. D. 1897, until such redemption is made and subsequent delinquent taxes for the years 1897, 1898, and 1899, amounting to *six hundred and thirty* dollars, amounting in all at the date of this notice to the sum of *one thousand eight hundred and seventy-two* dollars, exclusive of the cost of making, serving, mailing and publishing all notices required by law.[5] That the time of redemption of said piece or parcel of land will expire *sixty* (*60*) days after the personal service of this said notice upon the said *Oliver Ellsworth* (or *said The Central Trust Co.*), who has been heretofore legally designated as the person (or *corporation*) upon whom (or *upon which*) personal service may be made, the mailing of a copy of said notice to the said *Richard Roe*, and the return and filing of proof of said personal service and of said mailing, and of the sheriff's fees therefor in the undersigned county auditor's office, and the service,

corporation having any right, title or interest in or to the land or real estate described in the tax certificate, or in or to any part of such land, as indicated by any and all valid and effectual statements which have been filed in the office of the county auditor. Minn. Stat. (1894), § 1659.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

1. **Post-office address** of the person or corporation having such right, title or interest in or to the lands as indicated in statement on file, if the post-office address is given in such statement, must be given. Minn. Stat. (1894), § 1659.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

2. **Name of agent** or person or corporation designated in the statement as the one upon whom or upon which the personal service of notice might be made must be given. Minn. Stat. (1894), § 1659.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

3. **Description of property** sold must be given. Minn. Stat. (1894), § 1659.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note d, p. 879.

4. **Amount for which property was sold** must be stated. Minn. Stat. (1894), § 1659.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

5. **Amount required to redeem**, exclusive of the costs to accrue upon the notices, must be stated. Minn. Stat. (1894), § 1659.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

mailing and publishing of all other notices required by law, and the returning and filing of proof thereof and of the sheriff's fees therefor in the undersigned county auditor's office.[1]

Witness my hand and official seal this *twelfth* day of *May*, A. D. 1900.

(SEAL)[2]

Charles Atwood,
County Auditor of *Ramsey* County, *Minn.*[3]

(2) BY PURCHASER OF LAND.

Form No. 17323.[4]

Notice to Redeem.

State of *Iowa*, }
Harrison County. } ss.

To (*naming person in possession of the property and person to whom property is taxed*):

You are hereby notified that at a sale of lands and lots for taxes, on the *tenth* day of *June*, 1897,[5] by the treasurer of *Harrison* county, *Iowa*, the following described real property, situated in said county, to wit, (*describing it*),[6] was sold to the undersigned *John Doe*,[7] and that the right of redemption will expire, and a deed for said premises will be made, unless redemption from such sale be made within *ninety* days from the completed service of this notice.[8]

Dated this *fifteenth* day of *March*, 1900.

John Doe.[9]

1. Time when the redemption period will expire must be stated. Minn. Stat. (1894), § 1659.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

2. Seal. — Notice must be under the seal of the county auditor. Minn. Stat. (1894), § 1659.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

3. Signature. — Notice must be signed by the county auditor. Minn. Stat. (1894), § 1659.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

4. *Iowa.* — After two years and nine months from the date of sale, the holder of the certificate of purchase may cause to be served upon the person in possession of the real estate, and also upon the person in whose name the land is taxed, if such person exists in the county where the land is situated, in the manner provided for service of original notices, a notice that unless redemption is made within ninety days from the completed service thereof the right of redemption will expire and a deed for the land be made. Code (1897), § 1441.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

5. Date of sale must be stated in the notice. Iowa Code (1897), § 1441.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

6. Description of property sold must be given in the notice. Iowa Code (1897), § 1441.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

7. Name of purchaser must be given in the notice. Iowa Code (1897), § 1441.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

8. Expiration of Time for Redemption. — Notice must state that unless redemption is made within ninety days from the completed service of the notice the right to redeem will expire and a deed for the land be made. Iowa Code (1897), § 1441.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

9. Signature. — Notice must be signed

b. Affidavit of Service of Notice.[1]

(1) In General.

Form No. 17324.[2]

State of *Iowa*, }
Harrison County. } ss.

I, *Nathan Hale*, on oath say, that I am the agent of *John Doe*, the person named as purchaser of the real estate specified in the within notice; that I received the within notice for service on the *fifteenth* day of *March*, 1900;[3] that on said *fifteenth* day of *March*, at *Logan*, in said county, I served the same personally on the within named *Richard Roe*, by reading the said notice to the said *Richard Roe*, and by then delivering to the said *Richard Roe* personally a copy of said notice, all done in *Harrison* county, *Iowa*.

Dated this *fifteenth* day of *March*, 1900.

Nathan Hale.

Sworn to before me and subscribed in my presence by the said *Nathan Hale* this *fifteenth* day of *March*, 1900.

(SEAL) *Norton Porter*, Notary Public.

(*Itemized statement of fees.*)

(2) On Assessee and Occupant.

Form No. 17325.[4]

State of *Illinois*, }
Greene County. } ss.

Nathan Hale, of lawful age, being duly sworn, says that he resides in said county, and is the agent of *Richard Roe*, named in the annexed notice; that as such agent, deponent on the *tenth* day of *June*, A. D. 1898, being at least *three* months before the expiration of the time of redemption on the sale mentioned in the annexed notice, served a notice, of which the annexed notice is a true copy, on *Samuel Short*, by handing the same to and leaving the same with him personally, at his place of residence in the city of *Carrollton*, in said county of *Greene*. Deponent is acquainted with the land or lot mentioned in said notice, and the person so served was the only person in actual possession or occupancy of said land or lot at least *three* months before the expiration of the time of redemption on the sale mentioned in said notice, to wit, on the *tenth* day of *June*, A. D. 1898; and the

by the purchaser, his agent or attorney. Iowa Code (1897), § 1441.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 879.

1. Requisites of Affidavit, Generally. — For the formal parts of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

Service by Agent. — Service of the notice may be made by the holder of the certificate, his agent or attorney, and an affidavit of service by one of these parties is sufficient. Ellsworth *v.* Van Ort, 67 Iowa 222.

2. *Iowa.* — Code (1897), § 1441.

See also list of statutes cited *supra*, note 1, p. 879.

3. Date on which service was made must be stated. Wilkin *v.* Wilkin, 91 Iowa 652.

4. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 120, par. 219.

See also list of statutes cited *supra*, note 1, p. 879.

said land or lot was taxed or specially assessed in the name of *John Doe*, and deponent served a notice, of which the annexed notice is a true copy, on the said *John Doe*, by handing the same to and leaving the same with him at his place of residence in the city of *Carrollton*, in said county of *Greene*, on the *tenth* day of *June*, A. D. 1898, being at least *three* months before the expiration of the time of redemption on the sale mentioned in said notice.

Nathan Hale.

Subscribed and sworn to before me this *tenth* day of *June*, A. D. 1898. *Norton Porter*, Notary Public.

(3) On Assessee — Premises Vacant.

Form No. 17326.[1]

State of *Illinois*, } ss.
Greene County. }

Nathan Hale, of lawful age, being duly sworn, says that he resides in said county, and is the agent of *Richard Roe*, named in the annexed notice; that as such agent, deponent visited the land or lot described in the annexed notice, on the *tenth* day of *June*, A. D. 1898, being at least *three* months before the expiration of the time of redemption on the sale mentioned in said notice, for the purpose of serving said notice on the occupant, but there was no person in actual possession or occupancy of said land or lot. Deponent is acquainted with said land or lot and said land or lot was vacant, and no person was in actual possession or occupancy of said land or lot at least *three* months before the expiration of the time of redemption of the sale mentioned in said notice, to wit, the *tenth* day of *June*, A. D. 1898, and the said land or lot was taxed or specially assessed in the name of *John Doe*, and deponent served a notice, of which the annexed notice is a true copy, on the said *John Doe*, by handing the same to and leaving the same with the said *John Doe*, personally, at his place of residence, in the city of *Carrollton*, in said county of *Greene*, on the *tenth* day of *June*, A. D. 1898, being at least *three* months before the expiration of the time of redemption on the sale mentioned in said notice.

Nathan Hale.

Subscribed and sworn to before me this *tenth* day of *June*, A. D. 1898. *Norton Porter*, Notary Public.

(4) On Occupant.

(*a*) *Assessee Nonresident.*

Form No. 17327.[1]

State of *Illinois*, } ss.
Greene County. }

1. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 120, par. 219. See also list of statutes cited *supra*, note 1, p. 879.

Nathan Hale, of lawful age, being duly sworn, says that he resides in said county, and is the agent of *Richard Roe*, named in the annexed notice; that as such agent, deponent on the *tenth* day of *June*, A. D. 1898, being at least *three* months before the expiration of the time of redemption on the sale mentioned in the annexed notice, served a notice, of which the annexed notice is a true copy, on *Samuel Short*, by handing the same to and leaving the same with him, the said *Samuel Short*, personally, at his place of residence in the city of *Carrollton*, in said county. Deponent is acquainted with the land or lot mentioned in said notice, and the person so served was the only person in actual possession or occupancy of said land or lot at least *three* months before the expiration of the time of redemption on the sale mentioned in said notice, to wit, on the *tenth* day of *June*, A. D. 1898; and the said land or lot was taxed or specially assessed in the name of *John Doe*, and this deponent made diligent search and inquiry, within the county aforesaid, for said *John Doe*, the person in whose name the said land or lot described in the notice attached hereto was taxed or specially assessed, and upon diligent search and inquiry (*state facts showing diligence used*) this affiant was unable to find him, the said *John Doe*, or hear of his being within said county, or a resident thereof, and so deponent says that said *John Doe*, at said date, the same being at least *three* months before the time of redemption on the sale mentioned in said notice expired as aforesaid, could not be found in said county of *Greene*.

Nathan Hale.

Subscribed and sworn to before me this *tenth* day of *June*, A. D. 1898.

Norton Porter, Notary Public.

(*b*) *No Assessee.*

Form No. 17328.[1]

State of *Illinois*, } ss.
Greene County. }

Nathan Hale, of lawful age, being duly sworn, says that he resides in said county, and is the agent of *Richard Roe* named in the annexed notice; that as such agent, deponent on the *tenth* day of *June*, A. D. 1898, being at least *three* months before the expiration of the time of redemption on the sale mentioned in annexed notice, served a notice, of which the annexed notice is a true copy, on *Samuel Short*, by handing the same to and leaving the same with him personally, at his place of residence in the city of *Carrollton*, in said county of *Greene*. Deponent is acquainted with the land or lot mentioned in said notice, and the person so served was the only person in actual possession or occupancy of said land or lot at least *three* months before the expiration of the time of redemption on the sale mentioned in said notice, to wit, on the *tenth* day of *June*, A. D. 1898;

1. *Illinois*. — Starr & C. Anno. Stat. (1896), c. 120, par. 219. See also list of statutes cited *supra*, note 1, p. 879.

and said land or lot was not taxed or specially assessed in the name of any person.

Nathan Hale.

Subscribed and sworn to before me this *tenth* day of *June*, A. D. 1898.

Norton Porter, Notary Public.

(5) On Person Interested in Premises.

Form No. 17329.[1]

State of *Illinois*, } ss.
Greene County. }

Nathan Hale, of lawful age, being duly sworn, says that he resides in said county, and is the agent of *Richard Roe* named in the annexed notice; that as such agent, deponent on the *tenth* day of *June*, A. D. 1898, being at least *three* months before the expiration of the time of redemption on the sale mentioned in the annexed notice, served a notice, of which the annexed notice is a true copy, on *John Doe*, who, this deponent is informed and verily believes, had then some interest, either as judgment creditor, mortgagee or otherwise, in the land or lot described in said notice, by handing the same to and leaving the same with the said *John Doe*, at his residence in the city of *Carrollton* in said county.

Nathan Hale.

Subscribed and sworn to before me this *tenth* day of *June*, A. D. 1898.

Norton Porter, Notary Public.

c. Affidavit of Failure to Make Service of Notice.

(1) Assessee Nonresident.

Form No. 17330.[1]

State of *Illinois*, } ss.
Greene County. }

Nathan Hale, of lawful age, being duly sworn, says that he resides in said county, and is the agent of *Richard Roe*, named in the annexed notice; that as such agent, deponent visited the land or lot described in the annexed notice, on the *tenth* day of *June*, A. D. 1898, being at least *three* months before the expiration of the time of redemption on the sale mentioned in said notice, for the purpose of serving said notice on the occupant, but there was no person in actual possession or occupancy of said land or lot. Deponent is acquainted with said land or lot and said land or lot was vacant, and no person was in actual possession or occupancy of said land or lot at least *three* months before the expiration of the time of redemption on the sale mentioned in said notice, to wit, the *tenth* day of *June*, A. D. 1898, and the said land or lot was taxed or specially assessed in the name of *John Doe*, and this deponent made diligent search and

1. *Illinois*. — Starr & C. Anno. Stat. (1896), c. 120, par. 219. See also list of statutes cited *supra*, note 1, p. 879.

inquiry, within the county aforesaid, for the said *John Doe*, the person in whose name the said land or lot described in the notice attached hereto was taxed or specially assessed, and upon diligent search and inquiry (*state facts showing diligence used*) this affiant was unable to find him, the said *John Doe*, or hear of his being within said county, or a resident thereof, and so deponent says that said *John Doe*, at said date, the same being at least *three* months before the time of redemption on the sale mentioned in said notice expired as aforesaid, could not be found in said county of *Greene*.

Nathan Hale.

Subscribed and sworn to before me this *tenth* day of *June*, A. D. 1898.

Norton Porter, Notary Public.

(2) Premises Vacant and No Assessee.

Form No. 17331.[1]

State of *Illinois*, } ss.
Greene County. }

Nathan Hale, of lawful age, being duly sworn, says that he resides in said county, and is the agent of *Richard Roe* named in the annexed notice; that as such agent, deponent visited the land or lot described in the annexed notice on the *tenth* day of *June*, A. D. 1898, being at least *three* months before the expiration of the time of redemption on the sale mentioned in said notice, for the purpose of serving said notice on the occupant thereof, but there was no person in actual possession or occupancy of said land or lot. Deponent is acquainted with said land or lot and said land or lot was vacant, and no person was in actual possession or occupancy of said land or lot at least *three* months before the expiration of the time of redemption on the sale mentioned in said notice, to wit, the *tenth* day of *June*, A. D. 1898, and said land or lot was not taxed or specially assessed in the name of any person.

Nathan Hale.

Subscribed and sworn to before me this *tenth* day of *June*, 1898.

Norton Porter, Notary Public.

d. Affidavit of Publication of Notice.[2]

(1) By Publisher of Paper.

Form No. 17332.[3]

State of *Minnesota*, } ss.
County of *Ramsey*. }

Henry Martin, being duly sworn, deposes and says that the foregoing notice was printed in the "*Saint Paul Times*," a newspaper

1. *Illinois*. — Starr & C. Anno. Stat. (1896), c. 120, par. 219.
See also list of statutes cited *supra*, note 1, p. 879.

2. **For forms relating to publication,** generally, see the title Publication, *ante*, p. 1.

3. *Minnesota*. — The county auditor shall cause the notice to be published in a newspaper printed in the English language and published in his county, if there be such a newspaper, and if there be none, then in a newspaper printed at the state capitol, once a week

which, during the whole time of publication of said notice hereinafter stated, has been, and is, printed and published in the city of *St. Paul*, in the county of *Ramsey*, and state of *Minnesota*; that the said notice was published in said newspaper for the period of *three* successive weeks,[1] on *Monday* of each week, commencing on the *third* day of *February*, 1900, upon which day last mentioned it was first published, and ending on the *seventeenth* day of *February*, 1900, upon which day last mentioned it was last published, upon which days or times of publication aforesaid the said newspaper was regularly published, and that during the whole time of the said publication he was one of the printers and publishers of the said newspaper.

Henry Martin.

Subscribed and sworn to before me this *twentieth* day of *February*, A. D. 1900. *Norton Porter*,
Notary Public, *Ramsey* County, *Minn.*

Printer's Fee, $*4.00*.

(2) By Purchaser of Land.[2]

for three successive weeks Stat. (1894), § 1655.

See also list of statutes cited *supra*, note 1, p. 879.

1. Time of Publication. — Notice must be published once a week for three successive weeks. Minn. Stat. (1894), § 1655.

See also list of statutes cited *supra*, note 1, p. 879.

2. Requisites of Affidavit, Generally. — For the formal parts of an affidavit in a particular jurisdiction see the title Affidavits, vol. 1, p. 548.

Who must Make Affidavit. — Affidavit must be made by the holder of the certificate, his agent or attorney. Sweeley *v.* Van Steenburg, 69 Iowa 696; Ellsworth *v.* Cordrey, 63 Iowa 675, American Missionary Assoc. *v.* Smith, 59 Iowa 704; Viele *v.* Van Steenberg, 31 Fed. Rep. 249.

Where the affidavit is made by the proprietor of the paper in which the notice was published, it is not sufficient. Sweeley *v.* Van Steenburg, 69 Iowa 696; Ellsworth *v.* Cordrey, 63 Iowa 675; American Missionary Assoc. *v.* Smith, 59 Iowa 704; Viele *v.* Van Steenberg, 31 Fed. Rep. 249.

Place of publication of newspaper must be stated. Kessey *v.* Connell, 68 Iowa 430.

Date of publication of notice must be stated. Kessey *v.* Connell, 68 Iowa 430; Ellsworth *v.* Cordrey, 63 Iowa 675.

Copy of notice need not be attached to the affidavit. Knudson *v.* Litchfield, 87 Iowa 111.

Precedents. — In Smith *v.* Heath, 80 Iowa 231, the affidavit of publication was as follows:

"Affidavit of Publication

State of *Iowa*, } ss.
Audubon County. }

I, *H. M. Stuart*, on oath, depose and say that I am a member of the firm of *Carpenter & Stuart*, proprietors of the *Audubon Advocate*, a weekly newspaper printed at *Audubon*, *Audubon* county, *Iowa*; that the annexed printed notice was published in said newspaper for *four* (*4*) consecutive weeks; and that the last of said publication was on the *second* day of *August*, A. D. 1882.

H. M. Stuart.

Sworn to before me, and subscribed in my presence by the said *H. M. Stuart*, this *fourth* day of *August*, A. D. 1882. *Frank P. Bradley*,
(SEAL) Clerk *District* Court.
By *R. J. Hunter*, Deputy.

State of *Iowa*, } ss.
Audubon County. }

I, *F. W. Stotts*, being duly sworn, depose and say that I am the lawful holder of the certificate of purchase described in the foregoing notice; that I served the same on *Wm. H. Kibby* by publication, as per annexed notice, and the notice was published in the *Audubon Advocate* for *four* consecutive weeks, and the last publication was on the *second* day of *August*, 1882.

W. F. Stotts.

Form No. 17333.[1]

State of *Iowa*, } ss.
Harrison County. }

John Doe, being duly sworn, on his oath says that he is the lawful holder of the certificate of purchase of the real estate mentioned in the within notice; that *Richard Roe*, the person in whose name the real estate in said notice specified is taxed, is a nonresident of said county of *Harrison*; that deponent caused said notice to redeem to be served upon the said *Richard Roe* by publishing such notice in the "*Logan Times*," a newspaper issued weekly and printed in said *Harrison* county; that the within notice was published in said newspaper for *three* consecutive weeks, as follows: the first publication thereof being on the *first* day of *March*, 1898; the second on the *eighth* day of *March*, 1898, and the third on the *fifteenth* day of *March*, 1898.

John Doe.

Sworn to before me and subscribed in my presence by the said *John Doe* this *fifth* day of *April*, 1898.

(SEAL) *Norton Porter*, Notary public.

(*Itemized statement of costs.*)

e. Officer's Return of Service of Notice.

Subscribed and sworn to in my presence, before me, this *second* day of *August*, 1882. *Thomas Walker*,
Notary Public.

Filed in my office *August 4*, 1882.
E. J. Freeman, Treasurer."

It was held that the affidavit of the purchaser, by reference to the affidavit of the publisher, made the latter affidavit a part of the former, and that when read together they constituted sufficient proof of service of the notice.

In Johnson *v.* Brown, 71 Iowa 609, the affidavit of publication was made by the publisher of the newspaper. Attached to this affidavit was the following affidavit of the purchaser: "I, *J. N. Brown*, being duly sworn, on oath say that I am the holder of the certificate of purchase described in the within notice, and that said notice was served on the within named *Theodore Johnson* in the manner and form as shown by the within and foregoing return."

It was held that there was no doubt that the affiant referred to the affidavit showing publication, which appeared upon the same paper, and that by reference thereto the former affidavit became a part of the latter, and that the proof was sufficient.

In Stull *v.* Moore, 70 Iowa 149, the affidavit was as follows:

"State of *Iowa*, *Decatur* County: I swear that I am publisher of the *Decatur County Journal*, a newspaper printed and published in *Leon*, in said county, and of general circulation therein; that the annexed notice was published in said newspaper *three* consecutive weeks, the first publication of the same being on the *tenth* day of *July*, 1879, and the last said publication being on the *twenty-fourth* day of *July*, A. D. 1879. *W. T. Robinson.*

Sworn to before me and subscribed by the above named *W. T. Robinson* this *twenty-ninth* day of *July*, A. D. 1879.

Witness my hand and notarial seal.
J. W. Harvey, Notary Public.

I, *John W. Harvey*, being duly sworn, on oath say that I am agent for the holder of the certificate of purchase described in the annexed notice, and that said notice was served on the within named *Lewis Stull* in the manner and form shown by the within and foregoing return. *John W. Harvey.*

Subscribed and sworn to by *John W. Harvey* before me *July 31*, 1879.
T. S. Arnold. Notary Public."

It was held that the two affidavits should be read together as constituting an affidavit of the agent, and that the proof of service was sufficient.

1. *Iowa.* — Code (1897), § 1441.

See also list of statutes cited *supra*, note 1, p. 879; and, generally, *supra*, note 2, p. 893.

Form No. 17334.[1]

State of *Minnesota*, } ss.
County of *Ramsey*. }

I hereby certify and return that at *St. Paul*, in said county and state, on the *fourteenth* day of *May*, 1900, I made personal service[2] of the within notice upon the within named *Oliver Ellsworth* by reading the same to him, and leaving a true copy thereof with him at his office and place of business, No. *10 West* street, in said city of *St. Paul*, and that I also, at *St. Paul*, in said county and state, mailed a true and correct copy of said notice, with letter postage fully prepaid, plainly addressed to the within named *Richard Roe* to his post-office address, namely, to *191 Fiftieth street, Chicago*, in the county of *Cook* and state of *Illinois*, on the *thirteenth* day of *May*, 1900.[3]

Clyde Culp,
Sheriff, *Ramsey* County, *Minn.*

(*Itemized statement of fees.*)

2. Affidavit of Redemptioner.

Form No. 17335.[4]

State of *Florida*, }
County of *Dade*. }

John Doe, being duly sworn, says that he is the owner of the land embraced in tax certificate No. *20*, issued to the state of *Florida* by the collector of said county of *Dade* on the *tenth* day of *April*, A. D. 1899, for unpaid taxes amounting to *one hundred and twenty-five* dollars and *fifty* cents, and that he desires to redeem the same; that said land is situated in said county of *Dade*, and is described as follows: (*Here describe the land, specifying section, township and range*).

John Doe.

Sworn to and subscribed before me this *tenth* day of *January*, A. D. 1901.

Calvin Clark,
Clerk of the *Circuit* Court of *Dade* County.

1. *Minnesota.* — Stat. (1894), § 1659.
See also list of statutes cited *supra*, note 1, p. 879.

2. **Personal Service.** — The sheriff must serve each notice personally and directly upon the person or corporation designated therein as the one upon whom or upon which a personal service of notices may be made. Minn. Stat. (1894), § 1659.
See also list of statutes cited *supra*, note 1, p. 879.

3. **Copy Sent to Owner.** — At or before the service of the notice, the sheriff must mail a true and correct copy thereof, with letter postage fully prepaid, plainly addressed to the person or corporation named in said notice as having some right, title or interest in the land, and plainly addressed to the post-office address of such person or corporation if such post-office address is given in such notice. Minn. Stat. (1894), § 1659.
See also list of statutes cited *supra*, note 1, p. 879.

4. *Florida.* — Any person or persons, agent or agents, creditors, or other persons having an interest in the lands certified to the comptroller, claiming any of the lands or part thereof, may, at any time within two years after the closing of the tax books by the collectors, redeem such land or any part thereof, by making affidavit that he or she is the owner or agent, creditor, or other person having an interest therein, and paying to the clerk of

Form No. 17336.[1]

The State of *Texas*, }
County of *Freestone*. }

Before me, the undersigned authority, this day personally appeared *John Doe*, to me well known, who, being by me duly sworn, on his oath deposes and says that he is the owner of the following described land, situate, lying and being in said county of *Freestone* and state of *Texas*, to wit, (*describing it*); that on the *tenth* day of *June*, 1897, said land was sold by *Charles Taylor*, tax collector of said county, to *Richard Roe*, for the sum of *one thousand* dollars, being the amount of unpaid taxes, costs and penalties due on said land for the year 1896; that affiant has made diligent search in said *Freestone* county for said *Richard Roe*, the purchaser of said land at said tax sale, and has failed to find him (or *that said Richard Roe, the purchaser of said land at said tax sale, is not a resident of said county*, or *that he, affiant, and said Richard Roe, the purchaser of said land at said tax sale, cannot agree on the amount of the redemption money*).

John Doe.

Sworn to and subscribed before me on this *tenth* day of *March*, 1899.

(SEAL) *Norton Porter*, Notary Public.

3. Certificate of Redemption.

(1) By Clerk of Court.

Form No. 17337.[2]

State of *Florida*, }
County of *Dade*. }

I, *Calvin Clark*, clerk of the *Circuit* Court of said county, do hereby certify that the lands hereinafter described, and which were certified to the state of *Florida* for nonpayment of taxes due for the year 1898, by *Thomas Clark*, tax collector for said county, on the *tenth* day of *April*, A. D. 1899, as appears by the list made by said *Thomas Clark*, tax collector as aforesaid, and now on file and matter of record in my office, have this day been redeemed by *John Doe*, he having paid to me the sum of *thirty-five* dollars and *fifty* cents, taxes, that being the amount of money for which said lands were certified, and the further sum of *eight* dollars and *eighty-eight* cents interest at the rate of *25* per cent. per annum, and *three* dollars costs, making a total of *forty-seven* dollars and *thirty-eight* cents due to the state of *Florida*. And I further certify that said lands, to wit, (*Here describe the lands*,

the circuit court the amount for which such lands or parts thereof were sold. Rev. Stat. (1892), appendix, c. 4011, § 5.

See also list of statutes cited *supra*, note 1, p. 879.

1. *Texas.* — Rev. Stat. (1895), art. 5188.

See also list of statutes cited *supra*, note 1, p. 879.

2. *Florida.* — It shall be the duty of the clerk of court, upon redemption being made, to give to the party redeeming a certificate for all the moneys paid, and to forward forthwith to the comptroller all the money so collected, except the redemption fee, and to notify the comptroller what lands have been redeemed. Rev. Stat. (1892), appendix, c. 4011, § 5.

See also list of statutes cited *supra*, note 1, p. 879.

giving section, township and range) included and embraced in tax certificate No. *90*, issued by *Thomas Clark*, tax collector, to the state of *Florida* for said lands and dated the *tenth* day of *April*, A. D. 1899, are hereby redeemed, and that said tax certificate is hereby, by operation of law, canceled, null, void and of no effect.

Witness my hand and the seal of the *Circuit* Court at *Miami*, *Florida*, this *tenth* day of *April*, A. D. 1900.

(SEAL) *Calvin Clark*, Clerk.

(2) By Collector of Taxes.

Form No. 17338.[1]

No. *200.* $*1000.*

Office of Tax Collector of } *Freestone* County, *Texas.* }

Whereas, on the *tenth* day of *June*, 1897, there was sold for unpaid taxes of the year 1896, by the tax collector of *Freestone* county, the following described land, lying and being situated in the county of *Freestone* and state of *Texas*, viz: (*describing land*); and whereas *John Doe* has made the affidavit required by law of ownership, and that he has made diligent search in said *Freestone* county for *Richard Roe*, the purchaser of said land at said tax sale, and has failed to find him (or *that Richard Roe, the purchaser of said land at said tax sale, is not a resident of said county of Freestone*, or *that affiant and Richard Roe, the purchaser of said land at said tax sale, cannot agree on the amount of redemption money*), and has paid to me the sum of *one thousand* dollars, being the amount of taxes, penalty, subsequent taxes and interest due on said land; therefore this receipt is given as evidence thereof and to enable him to give legal notice of the redemption of said land in accordance with law.

Witness my official signature and seal this *tenth* day of *March*, 1899.

(SEAL) *Charles Taylor*,
Tax Collector of *Freestone* County, *Texas*.

Witnesses: *Samuel Short.*
William West.

(3) By County Treasurer.

Form No. 17339.

(Mills' Anno. Stat. Colo. (1891), § 3909.)[2]

Redemption Certificate No. *9.*

Treasurer's Office, } County of *Arapahoe*, } ss. State of *Colorado.* }

I hereby certify that the real estate hereinafter described, situate in the county of *Arapahoe* and state of *Colorado*, which was sold for

1. *Texas.* — Rev. Stat. (1895), art. 5192.
See also list of statutes cited *supra*, note 1, p. 879.

2. *Colorado.* — The county treasurer shall, on application of any party to redeem any property sold for taxes, on being satisfied that such party has a

delinquent taxes for the year *1898*, on the *tenth* day of *September*, *1899*, has this day[1] been redeemed by *John Doe*,[2] by the payment to me of the respective sum (or *sums*) of money set opposite said (or *each*) tract, being the amount due thereon, as provided by law, to-wit:

Description of land redeemed.[3]					Amount paid.[4]	
Part of section or lot.	Section or block.	Township, town, or city.	Range, division, or addition.	Number of acres.	$	c.
S. W. *1-4*.....	*14*	*38*	*39* W.	*160*	*31*	*10*

In witness whereof, I have hereunto set my hand and seal, this *ninth* day of *September*, *1902*.

Charles Turner, County Treasurer. (SEAL)

4. Bill, Complaint or Petition.[5]

right to redeem the same, on the payment of the proper amount, issue to such party a certificate of redemption. Mills' Anno. Stat. (1891), § 3907.

See also list of statutes cited *supra*, note 1, p. 879.

1. Date of redemption must be set forth in the certificate. Mills' Anno. Stat. Colo. (1891), § 3907.

See also list of statutes cited *supra*, note 1, p. 879.

2. By whom property was redeemed must be stated in the certificate. Mills' Anno. Stat. Colo. (1891), § 3907.

See also list of statutes cited *supra*, note 1, p. 879.

3. Description of land must be set forth in the certificate. Mills' Anno. Stat. Colo. (1891), § 3907.

See also list of statutes cited *supra*, note 1, p. 879.

4. Amount paid must be set forth in the certificate. Mills' Anno. Stat. Colo. (1891), § 3907.

See also list of statutes cited *supra*, note 1, p. 879.

Several Tracts in One Certificate. — If any person shall be entitled to redeem more than one tract or lot sold at the same sale, the treasurer shall include, at the request of the purchaser, the whole in one certificate. Mills' Anno. Stat. Colo. (1891), § 3909.

See also list of statutes cited *supra*, note 1, p. 879.

5. Requisites of Bill, Complaint or Petition, Generally. — For the formal parts of a bill, complaint or petition in a particular jurisdiction see the titles BILLS IN EQUITY, vol. 3, p. 417; COMPLAINTS, vol 4, p. 1019; PETITIONS, vol. 13, p. 887.

When defendant took certificate of sale, and how long he has held it, must be stated, in order that it may appear to the court that the right of redemption has not been lost through lapse of time limited by the statute. Langley *v.* Jones, 43 N. J. Eq. 404.

Precedent. — In Faxon *v.* Wallace, 101 Mass. 444, the bill alleged in substance that George W. Snow, being seised of the land, mortgaged it on the fourteenth day of April, 1859, to Albert G. Peck, who assigned the mortgage, on the twelfth day of November, 1859, to John O. Chaney; that Chaney duly sold the land, for breach of the condition of the mortgage, under a power therein contained, to the plaintiff, and executed to him a deed on the twelfth day of July, 1864, by virtue of which the plaintiff became seised in fee of the premises, entered thereon, and had ever since retained possession, taking the rents and profits to his own use; that on the first day of May, 1862, the assessors of the city of Boston assessed twenty-eight dollars and forty-eight cents to James M. Muhlig as a tax on the premises for the year 1861; that, the tax not having been paid, the premises were sold for

Form No. 17340.[1]

(*Commencement as in Form No. 4273.*)

Your complainant, *Eudora T. Barker*, of *Newton*, county of *Middlesex*, the above named plaintiff, shows unto your honor as follows:

1. That one *Sewell Barker* died *January 1st*, 1880, and that his will, dated *July 29*, 1879, was duly filed for probate on *January, 16th*, 1880. That under the fourth section of said will, *Sewell Barker* gave to his son, *Charles H. Barker*, a life estate in and to the incomes, rents, and improvements of a house owned in fee simple by *Sewell Barker* at the time of his decease, said house being that numbered *56 Liverpool* St., *East Boston.*

That *Charles H. Barker* disposed of his life interest by deed to *John Mackay*, said deed being recorded in (*stating place of record*), and that after several transfers the said interest was deeded to *Eudora T. Barker*, wife of *Charles H. Barker*, by one *Patrick*

nonpayment thereof, to the defendant Wallace, and a deed of the land was delivered to him by the collector of taxes on the twenty-fifth day of September, 1862; that Wallace, on the sixth day of January, 1866, delivered a deed of the premises to defendant Bean, who on the same date delivered a mortgage deed thereof to Oscar Kent, and subsequently delivered a second mortgage deed thereof to the defendant Butterfield; that on the first day of February, 1866, the mortgage deed to Kent was assigned by him to Emerson; and that neither Wallace, Bean nor Kent had ever entered upon the premises.

The bill further alleged that Muhlig had never been the rightful owner of the land, that the assessors assessed it to him because they understood him to be the tenant and occupant on the first day of May, 1861, and that neither the plaintiff nor his grantor Chaney had any notice that the estate had been sold for taxes, or any reason to suspect it, till May, 1866, when the plaintiff accidentally heard of it; that in July, 1866, the plaintiff requested Wallace to convey to him any right, title or interest which he had acquired by virtue of the deed from the collector, and tendered the sum paid to the collector, with interest at ten per cent. and all intervening charges, according to law, but Wallace refused, and denied that he had any right, title or interest in the estate; and that the plaintiff was uncertain who was the proper person to receive the said sum, interest and charges, but was ready and willing and offered to pay the same to any of the parties whom the court should declare entitled thereto.

The bill prayed that the defendants, or such of them as were entitled thereto, might be compelled to receive the said sum, interest and charges, and to release any title which they or any of them might have under the deed from the collector.

Redemption was decreed in this case.

Insufficient Petition. — A petition to have a tax deed declared void and to redeem from the tax sale, which alleged that "no notice of the expiration of the right of redemption of said land from the tax sale was served upon *Joseph A. Grove*, the name in which said land was taxed," was held insufficient to show the tax deed invalid, because plaintiff must show not only that no notice of the expiration of the right of redemption was given, but that some person was entitled to such notice, and that the averment quoted was not sufficient to show that the land was taxed in the name of someone in 1876, the time when the three years allowed for redemption expired and the deed was executed. Grove *v.* Benedict, 69 Iowa 346.

1. *Massachusetts.* — Stat. (1900), c. 177; Stat. (1888), c. 390, § 76; Pub. Stat. (1882), c. 12, § 66.

See also list of statutes cited *supra*, note 1, p. 879.

This bill is copied from the original papers in Barker *v.* Mackay, 168 Mass. 76. The action in that case was brought in the superior court, where the bill was sustained. In the supreme court, the bill was dismissed on the ground that the statutes did not give the superior court jurisdiction. Since this decision, the superior court has been given jurisdiction of bills of this nature (Mass. Stat. (1900), c. 177).

O'Connor, under deed dated *October 3d*, 1889, which deed is recorded with (*stating place of record*), and that the plaintiff is the owner of said estate during the life of said *Charles H. Barker*, and that said *Charles H. Barker* is still living.

2. That on *May 1*, 1889, the assessors of the city of *Boston* assessed the taxes of said estate to *Patrick O'Connor* for the year 1889, that the tax not having been paid, the premises were sold for non-payment thereof to defendant, *Mackay*, for $60 on *September 17th*, 1890, and a deed thereof was duly delivered to defendant, *Mackay*, by the collector of taxes, and duly recorded in (*stating place of record*).

3. That on or about *September 15th*, 1892, within the two years allowed by statute to redeem, *Eudora T. Barker*, by and through her attorney, *Jesse C. Ivy*, made a tender to *Sophia M. Mackay*, of *eighty* dollars ($80), as payment for all legal claims and demands which she had against the property numbered *56 Liverpool* St., *East Boston*, the same being the total amount or more than all due as and for taxes, interest and proper costs and charges, and demanded a deed or release thereof, and said tender your petitioner has continued to make ever since and has ever been ready and anxious and is now ready and anxious to pay to the said *Sophia M. Mackay* the full amount of her legal claim on said property, and hereby offers to pay the same, or any other amount which the court shall find to be due, into court or to the defendant, as the court shall order.

4. That the aforesaid *Sophia M. Mackay* refused to state the just and true amount due or to accept said tender or to give a deed or release of said property and still continues so to do.

5. That the said *Sophia M. Mackay* has on or about *June 1*, 1895, claimed to be the owner of said property at *56 Liverpool* St., under the aforesaid tax deed and has notified the tenants thereof not to pay the rent due to your petitioner, and threatened to eject the said tenants from the house unless they pay the rent to her, and has illegally and without any right entered upon the premises and taken possession of the keys thereto.

6. And the plaintiff says that because of the aforesaid unlawful acts of the said *Sophia M. Mackay* one tenant has departed from said property and the tenement has remained vacant ever since, and that the tenants have refused to pay the rents due for the past *three* months, which has caused your petitioner great annoyance and loss.

7. And further the aforesaid tax title is a cloud upon your petitioner's title.

Wherefore your petitioner prays:

1. That an injunction may issue from this Honorable Court restraining the said *Sophia M. Mackay* from interfering with your petitioner's control of said property at *56 Liverpool* St., pending a decision by this Honorable Court, and from disposing of the said property or any interest therein by deed, mortgage, lease, or other instrument.

2. That the said *Sophia M. Mackay* be ordered to give to your petitioner a proper deed or release of any interest the said *Sophia M.*

Mackay has in the premises numbered *56 Liverpool* St., under the aforesaid tax deed, upon the payment of such sum or sums of money as may be found due by this court.

3. And that this court will award to the plaintiff such sum or sums as damages because of the unlawful acts of said *Sophia M. Mackay* as this court thinks just.

4. For such further relief as may seem fitting in this Honorable Court.

Eudora T. Barker.

(*Verification.*)[1]

5. Answer.[2]

Form No. 17341.[3]

(*Commencement as in Form No. 1397.*)

1. Respondent says that as to paragraph *1* in said bill, she is ignorant whether the facts alleged are true, and therefore can neither admit nor deny the same, but leaves complainant to her proof.

2. Respondent admits the allegations in paragraph *2* of said bill.

3. Respondent denies the allegations in paragraph *3* of said bill, and every statement contained in same.

4. Respondent, as to paragraph *4* in said bill, denies that at any time she has refused to state the just and true amount due respondent, or to accept said tender, or to give a deed or release of said property provided complainant within the time required by statute paid or tendered to respondent the amount due respondent. Respondent admits that she now refuses to give a deed or release of said property unless required by law.

5. Respondent, as to paragraph *5* in said bill, admits that ever since the *two* years for redeeming said property expired, she has claimed and now claims that she is owner of said property, but she denies every other allegation and statement in said paragraph.

6. Respondent, as to paragraph *6* in said bill, denies each and every allegation and statement in the same.

7. Respondent, as to paragraph *7* in said bill, denies that said tax title is a cloud upon complainant's title. Respondent says that complainant has no title to said estate.

8. Further answering, respondent denies each and every allegation in said bill not specifically admitted.

9. Respondent says that she bought said estate at auction, the same being sold for non-payment of taxes, and a deed of said estate delivered to her *September twentieth*, 1890, and recorded with (*stating place of record*); that since said sale she paid the subsequent taxes levied on said estate, and that no person having a right to redeem

1. **For a form of verification** in a particular jurisdiction see the title VERIFICATIONS.

2. **For the formal parts** of an answer in a particular jurisdiction see the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799; ANSWERS IN EQUITY, vol. 1, p. 854.

3. This form is the answer in the case of Barker *v.* Mackay, 168 Mass. 76, and is copied from the records. The case was tried in the superior court and went to the supreme court on the question of jurisdiction.

See *supra*, Form No. 17340, and notes thereto.

said estate tendered to her within the time required by law the amount due her for taxes, interest and proper costs and charges.

Wherefore she prays to be dismissed and for her costs.

Sophia M. Mackay.
By her attorney, *Edward H. Pierce.*

6. Decree.[1]

Form No. 17342.[2]

(Precedent in Widersum *v.* Bender, 172 Mass. 437.)[3]

[(*Commencement as in Form No. 12123.*)][4]

That the plaintiffs pay to the defendant *Caroline Reichardt* the original sum paid to the collector of taxes of the city of *Boston*, together with all intervening sums paid as taxes upon said estate, with interest to the date of the decree, and the lawful costs, amounting to $*81.26*; that the defendant *Caroline Reichardt* execute, acknowledge, and deliver to the plaintiffs a deed of release of the remainder in fee of said estate from the tax sale in said plaintiffs' bill set forth; and that the defendant *Caroline Reichardt* pay to the plaintiffs the costs of this suit, to be taxed by the clerk of this court.

[(*Signed and dated as in Form No. 12123.*)][4]

IV. Of Goods Pledged for Debt.[5]

1. Requisites of Decree or Judgment, Generally. — For the formal parts of a decree or judgment in a particular jurisdiction see the title Judgments and Decrees, vol. 10, p. 645.

It is proper that the court should decree that the defendant convey to the plaintiff the title to the lands of the plaintiff which defendant had acquired by virtue of the sheriff's sale and deed, and there is no other mode in which a redemption can be effected. Quinn *v.* Kenney, 47 Cal. 147.

2. *Massachusetts.*— Stat. (1900), c. 177; Stat. (1888), c. 390, § 76; Pub. Stat. (1882), c. 12, § 66.

See also list of statutes cited *supra*, note 1, p. 879.

3. On appeal to the full bench, the decree, so far as it allowed the plaintiffs to redeem from the tax sale to Caroline Reichardt, was affirmed without modification.

4. The matter to be supplied within [ ] will not be found in the reported case.

5. Bill to Redeem from Chattel Mortgage. — It has been held that where the mortgagee in a chattel mortgage refuses to render an account without which the mortgagor cannot ascertain the amount due so as to make payment or tender, the mortgagor may bring a bill in equity to redeem. Boston, etc., Iron Works *v.* Montague, 108 Mass. 248.

Requisites of Bill, Complaint or Petition, Generally. — For the formal parts of a bill, complaint or petition in a particular jurisdiction see the titles Bills in Equity, vol. 2, p. 417; Complaints, vol. 4, p. 1019; Petitions, vol. 13, p. 887.

Insufficient Bill. — A bill which alleges that the plaintiffs were the assignees of the mortgagors of certain personal property and are now in the possession of such property; that all the conditions of the mortgage have been fully performed, and the plaintiffs are entitled to hold the property named in the mortgage free and discharged therefrom, but the defendants have given notice of their intention to foreclose and threaten to take possession of the mortgaged property, by reason of which a cloud rests upon the title thereto, is held to disclose no ground for relief. The fact that the bill prays an account may be taken to show what sum is due from the plaintiffs does not help the bill, because there are no alle-

Form No. 17343.[1]

(*Title of court and cause, and address as in Form No. 4267.*)

Humbly complaining, showeth unto your honor, *John Doe*, of *Kent* county and state of *Delaware*, as follows:

I. That on the *tenth* day of *June*, A. D. 1898, complainant, having occasion for a sum of money for the purpose of his business, made application to *Richard Roe*, of *Dover*, in said county of *Kent*, to lend to him said sum of money, and thereupon, upon said *tenth* day of *June*, the said *Richard Roe* advanced and loaned complainant the sum of *five hundred* dollars, and in order to secure the repayment thereof, with interest, complainant on said day deposited with the said defendant, *Richard Roe*, the following personal property, to wit, (*Here specify the property deposited*), which said property was of the value of *eight hundred* dollars and upward; that at the time complainant delivered to the defendant the above specified personal property he executed and delivered to said defendant a bill of sale of the said goods so deposited with him, said bill of sale bearing date the *tenth* day of *June*, A. D. 1898, but it was not meant and intended by said bill of sale, either by complainant or by the defendant, that the said transaction should amount to an absolute sale of the said goods to the said defendant, but on the contrary it was expressly agreed between complainant and said defendant that complainant should nevertheless be at liberty to redeem said goods.

II. Complainant avers that, being desirous to redeem said goods, he repeatedly applied to the said defendant and has offered to repay said defendant the said sum of *five hundred* dollars, with lawful interest thereon from the time of said loan, on having the said goods redelivered to him, but the defendant has wholly refused to receive the said sum of *five hundred* dollars, with interest as aforesaid, and restore the said goods to complainant.

And the complainant prays:

1. That an account may be taken of what is due to defendant for principal and interest in respect to the said loan of *five hundred* dollars.

2. That, upon payment thereof by complainant, the defendant may be decreed to deliver over the said goods so deposited as aforesaid.

3. And that the complainant may have such further and other relief as the nature of the case may require.

4. And that a subpœna may issue for the said *Richard Roe*, as defendant in this case.

Jeremiah Mason,
Solicitor, and of Counsel for Complainant.

gations in the stating part of the bill to show such facts as require that any such account should be ordered. Bushnell *v.* Avery, 121 Mass. 148.

Statutory provisions relating to redemption from chattel mortgage exist in the following states, to wit:

Maine. — Rev. Stat. (1883), c. 91, § 3.

Massachusetts. — Pub. Stat. (1882), c. 192, § 6.

Minnesota. — Stat. (1894), §§ 4136, 4137.

New Hampshire. — Pub. Stat. & Sess. L. (1900), c. 140, § 19.

Rhode Island. — Gen. Laws (1896), c. 207, §§ 12–14.

South Carolina. — Rev. Stat. (1893), §§ 2461, 2464.

Vermont. — Stat. (1894), § 2264.

Wisconsin. — Stat. (1898), § 2316*a*.

1. See, generally, *supra*, note 5, p. 902. This is substantially the form of bill set out in 2 Rev. Swift's Dig. 754.

Form No. 17344.[1]

(Curt. Eq. Prec. 88.)

(*Venue, title of court and address as in Form No. 4270.*)

Your orator, *John Doe*, of the city of *Carrollton*, in said county and state, respectfully shows unto your honor that your orator, having occasion for a sum of money for the purpose of his business, made application to *Richard Roe*, of said city of *Carrollton*, in said county and state, the defendant hereinafter named, to loan him the same, and thereupon the said *Richard Roe*, on or about the *tenth* day of *June*, one thousand eight hundred and *ninety-eight*, advanced and lent to your orator the sum of *one thousand* dollars, and in order to secure the repayment thereof with interest, your orator deposited with the said defendant (*Here insert a description of the goods*), which were of the value of *two thousand* dollars and upwards, and at the same time executed and delivered to the defendant a bill of sale of the said goods so deposited with him, but it was not meant and intended thereby either by your orator or by the said defendant that the said transaction should amount to an absolute sale of said goods to the said defendant, but it was expressly agreed between your orator and the said defendant that your orator should nevertheless be at liberty to redeem the same. And your orator further shows that being desirous to redeem the said goods, he has repeatedly applied to the said *Richard Roe* and has offered to repay him the said sum of *one thousand* dollars with lawful interest thereon on having the said goods redelivered to him, with which just and reasonable request your orator well hoped that the said *Richard Roe* would have complied, as in justice and equity he ought to have done. But now so it is, may it please your honor, that the said *Richard Roe*, combining and confederating with divers persons at present unknown to your orator, whose names when discovered your orator prays he may be at liberty to insert herein with apt words to charge them as parties defendant hereto, and contriving how to wrong and injure your orator in the premises, he, the said *Richard Roe*, absolutely refuses to comply with your orator's request, and he at times pretends that (*Here set out defendant's anticipated defense*). Whereas your orator charges the contrary to be the truth, and that (*Here set out the answer to defendant's anticipated defense*), all of which things, doings and pretenses of the defendant are contrary to equity and good conscience, and tend to the manifest injury and wrong of your orator in the premises.

In tender consideration whereof, and forasmuch as your orator is wholly remediless in the premises at and by the strict rules of the common law, and cannot have adequate relief except in a court of equity where matters of this nature are properly cognizable and relievable.

To the end therefore that the said *Richard Roe*, who is made party defendant to this bill of complaint, and his confederates when discovered, may, if they can, show why your orator should not have the relief hereby prayed, and that they may to the best and utmost of

1. See, generally, *supra*, note 5, p. 902.

their respective knowledge, remembrance, information and belief, full, true and perfect answer make to all and singular the matters aforesaid, but not under oath, answer under oath being hereby expressly waived, and that as fully and particularly as if the same were here repeated and they and every of them distinctly interrogated thereto, more especially that they may in manner aforesaid answer and set forth whether (*Here set out the interrogatories*). And that the defendant may answer the premises, and that an account may be taken of what is due the defendant for principal and interest in respect to the said loan of *one thousand* dollars, and that upon the payment thereof by your orator, the said defendant may be decreed to deliver over to your orator the said goods so deposited with him as aforesaid. And that your orator may have such further or other relief in the premises as the nature of this case may require and to your honor shall seem meet, according to equity and good conscience.

May it please your honor to grant unto your orator the writ of summons in chancery (*concluding as in Form No. 4270*).

REDUNDANT AND IRRELEVANT MATTER.

By Andrew Foulds, Jr.

CROSS-REFERENCES.

For Forms relating to Amendment of Pleadings, Generally, see the title AMENDMENTS, vol. 1, p. 712.

For Forms relating to Proceedings to Strike Out Impertinent and Scandalous Matter in Pleading in Equity, see the title IMPERTINENCE, vol. 9, p. 554.

See also the titles DEMURRERS, vol. 6, p. 294; *SHAM AND FRIVOLOUS PLEADINGS; STRIKING OUT; SURPLUSAGE; and the GENERAL INDEX to this work.*

I. Notice of Motion to Strike Out.[1]

1. Statutory provisions relating to redundant, irrelevant and scandalous matter exist in the following states, to wit:

Alabama. — Civ. Code (1896), § 3286.

Arizona. — Rev. Stat. (1901), §§ 1355, 1356.

Arkansas. — Sand. & H. Dig. (1894), § 5755.

California. — Code Civ. Proc. (1897), § 453.

Colorado. — Mills' Anno. Code (1896), § 60.

Connecticut. — Gen. Stat. (1888), § 882.

Georgia. — 2 Code (1895), § 5046.

Idaho. — Rev. Stat. (1887), § 4208.

Indiana. — Horner's Stat. (1896), § 382.

Indian Territory. — Carter's Stat. (1899), c. 54, p. 555, § 3271.

Iowa. — Code (1897), § 3618.

Kansas. — Gen. Stat. (1897), c. 95, § 123.

Kentucky. — Bullitt's Civ. Code (1895), § 121.

Minnesota. — Stat. (1894), §§ 5240, 5248.

Mississippi. — Anno. Code (1892), § 704.

Missouri. — Rev. Stat. (1899), § 612.

Montana. — Code Civ. Proc. (1895), § 742.

New Mexico. — Comp. Laws (1897), § 2685, subs. 51.

New York. — Code Civ. Proc., § 545.

North Carolina. — Clark's Code Civ. Proc. (1900), § 261.

Ohio. — Bates' Anno. Stat. (1897), § 5087.

Oregon. — Hill's Anno. Laws (1892), § 85.

South Carolina. — Code Civ. Proc. (1893), § 181.

Tennessee. — Code (1896), § 4603.

Utah. — Rev. Stat. (1898), § 2987.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 4932.

Wisconsin. — Stat. (1898), § 2683.

Wyoming. — Rev. Stat. (1887), § 2474.

Notice of Motion Necessary. — A notice of motion must be given to the oppo-

Form No. 17345.[1]

(*Title of court and cause as in Form No. 6954.*)

Please take notice that upon the affidavit and upon the pleadings (*naming them*) on file in this action, copies of which are herewith upon you served, a motion will be made by the undersigned at a *special* term of the above entitled court, to be held at the court-house in the city of *Albany*, in said county, on the *tenth* day of *September*, 1899, at *ten* o'clock in the *fore*noon, or as soon thereafter as counsel can be heard, for an order striking out of the within complaint the following matter in the *third* paragraph of said complaint, to wit: commencing in line *twenty-five* of said complaint with the words (*quote the words at the commencement of the objectionable matter*) and ending in line *thirty-four* of said complaint with the words (*quote the closing words of the objectionable matter*), for the reason that said matter is irrelevant (or *redundant* or *irrelevant and redundant* or *scandalous*, as the case may be), with costs of this motion, and for such other and further relief as may be just.

(*Signature and office address of attorney, date and address as in Form No. 6954.*)

Form No. 17346.[2]

(*Commencing as in Form No. 6954, and continuing down to* *) for an order striking out of the plaintiff's complaint in this action the following allegations of said complaint, to wit:

In paragraph *two* of said complaint, the following allegations: commencing in line *ten* of said complaint and ending in line *sixteen* thereof, to wit: "And its editorials and news items were extensively copied and commented upon by all the leading newspaper press in the state of *New York*, and plaintiff particularly states to the court that the libelous and defamatory publication in the defendants' newspaper in its issue of *April 18*, 1895, which said publication is herein-

site party." Jackins *v.* Dickinson, 39 S. Car. 436; Cohrs *v.* Fraser, 5 S. Car. 351; Herndon *v.* Campbell, 86 Tex. 168.

Requisites of Notice of Motion, Generally. — For the formal parts of a notice of motion in a particular jurisdiction see the title MOTIONS, vol. 12, p. 938.

Ground of motion must be specified in the notice. Bowman *v.* Sheldon, 5 Sandf. (N. Y.) 657.

That motion is noticed within time required need not be affirmatively stated in the notice. Barber *v.* Bennett, 4 Sandf. (N. Y.) 705.

That moving party is specially aggrieved need not be shown: it is enough to show that the matter is irrelevant or redundant. Isaac *v.* Velloman, (C. Pl. Spec. T.) 3 Abb. Pr. (N. Y.) 464.

One Cause of Action in Several Counts. — Where it appears from the face of the complaint that several counts therein are really for the same thing, no affidavit of the defendant is required as proof that there is really but one cause of action: the affidavit would simply state what the complaint concedes. Ford *v.* Mattice, (Supreme Ct. Spec. T.) 14 How. Pr. (N. Y.) 91.

1. *New York.* — Code Civ. Proc., § 545.

See also generally, *supra*, note 1, p. 906.

2. *New York.* — Code Civ. Proc., § 545.

See also generally, *supra*, note 1, p. 906.

This is substantially the motion filed in the case of Raines *v.* New York Press Co., 92 Hun (N. Y.) 515. It was held that these allegations of the complaint were irrelevant and should have been stricken from the complaint.

after particularly set forth, was so copied and commented upon by the general newspaper press of the state of *New York*."

In paragraph *three* of said complaint, the following allegations: commencing in line *twenty-four* of said complaint, and ending in line *forty-one* thereof, to wit: "The foregoing publication made of and concerning this plaintiff by defendants as aforesaid was made the subject of editorial comment and of news items in all the newspaper press of the state of *New York*, as well as of all important cities of the United States, and was given prominence as sensational news wherever such comment was made as bringing into disrepute this plaintiff as well as the bodies of men with which this plaintiff was associated in said publication."

In paragraph *four* of said complaint, the following allegations: commencing in line *forty-seven* in said complaint, and ending in line *sixty-two* thereof, to wit: "That immediately after said publication was made the senate of the state of *New York*, by formal resolution adopted in open session, ordered an investigation of all the matters contained in said publication, which investigation continued during the period of nearly *one* month and the details thereof were made the subject of much comment. And this plaintiff was obliged to employ, and did employ, counsel in his behalf to attend upon all the hearings of the said investigation at great expense and personally to devote a great deal of time to the gathering of evidence and personal attendance upon such investigation to establish the falsity of all the matters suggested and charged by all the matters of such publication by defendants; that such labors were protracted and exhausting, causing plaintiff great mental anxiety because of the difficulty of the investigation and the false rumors and suspicions caused to be put in circulation by said publication, and the shame, reproach and infamy brought hereby upon the plaintiff."

In paragraph *seven* of said complaint, the following allegations: commencing in line *one hundred and ten* of said complaint, and ending in line *one hundred and thirteen*, to wit: "And because no vindication by any investigation would repair the injury done to plaintiff's reputation by the universal publication of the charges contained in said publication of defendants;"

on the ground that said allegations are irrelevant, with costs of this motion, and for such other and further relief as may be just.

(*Signature and office address of attorney, date and address as in Form No. 6954.*)

II. MOTION TO STRIKE OUT.[1]

1. **Motion to Strike Out** — *Generally.* — Irrelevant, redundant or scandalous matter in a pleading may be stricken out by the court upon motion. Curtis *v.* Sprague, 41 Cal. 55; Kinney *v.* Miller, 25 Mo. 576; Hilton *v.* Carr, 40 N. Y. App. Div. 490; Mason *v.* Dutcher, (C. Pl. Spec. T.) 24 Civ. Proc. (N. Y.) 345; Blake *v.* Eldred, (Supreme Ct. Spec. T.) 18 How. Pr. (N. Y.) 240; Waller *v.* Raskan, (Supreme Ct. Spec. T.) 12 How. Pr. (N. Y.) 28; Nichols *v.* Jones, (Supreme Ct. Spec. T.) 6 How. Pr. (N. Y.) 355; Lockwood *v.* Salhenger, (C. Pl. Spec. T.) 18 Abb. Pr. (N. Y.) 136; Cahill *v.* Palmer, (Supreme Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 196; Trenndlich *v.* Hall, (Supreme Ct. Spec. T.) 7 Civ. Proc. (N.Y.) 62; Smith *v.* Summerfield, 108 N. Car. 284; Thames *v.*

Jones, 97 N. Car. 121; Toledo Lumber Mfg. Co. *v.* Gross, 1 Ohio Dec. 83; Holbrook *v.* Page, 3 Oregon 374; Herndon *v.* Campbell, 86 Tex. 168; Du Clos *v.* Batcheller, 17 Wash. 389; Balkins *v.* Baldwin, 84 Wis. 212; Horton *v.* Arnold, 17 Wis. 139; Fabric Fire Hose Co. *v.* Bibb Mfg. Co., 39 Fed. Rep. 98. And where part of the pleading is good and part irrelevant, redundant, immaterial or insufficient, such objectionable part may be stricken out on motion. Cochrane *v.* Parker, 5 Colo. App. 527. But the whole defense cannot be stricken out as irrelevant or redundant. If the pleading contain irrelevant or surreptitious matter, it may be stricken out, but in such case the defense must still be left to stand in substance. Collins *v.* Coggill, 7 Robt. (N. Y.) 81.

Irrelevant to Cause of Action Against Moving Party. — The matter objected to must be irrelevant to the cause of action against the moving party, and because it is irrelevant to an alleged cause of action against some other party it cannot be stricken out. Atty.-Gen. *v.* Continental L. Ins. Co., 94 N. Y. 199.

Where there is the semblance of a cause of action or defense shown by any pleading, its sufficiency cannot be determined on a motion to strike out as redundant or irrelevant. Mason *v.* Dutcher, (C. Pl. Spec. T.) 24 Civ. Proc. (N. Y.) 345.

In *Connecticut*, the practice act provides for matters to be expunged on the grounds of scandal and impertinence. See Gen. Stat., § 882. No similar provisions are made where irrelevant matter is introduced; and wherever it is not clear that there was no reasonable ground for inserting such allegations they should be allowed to stand, otherwise they are subject to demurrer. Freeman's Appeal, 71 Conn. 708.

Necessity for Motion.—Where the pleading is irrelevant, redundant or scandalous, a motion to strike out is the only remedy, and where no motion is made the court will take no action. Curtis *v.* Sprague, 41 Cal. 55; Blake *v.* Eldred, (Supreme Ct. Spec. T.) 18 How. Pr. (N. Y.) 240; Waller *v.* Raskan, (Supreme Ct. Spec. T.) 12 How. Pr. (N. Y.) 28; Nichols *v.* Jones, (Supreme Ct. Spec. T.) 6 How. Pr. (N. Y.) 355; Lockwood *v.* Salhenger, (C. Pl. Spec. T.) 18 Abb. Pr. (N. Y.) 136; Cahill *v.* Palmer, (Supreme Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 196; Trenndlich *v.* Hall, (Supreme Ct. Spec. T.) 7 Civ. Proc. (N. Y.) 62; Smith *v.* Summerfield, 108 N. Car. 284; Thames *v.* Jones, 97 N. Car. 121; Toledo Lumber Mfg. Co. *v.* Gross, 1 Ohio Dec. 83; Horton *v.* Arnold, 17 Wis. 139. And objection cannot be taken by demurrer. Smith *v.* Summerfield, 108 N. Car. 284. And a motion to separately state and number the causes stated in the complaint is not proper. Toledo Lumber Mfg. Co. *v.* Gross, 1 Ohio Dec. 83.

Requisites of Motion — Generally. — For the formal parts of a motion in a particular jurisdiction see the title MOTIONS, vol. 12, p. 938.

Grounds of objection, or reason for striking out the objectionable matter, must be stated in the motion. Brinkmeyer *v.* Helbling, 57 Ind. 435; Lucas *v.* Smith, 54 Ind. 530; Reed *v.* Lane, 96 Iowa 454; Bowman *v.* Sheldon, 5 Sandf. (N. Y.) 657.

Where the ground of the motion to strike out certain paragraphs of a pleading was that they were "incompetent, irrelevant, immaterial and no defense," it was held that the motion was sufficiently specific. Reed *v.* Lane, 96 Iowa 454.

Specifying Objectionable Matter — *Generally.* — Objectionable matter must be specified, so that the court can readily ascertain it. People *v.* Empire Gold, etc., Min. Co., 33 Cal. 171; Kearnes *v.* Durst, 110 Iowa 114; Truesdell *v.* Hull, 35 Minn. 468; State *v.* Fleming, 147 Mo. 1; O'Connor *v.* Koch, 56 Mo. 253; Pearce *v.* McIntyre, 29 Mo. 423; Zimmerer *v.* Fremont Nat. Bank, 59 Neb. 661; Smith *v.* Meyers, 54 Neb. 1; Chicago, etc., R. Co. *v.* Spirk, 51 Neb. 167; Stuht *v.* Sweesy, 48 Neb. 767; Blake *v.* Eldred, (Supreme Ct. Spec. T.) 18 How. Pr. (N. Y.) 240; Bryant *v.* Bryant, 2 Robt. (N. Y.) 612; Osseforth *v.* Schroder, 6 Ohio Dec. 447; Du Clos *v.* Batcheller, 17 Wash. 389; McGorray *v.* O'Connor, 87 Fed. Rep. 586. As the court is not required to examine the whole pleading and collect the parts objectionable. Blake *v.* Eldred, (Supreme Ct. Spec. T.) 18 How. Pr. (N. Y.) 240; Osseforth *v.* Schroder, 6 Ohio Dec. 447. And the pleader should be careful to include in his specification only such portions of the pleading as are clearly obnoxious to the objection, for the reason that if any portion of the pleading should appear material to a proper disposition of the cause, the objection, being entire, must be overruled. People *v.* Lothrop,

Form No. 17347.[1]

State of *Indiana*, } In the *Posey Circuit* Court,
County of *Posey*. } *September* Term, 1899.

John Doe, plaintiff,
against
Richard Roe, defendant. } Motion to Strike Out Irrelevant (or *Redundant* or *Scandalous*) Matter.

And now comes the above defendant, *Richard Roe*, by his attorney, *Oliver Ellsworth*, and moves the court to strike out of the complaint of the plaintiff in the above entitled cause the following matter, to wit: the matter in paragraph *one* of said complaint, commencing in line *twenty-five* with the words (*Here quote a few words at the commencement of the objectionable matter*) and ending in line *thirty-four* with the words (*Here quote a few of the closing words of the objectionable matter*), for the reason that said matter is irrelevant (or *scandalous* or *surplusage* or *tautology*, as the case may be).

Oliver Ellsworth,
Attorney for Defendant.

Form No. 17348.[2]

In the *District* Court in and for *Harrison* County, *Iowa*.

John Doe, plaintiff,
against
Richard Roe, defendant. } Motion to Strike Out Irrelevant (or *Redundant*) Matter.

Comes now the defendant in the above entitled cause and moves the court to strike out of the petition of the plaintiff in this cause the following matter, to wit: (*Here specify clearly the matter complained of*), for the reason that the said matter is a repetition already pleaded in the petition of said plaintiff (or *because said matter is not a statement of facts, but a statement of evidence merely*, or *of legal conclusions*, or stating other grounds of objection).

Oliver Ellsworth, Attorney for Defendant.

3 Colo. 428; Holbrook *v.* Page, 3 Oregon 374; White *v.* Allen, 3 Oregon 103; Gilbert *v.* Loberg, 86 Wis. 661; Jarvis *v.* McBride, 18 Wis. 316. Thus, where part of the answer was good, a motion to strike out the answer "and every allegation and part thereof" as sham and irrelevant was held to be properly overruled. Jarvis *v.* McBride, 18 Wis. 316. But all matter of a redundant or irrelevant nature need not be included in the motion. Brugman *v.* Burr, 30 Neb. 406.

Entire Count. — Where a count in the complaint contains both proper and improper averments, a motion to strike out the entire count will be overruled. Louisville, etc., R. Co. *v.* Quick, 125 Ala. 553. And in William H. Frank Brewing Co. *v.* Hammersen, 22 N. Y. App. Div. 475, it is intimated that the whole count cannot be stricken out as irrelevant or redundant.

Part of Sentence. — A motion cannot be made to strike our part of a single sentence in the pleading: the whole sentence must be considered. Beals *v.* Beals, 27 Ind. 77.

Affidavit in Support of Motion. — In *Iowa*, it is held that section 3630 of the code, providing that a motion to make a pleading more specific, if the reason therefor exist outside of the pleadings, must be supported by an affidavit, does not authorize an affidavit in support of a motion to strike out allegations as redundant and irrelevant, and in such cases an affidavit, if filed, will not be considered. Mast *v.* Wells, 110 Iowa 128.

1. *Indiana.* — Horner's Stat. (1896), § 382.

See also list of statutes cited *supra*, note 1, p. 906; and, generally, *supra*, note 1, p. 908.

2. *Iowa.* — Code (1897), § 3618.

III. ORDER GRANTING MOTION TO STRIKE OUT.[1]

Form No. 17349.[2]

In *Posey Circuit* Court, *September* Term, 1899.

John Doe, plaintiff, against *Richard Roe*, defendant. } Order Striking Out Irrelevant (or *Redundant* or *Scandalous*) Matter from Complaint.

And now comes the above named parties by their attorneys, and the motion of the said defendant, *Richard Roe*, to strike out of the plaintiff's complaint the matter contained in paragraph *one* of said complaint, commencing in line *twenty-five* of said complaint with the words (*Here quote a few words at the commencement of the objectionable matter*) and ending in line *thirty-four* of said complaint with the words (*Here quote a few of the closing words of the objectionable matter*), coming on to be heard, and the counsel of the aforesaid parties having been heard in argument, the aforesaid motion is sustained by the court.

It is therefore ordered that within *ten* days from the date hereof the plaintiff may refile his said complaint, amended by omitting the aforesaid matter herein ordered stricken out.

And it is further ordered that the defendant in this action be granted *ten* days from the filing of the said amended complaint in which to demur or answer or take other action in relation to the same as he may be advised.

Form No. 17350.[3]

(*Title of court and cause as in Form No. 6957.*)

Upon reading and filing (*Here enumerate the motion papers*), together with satisfactory proof of service of said notice of motion and papers upon *Jeremiah Mason*, attorney for *John Doe*, the plaintiff above

See also list of statutes cited *supra*, note 1, p. 906; and, generally, *supra*, note 1, p. 908.

1. Requisites of Order — Generally. — For the formal parts of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

Striking Out Entire Pleading. — Where the motion is to strike out a specified portion of a pleading, and also prays that the moving party may have such other or further relief as to the court shall seem meet, an order striking out the entire pleading is erroneous. Mott *v.* Burnett, 2 E. D. Smith (N. Y.) 50.

Imposition of Costs. — An order striking out portions of a pleading as redundant, irrelevant or scandalous may impose costs of the motion upon the losing party. Joint School Dist. No. 7 *v.* Kemen, 65 Wis. 282.

Time of Service of Answer. — An order striking matter from the complaint as irrelevant, redundant or scandalous may direct that the defendant have a certain time after payment by the plaintiff of costs to serve his answer. Joint School Dist. No. 7 *v.* Kemen, 65 Wis. 282.

Service of Amended Complaint. — An order directing that matter be stricken out of the complaint as irrelevant, redundant or scandalous, may direct the service of an amended complaint. Durch *v.* Chippewa County, 60 Wis. 227.

2. *Indiana.* —Horner's Stat. (1896), § 382.

See also list of statutes cited *supra*, note 1, p. 906; and, generally, *supra*, note 1, this page.

If omission leaves pleading sensible and does not affect the verification, the order may direct the clerk to strike out of the complaint the matter objected to.

3. *New York.* — Code Civ. Proc., § 545.

named, and upon reading and filing (*Here specify papers, if any, filed by the plaintiff in opposition to the motion*), and upon hearing *Oliver Ellsworth*, attorney for the above named defendant, in argument in support of said motion, and *Jeremiah Mason*, attorney for said plaintiff (or *no one appearing*), in opposition,

Ordered, that so much of the matter contained in paragraph *two* of the complaint of the plaintiff in this action commencing in line *twenty-five* with the words (*Here quote a few words at the commencement of the objectionable matter*) and ending in line *thirty-four* with the words (*Here quote a few of the closing words of the objectionable matter*) be stricken out as irrelevant (or *redundant* or *irrelevant and redundant* or *scandalous*, as the case may be), and that within *ten* days from the date of service of a copy of this order upon the plaintiff's attorney, and upon the payment of the costs hereinafter mentioned, the plaintiff herein may reserve upon the defendant herein the aforesaid complaint herein, amended by omitting the aforesaid matter herein ordered stricken out.

And it is further ordered that the said defendant be granted *ten* days from the date of service of the said amended complaint upon him in which to demur or answer or take other action in relation to the same as he may be advised.

And it is further ordered that the plaintiff pay to the defendant *ten* dollars, the costs of this motion.

Enter: *John Marshall*, J. *S.* C.

See also list of statutes cited *supra*, note 1, p. 906; and, generally, *supra*, note 1, p. 911.

If omission leaves pleading sensible and does not affect the verification, the order may direct the clerk to strike out of the complaint the matter objected to.

REFERENCES.

By Harold N. Eldridge.

CROSS-REFERENCES.

For Forms relating to Arbitration and Award, see the title ARBITRATION AND AWARD, vol. 2, p. 33.
For Forms of Reference in Divorce Proceedings, see the title DIVORCE AND SEPARATION, vol. 7, p. 1.
For Forms of Reference in Eminent Domain Proceedings, see the title EMINENT DOMAIN, vol. 7, p. 561.
For Forms of Reference in Proceedings Upon Exceptions for Impertinence, see the title IMPERTINENCE, vol. 9, p. 554.
For other Forms of Reference in Mortgage Foreclosure Proceedings, see the title MORTGAGES, vol. 12, p. 390.
For Forms of Reference in Partition Proceedings, see the title PARTITION, vol. 13, p. 393.
For Forms of Reference in Receivership Proceedings, see the title RECEIVERS, ante, p. 585.
See also the GENERAL INDEX to this work.

I. APPOINTMENT OF AUDITOR, COMMISSIONER, MASTER OR REFEREE.[1]

1. On Voluntary Reference.[2]

1. Statutes relating to reference exist as follows:

Alabama. — Civ. Code (1896), § 741 *et seq.*

Arkansas. — Sand. & H. Dig. (1894), § 5948 *et seq.*

California. — Code Civ. Proc. (1897), §§ 259, 298, 638 *et seq.*, 1053; Code Civ. Proc. (Supp. 1902), p. 36, § 641.

Colorado. — Mills' Anno. Code (1896), §§ 168, 203 *et seq.*

Connecticut. — Laws (1901), c. 9; Laws (1893), c. 91; Laws (1889), c. 249; Gen. Stat. (1888), § 1035 *et seq.*

Delaware. — Rev. Stat. (1893), p. 859, c. 116, § 1 *et seq.*

Florida. — Rev. Stat. (1892), § 1230 *et seq.*

Georgia. — 2 Code (1895), § 4581 *et seq.*

Illinois. — Starr & C. Anno. Stat. (1896), c. 117, § 1 *et seq.*

Indiana. — Horner's Stat. (1896), § 556 *et seq.*

Iowa. — Code (1897), §§ 370, 2982 *et seq.*, 3344, 3370, 3734 *et seq.*, 3791, 3862, 3864, 3874, 3928, 4074, 4084, 4230 *et seq.*

Kansas. — Gen. Stat. (1897), c. 95, §§ 205, 301 *et seq.*

Kentucky. — Bullitt's Civ. Code (1895), §§ 235, 379, 430, 431.

Maryland. — Pub. Gen. Laws (1888), art. 16, § 18 *et seq.*

Michigan. — Comp. Laws (1897), §§ 9662 *et seq.*, 10089 *et seq.*, 10136 *et seq.*, 10839, 10843, 10867.

Minnesota. — Stat. (1894), §§ 5391 *et seq.*, 5393, 5395, 5400, 5404, 5490, 5634, 5636, 5641, 5775, 5776, 5781.

Mississippi. — Anno. Code (1892), §§ 742 *et seq.*, 2012.

Missouri. — Rev. Stat. (1899), § 697 *et seq.*, 2986, 3229, 8027, 8942.

Montana. — Code Civ. Proc. (1895), § 1130 *et seq.*

Nebraska. — Comp. Stat. (1899), §§ 5870 *et seq.*, 6137.

Nevada. — Comp. Laws (1900), § 3279 *et seq.*

New Hampshire. — Pub. Stat. & Sess. L. (1901), c. 89, § 18; c. 156, § 10; c. 227, § 9 *et seq.*

New Jersey. — Gen. Stat. (1895), p. 70, § 5; p. 378, § 34; p. 391, § 99; p. 397, § 128 *et seq.*; p. 1233, § 106; p. 1683, § 15; p. 1882, § 89; p. 1887, § 115; p. 2029, § 39; p. 2358; § 10; p. 2562, § 177 *et seq.*

New Mexico. — Laws (1901), c. 82, § 4; Comp. Laws (1897), § 2685, subs. 138 *et seq.*

New York. — Code Civ. Proc. § 1011 *et seq.*

North Carolina. — Clark's Code Civ. Proc. (1900), § 420 *et seq.*; Laws (1897), § 237.

North Dakota. — Rev. Codes (1895), § 5455 *et seq.*

Ohio. — Bates' Anno. Stat. (1897), §§ 4973, 5210 *et seq.*, 5277, 5472, 5477, 5480, 5489, 5559, 5654 *et seq.*, 6093 *et seq.*, 6186, 6240, 6242.

Oklahoma. — Stat. (1893), § 4181 *et seq.*

Oregon. — Laws (1893), p. 27, § 2; Hill's Anno. Laws (1892), §§ 221 *et seq.*, 815, 969, 970.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 1133, §§ 60, 61; p. 1136, §§ 76–78; p. 1148, § 133 *et seq.*; p. 1845, § 1 *et seq.*

Rhode Island. — Gen. Laws (1896), c. 245, § 1 *et seq.*; c. 274, § 41.

South Carolina. — Code Civ. Proc. (1893), §§ 245, 292 *et seq.*, 320, 402.

South Dakota. — Laws (1891), c. 100; Dak. Comp. Laws (1887), §§ 4988, 5025, 5071 *et seq.*, 5178, 5183, 5371, 5372, 5385, 5442, 5457, 5527, 5805, 5903.

Texas. — Rev. Stat. (1895), art. 1494.

Utah. — Rev. Stat. (1898), § 3172 *et seq.*

Vermont. — Stat. (1894), §§ 1437 *et seq.*, 1453 *et seq.*

Washington. — Ballinger's Anno. Codes & Stat. (1897), §§ 4727, 5033 *et seq.*, 5174, 5315, 5317, 5338.

West Virginia. — Code (1899), c. 129, § 1 *et seq.*

Wisconsin. — Stat. (1898), §§ 2778, 2864 *et seq.*, 2893, 3033, 3067, 3122, 3154, 3168, 3189, 3262, 3282, 4154.

2. Voluntary Reference. — A reference may be directed upon the written consent of the parties. Smith *v.* Polack, 2 Cal. 92; Shaw *v.* Kent, 11 Ind. 80; Bucklin *v.* Chapin, (Supreme Ct. Gen. T.) 35 How. Pr. (N. Y.) 155; Leaycroft *v.* Fowler, (Supreme Ct. Spec. T.) 7 How. Pr. (N. Y.) 259; Morisey *v.* Swinson, 104 N. Car. 555; Perry *v.* Tupper, 77 N. Car. 413; Duncan *v.* Erickson, 82 Wis. 128.

See also list of statutes cited *supra*, note 1, this page.

a. The Appointment.

(1) In General.

(*a*) *Stipulation.*[1]

aa. In General.

Form No. 17351.[2]

Supreme Court.
Isabella H. Mitchell
against
The Village of White Plains.

It is hereby stipulated and agreed that this action be referred to *Joseph S. Wood*, counsellor at law, residing at *Mt. Vernon, Westchester* county, *N. Y.*, to hear and determine, and that an order to that effect may be entered without further notice.

Dated *White Plains, June 7th*, 1893.

M. M. Silliman, Plaintiff's Attorney.
H. T. Dykman, Defendant's Attorney.

1. Stipulation — *Generally.* — The consent of the parties to a reference must, as a general rule, be by written stipulation signed by the parties or their attorney. Smith *v.* Polack, 2 Cal. 92; Shaw *v.* Kent, 11 Ind. 80.

See also, generally, list of statutes cited *supra*, note 1, p. 916.

Consent Entered of Record. — It has been held, however, that the consent of the parties made in open court and entered of record has the same effect as if made by written stipulation. Waterman *v.* Waterman, (Supreme Ct. Spec. T.) 37 How. Pr. (N. Y.) 36; Bucklin *v.* Chapin, (Supreme Ct. Gen. T.) 35 How. Pr. (N. Y.) 155; Leaycroft *v.* Fowler, (Supreme Ct. Spec. T.) 7 How. Pr. (N. Y.) 259; Keator *v.* Ulster, etc., Plank Road Co., (Supreme Ct. Spec. T.) 7 How. Pr. (N. Y.) 41; Lennon *v.* Smith, (C. Pl. Spec. T.) 22 Civ. Proc. (N. Y.) 22; Smith *v.* Hicks, 108 N. Car. 248; Morisey *v.* Swinson, 104 N. Car. 555; Heald *v.* Yumisko, 7 N. Dak. 422.

Precedent. — In Smith *v.* Barnes, (N. Y. Super. Ct. Gen. T.) 9 Misc. (N. Y.) 368, the stipulation was as follows:

"The issue in the above-entitled action having been set down for trial this *16th* day of *October*, 1893, and the case having been called, and marked ready, it is hereby stipulated and agreed by and between the parties to this action and their respective attorneys that the issues in the above-entitled action be, and the same hereby are, referred for determination to the Hon. *William S. Keiley*, as referee, the said reference to proceed without delay, and to continue thereafter without unreasonable adjournment, as hereinafter specified. And it is further stipulated and agreed that neither party hereto will appeal from the judgment to be entered on the report of the referee, or make any motion in arrest or stay of the said judgment, or of the execution to be issued thereon, or appeal from any order denying any motion that may be made by the defeated or aggrieved party for a new trial, the object of this stipulation being to bring this litigation to a speedy and final determination.

Dated *New York, October 16th*, 1893.

David Leventritt,
Attorney for plaintiff.
Durnin & Hendrick,
Attorneys for defendants."

An order denying the motion to set aside the stipulation was affirmed, the court holding that in their opinion "the stipulation was a reasonable and proper one under the circumstances and should be enforced."

2. *New York.* — Code Civ. Proc., § 1011.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, this page.

This is the form of stipulation in the case of Mitchell *v.* White Plains, 9 N. Y. App. Div. 258, and is copied from the records. An order was entered carrying into effect the terms of the stipulation.

bb. In Case of Disputed Claim Against Decedent's Estate.

Form No. 17352.[1]

Supreme Court, *Dutchess* County.

Henry H. Hustis
against
Aaron E. Aldridge and *Thomas Aldridge, Jr.*, executors of the last will and testament of *Thomas Aldridge*, deceased.

Whereas *Henry H. Hustis* has lately presented a claim to *Aaron E. Aldridge* and *Thomas Aldridge, Jr.*, as executors of the last will and testament of *Thomas Aldridge*, deceased, late of the town of *Fishkill*, in the county of *Dutchess*, for *nineteen hundred and twenty-two* dollars and *one* cent, the justice of which claim is doubted and the same has been rejected by said executors,

It is hereby stipulated and agreed that the matter in controversy be referred to *James L. Williams* of *Poughkeepsie*, and *John T. Smith* and *John Place* of *Fishkill Landing*, to hear and determine the same.

Dated *August 31st*, 1894.

H. H. Hustis, Plaintiff in person.

Frederick Barnard, Attorney for *Aaron E. Aldridge* and *Thomas Aldridge, Jr.*, executors, etc.

I hereby approve of the referees named in the within agreement.

Dated *September 1st*, 1894.

C. P. Dorland, Surrogate of *Dutchess* County.

(*b*) *Order of Reference.*[2]

aa. In Partnership Proceedings.[3]

1. *New York.* — Code Civ. Proc., § 2718.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 917.

This is the form of stipulation in the case of Hustis *v.* Aldridge, 144 N. Y. 508, and is copied from the records. An order was entered carrying into effect the terms of the stipulation.

2. **Requisites of Order, Generally.** — For the formal parts of an order in a particular jurisdiction see the title Orders, vol. 13, p. 356.

Must Show Consent. — That the order of reference was on the written consent of the parties should be shown. Terpening *v.* Holton, 9 Colo. 306; Duncan *v.* Erickson, 82 Wis. 128.

Specific Findings. — If parties desire specific findings by the referee, they should so stipulate in the order of reference, in the absence of any statute requiring specific findings. Caruth-Byrnes Hardware Co. *v.* Wolter, 91 Mo. 484.

3. **Precedents.** — In Bradshaw *v.* Morse 20 Mont. 214, an order appointing a referee in an action for a settlement of the accounts of a firm stated that: "It appearing to the court from the pleadings filed in said cause that the trial of the issue of facts raised herein requires the examination of a long partnership account of the partnership transactions and dealings of the firm of *Morse & Bradshaw*, as set out in the pleadings of the parties herein, from on or about the *15th* day of *November*, 1880, until the dissolution of said firm, on or about *June 9*, 1890, and also of the partnership transactions thereafter by the said parties in the winding up of the business of said firm up to the commencement of this action, *November 4*, 1893: Therefore, it is hereby ordered and adjudged and decreed that this is a proper cause for accounting; therefore, by reason of the premises aforesaid, it is hereby ordered, adjudged and decreed that the cause be, and the same is hereby, referred, by the consent of the

Form No. 17353.[1]

(Precedent in Riley *v.* Coghill, 1 Cinc. Super. Ct. 241.)[2]

[*Emma Riley*, plaintiff, against *Thomas Coghill*, defendant. } *Superior* Court of *Cincinnati*.][3]

This day came the parties by their attorneys, and upon application to the court for that purpose, and it appearing that the proceedings herein are instituted for the settlement of partnership accounts and a division of the assets on hand of a partnership heretofore existing between the parties hereto, the existence of which partnership being admitted by both parties:

It is, with the consent of parties, therefore ordered by the court that this cause be and the same is hereby referred to *Thomas B. Paxton*, Esq., who is hereby appointed as a special referee to hear and determine all the issues in the action, whether of law or of fact, or both, and that said referee make report of his proceedings, findings, and decision to this court for approval and judgment.

bb. To Determine Claim Against Decedent's Estate.[4]

attorneys for the plaintiff and the defendant, to *Edward Scharnikow*, an attorney of this bar, to examine the accounts of the co-partnership heretofore existing between plaintiff and defendant from the commencement of said co-partnership up to the present date."

After ordering the parties to deliver their books and papers to said referee, and authorizing him to take the testimony of witnesses offered by said parties, the order continued: "And the said referee, after hearing and considering all the evidence, shall thereafter, on or before the *1st* day of *October*, A. D. 1894, make up an account stated between the said parties plaintiff and defendant, and shall on or before the *1st* day of *October*, A. D. 1894, report the same to this court, with his findings thereon."

The court held that there was evidently a clerical error in the order in the use of the terms "make up an account stated;" that it was beyond question that what the referee was appointed and authorized to do was to state an account between the parties The court further held that the referee was given no authority by the order to try and determine the whole issue.

In Illstad *v.* Anderson, 2 N. Dak. 167, in an action for the dissolution of a copartnership, the issues coming on for trial at a regular term, were referred to a referee "with the usual powers." The reference was made on the consent of the plaintiff and defendant, made in open court, that the case be referred "to take testimony and report." It was held that the order of reference was broad enough to warrant the referee in reporting findings of fact and conclusions of law.

In Philadelphia Third Nat. Bank *v.* National Bank, 58 U. S. App. 148, is set out the following consent order: "Counsel consenting thereto, it is ordered that the within intervention and answer of respondent thereto be and the same are referred to *B. H. Hill*, Esq., as special master, who is directed to hear and report the facts and the law involved in the questions at issue."

1. *Ohio.* — Bates' Anno. Stat. (1897), § 5210.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 2, p. 918.

2. There was no objection made to this order of reference.

3. The matter enclosed by [ ] will not be found in the reported case.

4. **Precedent.** — In Bucklin *v.* Chapin, (Supreme Ct. Gen. T.) 35 How. Pr. (N. Y.) 155, the order was as follows:

"*Surrogate* Court, *Herkimer* County. In the matter of the claim of *James H. Bucklin* agt. The Estate of *Edmund G. Chapin*.

The claim of *James H. Bucklin* having been presented to the administratrix and rejected, and the parties agreeing

Form No. 17354.[1]

Supreme Court, *Dutchess* County.

Henry H. Hustis
against
Aaron E. Aldridge and *Thomas Aldridge, Jr.*, executors of the last will and testament of *Thomas Aldridge*, deceased.

On reading and filing the annexed agreement to refer the claim of *Henry H. Hustis* above named against the estate of *Thomas Aldridge*, deceased, to *James L. Williams* of the city of *Poughkeepsie*, and *John T. Smith* and *John Place* of *Fishkill*, as referees to hear and determine the same, and the approval of the *Surrogate* of the county of *Dutchess*,

Now, on motion of *H. H. Hustis*, the plaintiff in person,

Ordered that the said *James L. Williams*, *John T. Smith* and *John Place* be, and they are, appointed referees to hear and determine the matter in controversy in said agreement.

Enter: *C. F. Brown.*

cc. To Determine Issues.[2]

(*aa*) *In General.*

Form No. 17355.[3]

At a *Circuit* Court held in and for the county of *Westchester*, at the Court House in the village of *White Plains* on the *8th* day of *June*, 1893.

to a reference: It is ordered by the surrogate, that Hon. *Amos H. Prescott*, *Martin W. Priest*, Esq., and *William T. Wheeler*, Esq., be and they are hereby appointed referees to hear and determine the claim of said *Bucklin*; and let this order be entered with the clerk of *Herkimer* county.

Dated *May 11th*, 1866, at *Herkimer*.

Volney Owen, Surrogate."

A reference was had under this order.

1. *New York.* — Civ. Code Proc., § 2718.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 2, p. 918.

This is the form of order in the case of Hustis *v.* Aldridge, 144 N. Y. 508, and is copied from the records. No objection was made to it.

2. To Determine Issues. — Where the order is upon consent, it may direct a reference of all or any of the issues. Illstad *v.* Anderson, 2 N. Dak. 167.

Requisites of Order, Generally. — For the formal parts of an order in a particular jurisdiction see the title Orders, vol. 13, p. 356.

To Hear and Determine the Action.— An order of reference "to hear and determine the action" is a reference to hear and decide the whole issue. Bouton *v.* Bouton, (Supreme Ct. Gen. T.) 42 How. Pr. (N. Y.) 11.

Precedent.— In Dundee Mortg., etc., Invest. Co. *v.* Hughes, 124 U. S. 157, the following entry was made on the minutes of the court:

"Now at this day comes the plaintiff, * * * by Mr. *George H. Williams*, of counsel, and the defendant by Mr. *William G. Effinger*, of counsel, and by consent of parties it is ordered that this cause be, and the same is hereby, referred to Mr. *Wm. B. Gilbert*, to take the testimony herein pursuant to a stipulation to be filed herein within *three* months from this date, to try said cause, and to report to this court his conclusions of fact and law herein; and said *Wm. B. Gilbert* is hereby appointed referee for the purpose aforesaid."

No objection was made to this order.

3. *New York.* — Code Civ. Proc., § 1011.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 2, p. 918.

This is the form of order in the

Present — Hon. *Charles F. Brown*, Justice.

Isabella H. Mitchell
against
The Village of White Plains.

On reading and filing the stipulation hereto annexed, and on motion of *M. M. Silliman*, attorney for said plaintiff,

Ordered, that this cause and all the issues therein are hereby referred to *Joseph S. Wood*, counsellor at law, residing in the city of *Mt. Vernon* as referee to hear and determine.

Enter: *C. F. Brown.*

(*bb*) *And Report Findings and Testimony.*[1]

Form No. 17356.

(Precedent in Kimberly *v.* Arms, 129 U. S. 516.)[2]

[In the *Circuit* Court *of the United States* for the *Northern* District of *Ohio, Eastern* Division.

Peter L. Kimberly, complainant,
against
Hannah M. Arms, defendant. } In Equity.][3]

By consent and request of all the parties herein, it is ordered by the court that Hon. *Richard D. Harrison* be and is hereby appointed a special master herein to hear the evidence and decide all the issues between the parties and make his report to this court, separately stating his findings of law and fact, together with all the evidence introduced before him, which evidence shall thereby become part of the report, which report shall be subject to like exceptions as other reports of masters.

It is further ordered by like consent and request that said master shall proceed upon *twenty* days' notice from either party to hear and determine said issues, and with full power and authority to grant such adjournments, amendments, exceptions and motions, as might be granted by the court if the trial was by the court.

[*John Marshall, Circuit* Judge.][3]

case of Mitchell *v.* White Plains, 9 N. Y. App. Div. 258, and is copied from the records. No objection was made to the form.

1. Reporting Evidence. — In Butler *v.* Cornell, 148 Ill. 276, under a statute providing that in all common-law cases in courts of record it shall be competent for the court to appoint referees upon agreement of parties or counsel, who shall have authority to take testimony in such cases and report the same in writing, together with their conclusions of law and fact, to the court, there was a reference to referees "to report their conclusions of law and facts herein." An objection that the order did not in express terms require the referees to report the evidence heard by them to the court in writing was held not well taken, because made too late. The court, however, inclined to the opinion that it was not essential to the validity of the order of reference that it should in express terms require the referees to report the evidence in writing, since the statute makes that one of their duties.

2. It was held by the supreme court that "the reference of a whole case to a master, as here, has become in late years a matter of more common occurrence than formerly, though it has always been within the power of a court of chancery, with the consent of parties, to order such a reference."

See, generally, *supra*, note 2, p. 918.

3. The matter enclosed by [ ] will not be found in the reported case.

Form No. 17357.[1]

(Precedent in Schuler *v.* Collins, 58 Kan. 579.)[2]

[(*Venue and title of court and cause as in Form No. 14150.*)][3]

On this day this cause comes on for further trial; whereupon by agreement of the parties this cause is referred to *G. H. Buckman*, and upon the said referee subscribing to the oath of office as required by law, he shall have full power to settle the issues in this case, to summon witnesses and compel their attendance, and fully hear and determine the matters in controversy herein. It is further ordered by the court that said referee make a report to this court of his acts in and about his appointment, on or before the *first* day of the next regular term of this court.

It is further ordered that said referee have full power to permit amendments and further pleadings in this action upon terms and at such times as he may direct; that he report his findings of fact and conclusions of law separately, together with the testimony orally introduced before him.

[(*Signature as in Form No. 14150.*)][3]

dd. To Hear Testimony.

Form No. 17358.[4]

(Precedent in District of Columbia *v.* Metropolitan R. Co., 8 App. Cas. (D. C.) 334.)[5]

[(*Title of court and cause as in Form No. 13800.*)][3]

It appearing to the court that a transcript of the record of the case of *The District of Columbia* against *The Metropolitan Railroad Company*, at Law, No. *22,458*, in the *Supreme* Court of the *District of Columbia*, together with the original papers and record entries therein duly certified, has, by proper orders, duly entered of record, been transferred and delivered to this court in pursuance with the act of Congress, approved August 2, 1894, entitled "An act to authorize the Metropolitan Railroad Company to change its motive power for the propulsion of the cars of said company," and it also appearing that additional testimony is necessary in order to enable the court to dispose of the case upon its merits, it is therefore, this *7th* day of *June*, 1895, ordered that said cause be, and the same is hereby, referred to *James G. Payne*, Esq., who is hereby appointed special commissioner for the purpose, with directions to consider the case on the aforesaid transcript of record and the stenographic report of the testimony adduced at the trial of the cause in the *Supreme* Court of the *District of Columbia*, and such other proof as either party may submit, and report to this court what, if any

1. *Kansas.* — Gen. Stat. (1897), c. 95, § 301.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 2, p. 918.

2. No objection was made to the order of reference in this case.

3. The matter to be supplied within [] will not be found in the reported case.

4. *District of Columbia.* — Comp. Stat. (1894), c. 10, § 35.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 2, p. 918.

5. No objection was made to the form of this order of reference.

indebtedness is due to the *District of Columbia* from the said railroad company in respect of the cause of action stated in the declaration filed in said case; and the said special commissioner will submit such schedules and alternative statements of account, if need be, as in his judgment he may think necessary to present said cause to this court for its final disposition, said report to be filed, together with the testimony, on or before *October 1 next*; and it is further ordered that said cause be, and the same hereby is, set for hearing on the *first Tuesday* of *November*, 1895.

This order is made without prejudice to any of the rights of the defendant.

Per curiam: *R. H. Alvey*, Chief Justice.

ee. To State Account.[1]

1. **Precedents.** — In Jackson *v.* Puget Sound Lumber Co., 123 Cal. 97, the court made the following consent order: "It is ordered that this action be and it is hereby transferred to *Stewart S. Wright*, court commissioner, for an accounting; said court commissioner to report back to this court the evidence taken, and the balance found due on said accounting." It was held that this order would be considered a reference to Wright as referee and not as court commissioner, since as court commissioner he had not by statute any authority to try an issue of fact raised by the pleadings, and the settlement of the account covered the entire issue made by the pleadings.

In Garrity *v.* Hamburger Co., 136 Ill. 499, the following order was made in an action of assumpsit:

"It appearing to the court, from the evidence heard, that this cause involves long book accounts, and involves the casting of an account between the plaintiff and defendant, the court, of its own motion, orders that the jury be discharged; and the defendant making no objection to the accounting, it is ordered that the defendant do account with the plaintiff, and that the plaintiff do account with the defendant. And it is further ordered, that *Penoyer L. Sherman* be appointed auditor in this case; that he proceed immediately to hear the evidence in this cause, and that he report on the evidence with all due speed to this court, together with his conclusions thereon, finding:

First — What were the terms of sale of the branch store from *Garrity* to the *Hamburger & Garrity Co.*

Second — What amount, if any, is due the plaintiff, growing out of said sale and the representations made thereat.

Third — What amount, if any, is due the plaintiff for moneys taken in at the branch store, and either not turned over to the plaintiff, or misappropriated, or used by *Garrity* for purposes foreign to the objects and business of the corporation.

Fourth — What sum, if any, was due from the *Hamburger & Garrity Co.* to defendant *Garrity* at the time of his sale to *Jonas Hamburger*, in *February*, 1886.

Fifth — What sum, if any, was due from the defendant *Garrity* to the *Hamburger & Garrity Co.* at the date of said sale.

Sixth — What interest *Garrity* had in the *Hamburger & Garrity Co.* at the date of said sale to *Jonas Hamburger*."

The court held that as it affirmatively appeared from this order that defendant made no objection and took no exception to the action of the court in the premises, it must be presumed that he acquiesced in and consented to the discharge of the jury, to the interlocutory order requiring each party to account to each other, to the appointment of the auditor, and to the questions to be submitted to the auditor, and that there was a waiver of the right of trial by jury in respect to the matters of fact involved in such questions.

In Leyde *v.* Martin, 16 Minn. 38, an action on an account was referred by consent of the parties in open court to R. F. Crowell, Esq., who was appointed sole referee to hear and determine all the issues therein. It was held that this was a sufficient reference.

Form No. 17359.[1]

(Precedent in Hubbard *v.* Dubois, 37 Vt. 94.)[2]

[(*Commencement as in Form No. 11881.*)][3]

And at the same term come the said defendants by their attorney, *J. P. Kidder*, and by consent of parties it is ordered by the court that the defendants do account with the plaintiff, and that *John Pierpoint* be appointed auditor, to hear, examine and adjust the accounts of the parties, and make report thereof to this court at their next term.

[(*Signature as in Form No. 11881.*)][3]

(2) On New Trial of Action Tried by Referee Named in Stipulation.

(*a*) *Notice of Motion for Appointment.*[4]

Form No. 17360.[5]

Supreme Court, *Albany* County.

Frank Brown, plaintiff,
against
Root Manufacturing Company, defendant.

To Messrs. *Doyle & Fitts*, Plaintiff's Attorneys:

Gentlemen — Please take notice that upon the written stipulation, signed by the attorneys for the plaintiff and defendant in this action,

1. *Vermont.*—Stat. (1894), § 1449 *et seq.*

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 2, p. 918.

2. No objection was made to the order in this case.

3. The matter to be supplied within [ ] will not be found in the reported case.

4. **Requisites of Notice of Motion, Generally.** — For the formal parts of a notice of motion in a particular jurisdiction see the title Motions, vol. 12, p. 938.

Precedent. — In Mitchell *v.* White Plains, 9 N. Y. App. Div. 258, the notice of motion was as follows:

"*Supreme* Court,
Westchester County.

Anne Minott Mitchell, Individually, and as Administratrix of the Goods, Chattels, and Credits of *Isabella H. Mitchell*, deceased,
against
The Village of White Plains.

Please to take notice, that on the pleadings and all the proceedings had in the above-entitled action and on an affidavit with a copy of which you are herewith served, a motion will be made at a *Special* Term of this court, to be held at the court house in the city of *Poughkeepsie*, *Dutchess* county, on the *15th* day of *June*, 1896, at *ten* o'clock in the *fore*noon of that day, or as soon thereafter as counsel can be heard, for the appointment of a referee by the court, to hear and determine all the issues in this action, and for such other or further order or relief as the court may see proper to grant.

Dated *White Plains*, *June 5th*, 1896.

M. M. Silliman,
Plaintiff's Attorney,
Office and P. O. address,
White Plains, *Westchester* county, *N. Y.*"

An order appointing a referee as prayed for was affirmed.

5. *New York.* — Code Civ. Proc., § 1011.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 4, this page.

This is substantially the form of notice of motion copied from the records in Brown *v.* Root Mfg. Co., 148 N. Y. 294. An order of the special term denying the motion was reversed.

bearing date *March 2*, 1888, and the order thereon granted at a *Special* Term and *Circuit* held at *Albany* on the *5th* day of *March*, 1888, by which all the issues in this action were thereby referred to *Joseph M. Lawson*, Esq., thereby appointed sole referee to hear and determine said action, filed in the office of the clerk of *Albany* county, and upon the order granted at the *Special* Term held at *Albany*, on the *8th* day of *April*, 1893, by which a new trial of said action was granted, and upon the affidavits of *Charles M. Jenkins* and *Eugene Burlingame*, verified *August 24*, 1893, with copies of which you are herewith served, and upon the summons, complaint and answer, and upon the report of the referee, and upon the judgment thereon entered in *Albany* county clerk's office *March 27*, 1893, and upon all the papers and proceedings herein, a motion will be made at the next *Special* Term of the *Supreme* Court, appointed to be held at the *City Hall*, in the city of *Albany*, *New York*, on the *29th* day of *August*, A. D. 1893, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for a rule or order appointing another referee in the place of *Joseph M. Lawson*, Esq., who was named in said stipulation of *March 2*, 1888, and appointed in pursuance thereof, by said order *March 5*, 1888, as the referee to hear and determine this action and to whom all the issues therein were thereby referred, and for such other or further order or relief as may be just and proper, together with the costs of said motion to abide the event.

Yours, etc.

Jenkins & Cooper,
Defendant's Attorneys, *Albany*, *N. Y.*

(*b*) *Affidavit Supporting Motion.*[1]

Form No. 17361.[2]

Supreme Court, *Westchester* County.

Anne Minott Mitchell, Individually, and as Administratrix of the Goods, Chattels, and Credits of *Isabella H. Mitchell*, deceased, plaintiff,
against
The Village of White Plains, defendant.

Westchester County, ss.

Minott M. Silliman, being duly sworn, says he is the attorney for the plaintiff in the above entitled action; that said action was brought to recover *five thousand* dollars as damages for the wrongful taking and appropriating by the defendant to its own use for street and sewer purposes, a strip of land *four hundred and fifty-three* feet in length by *fifty* feet in width, in the village of *White Plains*, in said

1. **For the formal parts** of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

2. *New York.* — Code Civ. Proc., § 1011.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, this page.

This is the form of affidavit supporting the motion for the appointment of a referee in the case of Mitchell *v.* White Plains, 9 N. Y. App. Div.

county, then owned by *Isabella H. Mitchell* (now deceased), and now owned by the above-named *Anne Minott Mitchell*; that said action, by consent, was referred to *Joseph S. Wood*, Esq., to hear and determine; that said referee made and delivered his report in *January*, 1895, in favor of said *Isabella H. Mitchell* (now deceased), and judgment was entered thereon for $5,427.40 damages and costs on the *18th* day of *February*, 1895; that an appeal was taken from said judgment to the General Term of this court by said defendant, and said judgment was reversed and a new trial granted unless the plaintiff stipulated to accept $138.33, with interest from *September 8th*, 1890; that said plaintiff declined to so stipulate and notice accordingly was served on the attorney for said defendant, and judgment of reversal was duly entered in the office of the clerk of said county on or about the *4th* day of *February*, 1896; and said cause has not been noticed for trial by either party since that date. Deponent now asks the court to appoint a referee to hear and determine all the issues in said action.

M. M. Silliman.

Sworn to before me this *5th* day of *June*, 1896.

Frederick E. Weeks, Notary Public.

(*c*) *Order of Reference.*[1]

Form No. 17362.[2]

At a *Special* Term of the *Supreme* Court, state of *New York*, in and for the *Second* Judicial Department, held at the *Dutchess* county courthouse, in the city of *Poughkeepsie*, on the *16th* day of *June*, 1896.

Present — Hon. *William J. Gaynor*, Justice.

Anne Minott Mitchell, Individually, and as Administratrix of the Goods, Chattels and Credits of *Isabella H. Mitchell*, deceased, plaintiff,
against
The Village of White Plains, defendant.

Upon all the proceedings and pleadings in this action, and the stipulation, consent and order of reference heretofore made in this action, which said order is dated *June 8th*, 1893, and upon reading and filing the affidavit of *M. M. Silliman*, attorney for plaintiff, verified on the *5th* day of *June*, 1896, with notice of motion thereto attached, bearing date on that day; and after hearing *William P. Fiero*, of counsel for the plaintiff, in support of the motion, and *H. T. Dykman*, Esq., of counsel for the defendant, in opposition, submit-

258, and is copied from the records. An order appointing a referee was affirmed.

1. **For the formal parts** of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

2. *New York.* — Code Civ. Proc., § 1011.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 2, p. 918.

This is the form of order appointing a referee on the granting of a new trial in the case of Mitchell *v.* White Plains, 9 N. Y. App. Div. 258, and is copied from the records. The order was affirmed.

ting his affidavit, verified the *13th* day of *June*, 1896, which is also read and filed;

Now, on motion of *William P. Fiero*, of counsel for the plaintiff, it is ordered that the trial of this action and of the issues therein, be and the same are hereby referred to *Charles H. Young*, Esq., counsellor at law of *New Rochelle*, *Westchester* county, *N. Y.*, to hear and determine the same as sole referee.

Enter: *W. J. Gaynor.*

(*d*) *Notice of Appeal from Order of Reference.*[1]

Form No. 17363.[2]

Supreme Court.

Anne Minott Mitchell, Individually, and as Administratrix of the Goods, Chattels and Credits of *Isabella H. Mitchell*, deceased, plaintiff,
against
The Village of White Plains, defendant.

Take notice, that the defendant appeals to the Appellate Division of the *Supreme* Court in the *Second* Judicial Department from the order entered herein in the office of the Clerk of the County of *Westchester* on the *29th* day of *June*, 1896, referring the issues herein to *Charles H. Young*, Esq., to hear, try and determine the issues and from each and every part of said order.

Dated *July 7th*, 1896.

H. T. Dykman, Attorney for Defendant.
Office and post-office address, *White Plains*, *N. Y.*

To *Minott M. Silliman*, Esq., Plaintiff's Attorney,
Leverett F. Crumb, Esq., County Clerk of *Westchester* Co.

b. Proceedings for Appointment of New Referee, Where Referee Named Refuses to Serve.[3]

(1) Notice of Motion for Appointment.[4]

Form No. 17364.[5]

Supreme Court, *Dutchess* County.

1. **For forms relating to appeals, generally,** see the title Appeals, vol. 1, p. 890.

2. *New York.* — Code Civ. Proc., § 1011.

See also list of statutes cited *supra*, note 1, p. 916.

This is the form of notice of appeal in the case of Mitchell *v.* White Plains, 9 N. Y. App. Div. 258, and is copied from the records. No objection was made to it.

3. **Refusal of Referee to Serve.** — If the referee named in the stipulation refuses to serve, the court must appoint another referee unless the stipulation expressly provides otherwise Hustis *v.* Aldridge, 144 N. Y. 508; Mitchell *v.* White Plains, 9 N. Y. App. Div. 258. See also list of statutes cited *supra*, note 1, p. 916.

4. **For the formal parts** of a notice of motion in a particular jurisdiction see the title Motions, vol. 12, p. 938.

5. *New York.* — Code Civ. Proc., § 1011.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 3, this page.

This is substantially the form of

Henry H. Hustis
against
Aaron E. Aldridge and *Thomas Aldridge, Jr.*,
executors of the last will and testament of
Thomas Aldridge, deceased.

Take notice that upon the agreement to refer the issues in this action with the approval of the Surrogate endorsed thereon, and the order of this court in this action, and the affidavit of *H. H. Hustis*, dated *September 20th*, 1894, all of which are hereto annexed, a motion will be made at a *Special* Term of this court, to be held at the *Supreme* Court Chambers in the city of *Newburgh*, on the *29th* day of *September*, 1894, at *ten* o'clock in the *fore*noon of that day, or as soon thereafter as counsel can be heard, for a rule or order appointing another referee in the place of *Andrew Jackson*, Esquire, who was named in the agreement aforesaid and appointed by said order in pursuance thereof as a referee to hear and determine this action, and who has declined to serve, and for such other relief as may be just and proper.

Dated, *September 20th*, 1894.

H. H. Hustis, Plaintiff in person,
Fishkill Landing, N. Y.

To *Frederick Barnard*, Esq., Defendant's Attorney.

(2) Affidavit Supporting Motion.[1]

Form No. 17365.[2]

Supreme Court, *Dutchess* County.

Henry H. Hustis,
against
Aaron E. Aldridge and *Thomas Aldridge, Jr.*,
executors of the last will and testament of
Thomas Aldridge, deceased.

Dutchess County, ss.

H. H. Hustis, being duly sworn, says that he is the plaintiff in this action.

That this action was commenced by the plaintiff presenting a claim for professional services and disbursements to the defendants as executors of the estate of *Thomas Aldridge*, deceased, and rejected by defendants.

That an agreement was entered into under the statute referring said claim to *James L. Williams*, counsellor-at-law, residing in the city of *Poughkeepsie*, and *John T. Smith* and *John Place*, laymen residing at *Fishkill Landing* in said county, to hear and determine, and the same was approved by the Surrogate of the county of

notice of motion in Hustis *v.* Aldridge, 144 N. Y. 508. An order denying the motion was overruled.

1. **For the formal parts** of an affidavit in a particular jurisdiction see the title Affidavits, vol. 1, p. 548.

2. *New York.* — Code Civ. Proc., § 1011.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 3, p. 927.

This form of affidavit supported a motion for the appointment of referees to take the place of referees who declined to serve, and is copied from the records in Hustis *v.* Aldridge, 144 N. Y. 508. An order denying the motion was held to be erroneous.

Dutchess; copies of which agreement and approval by said Surrogate are hereto annexed.

That upon said agreement to refer said claim and the approval of said surrogate, an order was made in this court on the *fourth* day of *September*, 1894, referring said claim to the referees above named to hear and determine the same.

That on the said *fourth* day of *September*, 1894, the said agreement, with the approval of said surrogate, was filed in the *Dutchess* County Clerk's office, and said *Supreme* Court order was on the same day duly filed and entered in said *Dutchess* County Clerk's office.

That on the *fourth* day of *September*, 1894, this deponent served on *Frederick Barnard*, defendants' attorney, copies of said agreement and approval of the surrogate, and the order of reference made by this court.

That *John T. Smith* and *John Place*, *two* of said referees, have refused to serve as such referees in this action and have notified this deponent to that effect.

H. H. Hustis.

Sworn to before me this *20th* day of *September*, 1894.

C. S. Howland, Notary Public.

2. On Compulsory Reference.[1]

a. Notice of Motion for Appointment.[2]

(1) To Ascertain Damages Sustained by Reason of Injunction.

Form No. 17366.[3]

N. Y. Supreme Court.

Frederick De Berard, plaintiff,
against
E. P. Prial, The Dry Goods Chronicle Publishing Company, Clucas Publishing Company, John R. Anderson Company, Charles Clucas and *John R. Anderson*, and *The Chronicle and Outfitter Company*, defendants.

Please take notice that on the undertaking filed on procuring the injunction in this action on or about the *4th* day of *June*, 1897, and

1. **Statutes** relating to reference by compulsion are set out *supra*, note 1, p. 916.

2. **Requisites of Notice of Motion, Generally.** — For the formal parts of a notice of motion in a particular jurisdiction see the title Motions, vol. 12, p. 938.

Names of Defendants. — Notice of a motion, in an action in which several defendants are named in the pleadings, is sufficient which gives the names of the first-named defendant, followed by the abbreviation "*et al.*," in the absence of proof that the adverse party has been misled or prejudiced by not naming all of the defendants. Jerauld County *v.* Williams, 7 S. Dak. 196.

3. *New York.* — Code Civ. Proc., § 623.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 2, this page.

This is the form of notice of motion in the case of De Berard *v.* Prial, 34 N. Y. App. Div. 502, and is copied from the records. An order granting the motion and appointing a referee to assess the damages sustained by defendants was affirmed.

the annexed affidavit of *John H. Parsons*, verified *May 14*, 1898, on the judgment entered herein in favor of the defendants, *Clucas Publishing Company*, *John R. Anderson Company*, *Charles Clucas* and *John R. Anderson*, and on all the pleadings and proceedings herein, I will move this court at its *special* term to be held at the court-house, *New York City*, Borough of *Manhattan*, in Part *II*, the part assigned for the hearing of contested motions, on the *25th* day of *May*, 1898, at *10.30* o'clock in the *fore*noon on that day, or as soon thereafter as counsel can be heard for a reference to ascertain the damages sustained by the defendants by reason of the injunction granted in this action on the *4th* day of *June*, 1898, and for such other and further relief as may be just.

Dated *New York*, *May 17th*, 1898.

Yours, etc.,
John H. Parsons, Attorney for Defendants.

Clucas Publishing Company,
John R. Anderson Company,
Charles Clucas and *John R. Anderson*,
253 Broadway, *New York City*.

(2) Where Long Account is Involved.

Form No. 17367.[1]

Supreme Court, *Kings* County.

John J. Connor and *Michael Connor*, copartners under the firm name and style of *Connor Brothers*, plaintiffs,
against
John J. Jackson, as executor under the last will and testament of *Margaret Jackson*, deceased, defendant.

Please to take notice, that on the pleadings in this action, the proof of the claim of the plaintiffs presented to the defendant and the annexed affidavit of *Herbert T. Ketcham*, we shall move this court at a *Special* Term thereof, to be held for the hearing of motions, at the court-house in the Borough of *Brooklyn*, in the county of *Kings*, on the *3d* day of *May*, 1900, at *10.30* o'clock in the *fore*noon of that day, for an order that this action be referred to a referee to hear and determine all the issues therein, and for such further relief as may be just.

Dated *April 28th*, 1900.

Ketcham & Owens, Attys. for plaintiffs,
189 Montague St., *Brooklyn*, *N. Y.*

To *Edward Swann*, Esq., Attorney for defendant.

1. *New York.*—Code Civ. Proc., § 1013.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 2, p. 929.

This is the form of notice of motion in Connor *v.* Jackson, 53 N. Y. App. Div. 322, and is copied from the records. There was an order of reference, which was affirmed.

b. Affidavit in Support of Motion.[1]

(1) Of No Answer in Mortgage Foreclosure Proceedings.

Form No. 17368.[2]

Circuit Court, *Milwaukee* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

State of *Wisconsin*, } ss.
Milwaukee County, }

Jeremiah Mason, being duly sworn, deposes and says that he is the plaintiff's attorney in this action; that although more than *twenty* days have elapsed since the summons herein was served upon the defendant, no answer or demurrer to the complaint and no copy of either has been served upon the plaintiff's attorney herein, nor at his office, and the defendant has not appeared in this action; and deponent further says that this action is to foreclose a mortgage upon real estate, and that the whole amount of said mortgage has become due; that there are no infant defendants, and none of the defendants is an absentee or a prior incumbrancer; that due notice of the pendency of this action was filed in the office of the register of deeds in and for *Milwaukee* county, more than *twenty* days ago, the summons and complaint herein having been first duly filed in the office of the clerk of this court.

1. **Requisites of Affidavit, Generally.** — For the formal parts of an affidavit in a particular jurisdiction see the title Affidavits, vol. 1, p. 548.

By Whom Made. — Affidavit must, in general, be made by the party rather than by the attorney, unless the attorney states a valid excuse why it is not made by the party. Van Ingen *v.* Herold, (Supreme Ct. Gen. T.) 19 N. Y. Supp. 456; Ross *v.* Beecher, (Supreme Ct. Spec. T.) 2 How. Pr. (N. Y.) 157; Mesick *v.* Smith, (Supreme Ct. Spec. T.) 2 How. Pr. (N. Y.) 7; Little *v.* Bigelow, (Supreme Ct. Spec. T.) 2 How. Pr. (N. Y.) 164; Bolton *v.* McCullough, (Supreme Ct. Spec T.) 2 How. Pr. (N. Y.) 165; Wood *v.* Crowner, 4 Hill (N. Y.) 548.

In Little *v.* Bigelow, (Supreme Ct. Spec. T.) 2 How. Pr. (N. Y.) 164, the affidavit for motion was made by S. G. Haven, Esq., the law partner of plaintiff's attorney, who stated that he was counsel for the plaintiff in the cause; that Millard Fillmore, Esq., the attorney for the plaintiff, was then absent from the county of Erie, where the venue in the cause was laid, and would not, probably, be back for some time to come; that the plaintiff resided in the town of Collins, at a remote part of the county of Erie, and could not, without inconvenience and loss of time, come to the city of Buffalo to have his affidavit drawn and sworn to. The affidavit then stated the cause of action and the particular claims on the part of the plaintiff, and also the particulars of the defendant's defense which would arise under his bill of particulars, and concluded by stating that the trial of the cause would involve the examination of a long account by both parties, etc.

This affidavit was held insufficient to show an excuse why the affidavit was not made by the plaintiff.

Venue. — Affidavit for reference need not state where the venue is laid. Feeter *v.* Harter, 7 Cow. (N. Y.) 478; Cleveland *v.* Strong, 2 Cow. (N. Y.) 448.

Issue Joined. — An affidavit for a reference should state that issue is joined. Jansen *v.* Tappen, 3 Cow. (N. Y.) 34.

2. *Wisconsin.* — Stat. (1898), §§ 2891, 3154.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, this page.

Deponent makes this affidavit to procure an order of reference pursuant to law and the rules of practice in this court.

Jeremiah Mason.

Subscribed and sworn to before me this *tenth* day of *June*, A. D. 1899.

Abraham Kent, Justice of the Peace,
in and for *Milwaukee* County, *Wisconsin.*

(2) That Damages have been Sustained by Reason of Injunction Proceedings.

Form No. 17369.[1]

New York Supreme Court.

Frederick De Berard, plaintiff,
against
F. P. Prial, *The Dry Goods Chronicle Publishing Company*, *Clucas Publishing Company*, *John R. Anderson Company*, *Charles Clucas* and *John R. Anderson*, and *The Chronicle and Outfitter Company*, defendants.

City and County of *New York*, ss.

John H. Parsons, being duly sworn, deposes and says that he is the attorney in this action for the defendants *Clucas Publishing Company*, *John R. Anderson Company*, *Charles Clucas* and *John R. Anderson*. That this action was begun in or about *June*, 1897, and issue was joined on *December 7th*, 1897. That the action was brought to procure an injunction against the said defendants enjoining them from consummating the sale of the property of *The Dry Goods Chronicle Publishing Company* to *F. P. Prial* and from printing in the said paper any notice of transfer of title rights therein or any change of publishers thereof, and to cancel and set aside a certain contract and note set forth in the complaint and for certain other relief fully therein set out. That in said action the plaintiff procured a preliminary injunction from one of the justices of this court dated *June 4th*, 1897, and thereunder restrained these defendants from disposing of the assets of the defendant *The Dry Goods Chronicle Publishing Company* without a *two-thirds* affirmative vote of the stock of the said company, and restraining the said defendants as in said order more fully set out, and said order required the defendants to show cause before the court why the said temporary injunction should not be continued. That as a preliminary condition of obtaining said injunction the plaintiff filed with this court about *June 4th*, 1897, an undertaking executed by the *Fidelity & Deposit Company* of *Maryland* in the sum of *fifteen hundred* dollars, wherein the said company undertook that the plaintiff would pay to the defendants so enjoined, such damages, not exceeding a stated sum, as they might sustain by rea-

1. *New York.*—Code Civ. Proc., § 623. See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 931.

This is the form of affidavit in the case of De Berard *v.* Prial, 34 N. Y. App. Div. 502, and is copied from the records. An order granting the motion for reference which this affidavit supported was affirmed.

son of the said injunction, if the court should finally decide that the plaintiff was not entitled thereto, and that such undertaking contained a provision that such damages might be ascertained by reference or otherwise as the court might direct. That heretofore and on the *12th* day of *May*, 1*898*, the judgment in this court was entered in this action dismissing the complaint as to the defendants so appearing by deponent, and granting a judgment in their favor for the costs of this action against the plaintiff amounting to the sum of *eighty-nine* dollars and *thirty-five* cents (*$89.35*), and notice of such judgment and a copy thereof has been served upon the attorneys for the plaintiff in this action. That thereby the court has finally decided that the said plaintiff was not entitled to the said injunction. Deponent further says that in and about the procuring the dissolution of said injunction or otherwise the defendants so appearing by him in this action have sustained damages by reason of the issuance of said injunction. That no action has been begun on said undertaking on their behalf.

John H. Parsons.

Sworn to before me this *14th* day of *May*, 1*898*.
Thomas F. Coen, Notary Public, *N. Y.* Co., *N. Y.*

(3) That Examination of a Long Account is Involved.[1]

1. Statutory Provisions. — By statute, in some states, it is provided that the court may on its own motion, or upon the application of either party without the consent of the other, direct a trial of the issues by a referee, where the trial will require the examination of a long account and will not require the trial of difficult questions of law. N. Y. Code Civ. Proc., § 1013.

And see list of statutes cited *supra*, note 1, p. 916.

Examination of Long Account Necessary. — In order to entitle the party to a reference under these statutes, it must affirmatively appear that the examination of a long account is necessarily involved upon the trial. Cassidy *v.* McFarland, 139 N. Y. 201; Spence *v.* Simis, 137 N. Y. 616; Kain *v.* Delano, (Ct. App.) 11 Abb. Pr. N. S. (N. Y.) 29; Whitaker *v.* Desfosse, 7 Bosw. (N. Y.) 678. And it is not enough that the case might possibly involve the examination of a long account. Cassidy *v.* McFarland, 139 N. Y. 201.

How Shown — *By Affidavit.* — That the examination of a long account is necessarily involved may be shown by affidavit. Crawford *v.* Canary, 28 N. Y. App. Div. 135; Abbott *v.* Corbin, 22 N. Y. App. Div. 584; Cassidy *v.* McFarland, 139 N. Y. 201; Spence *v.* Simis, 137 N. Y. 616.

By Verified Pleadings. — Where this fact is shown by the verified pleadings, it is sufficient. Crawford *v.* Canary, 28 N. Y. App. Div. 135; Abbott *v.* Corbin, 22 N. Y. App. Div. 584; Cassidy *v.* McFarland, 139 N. Y. 201; Spence *v.* Simis, 137 N. Y. 616.

Referable Quality of Action.—The character or referable quality of the action must be determined from the complaint. Crawford *v.* Canary, 28 N. Y. App. Div. 135; Cassidy *v.* McFarland, 139 N. Y. 201; Dalzell *v.* Fahys Watch Case Co., (N. Y. Super. Ct. Gen. T.) 12 Misc. (N. Y.) 357.

Facts Showing Long Account. — Facts must be disclosed, either by affidavit or upon the face of the pleadings, from which the conclusion can be fairly drawn that so many separate and distinct items of account may be litigated on trial that a jury cannot keep the evidence in mind in regard to each of the items and give it the proper weight and application when they retire to deliberate upon their verdict. McAleer *v.* Sinnott, 30 N. Y. App. Div. 318; Abbott *v.* Corbin, 22 N. Y. App. Div. 584; Spence *v.* Simis, 137 N. Y. 616; Cornell *v.* U. S. Illuminating Co., (Supreme Ct. Gen. T.) 16 N. Y. Supp. 306. And a general allegation that an examination of the account is necessarily involved is not enough. Kain

(*a*) *In General.*

aa. By Plaintiff.

Form No. 17370.[1]

New York Supreme Court.
William Crawford }
against
Thomas Canary. }
City and county of *New York*, ss.:

William Crawford, being duly sworn, says, that he is the plaintiff herein. That he has read the affidavit of *Jno. J. Adams*, duly verified the *28th* day of *February*, 1898, hereto annexed, with reference to the necessity of proving upon the trial the sales and deliveries, amount and prices of many hundred items of specified articles, and that this action involves the examination of a long account, and that said statements are true to deponent's own knowledge.

William Crawford.

Sworn to before me this *28th* day of *February*, 1898.

Geo. J. Vestner, Com. of Deeds, *N. Y.* Co.

bb. By Plaintiff's Attorney.[2]

v. Delano, (Ct. App.) 11 Abb. Pr. N. S. (N. Y.) 29.

Insufficient Affidavit. — An affidavit which states that "the trial of this action will involve the examination of a long account embracing, as I verily believe, upwards of *one hundred and fifty* items," but which states no fact from which this conclusion appears to be supported, is insufficient. Knope *v.* Nunn, 75 Hun (N. Y.) 287.

An averment in an affidavit that a copy of the account between the parties served contains about eighteen charges of amounts claimed to have been paid, "some of which will be disputed upon the trial of this action," is insufficient to show a proper case for reference. McAleer *v.* Sinnott, 30 N. Y. App. Div. 318.

1. *New York.*— Code Civ. Proc., § 1013.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 933.

This is the form of affidavit in Crawford *v.* Canary, 28 N. Y. App. Div. 135, and is copied from the records. An order of a special term of the supreme court denying the plaintiff's motion for an order of reference was reversed in the appellate division of the supreme court.

2. Precedent. — The following form is copied from the records in the case of Connor *v.* Jackson, 53 N. Y. App. Div. 322:

"*Supreme* Court, *Kings* County.

John J. Connor and *Michael Connor*, copartners under the firm name and title of *Connor Brothers*, plaintiffs,
vs.
John J. Jackson, as Executor under the last will and testament of *Margaret Jackson*, deceased, defendant.

State of *New York*,
County of *Kings*,
City of *New York*,
Borough of *Brooklyn*. } ss.

Herbert T. Ketcham being duly sworn, says:

I. I am one of the plaintiffs' attorneys in this action.

II. The complaint sets forth *three* causes of action. The *first* is for goods sold and delivered to the amount of $*14727 92-100* upon which it is alleged in the said complaint the sum of $*12196-12-100* was paid, and the said complaint demands judgment for the sum of $*2531.35* balance. The *second* cause of action is for rent of real property, and the said complaint alleges that the same was let from month to month at the agreed rental of $*100*; that the same were occupied for *thirteen* months, and

Form No. 17371.[1]

N. Y. Supreme Court.

William Crawford
against
Thomas Canary.

City and county of *New York*, ss.:

John J. Adams, being duly sworn, on oath deposes and says, that he is one of the attorneys for the plaintiff in this action.

That this action was begun by the service of the summons and complaint upon the defendant on the *1st* day of *December*, *1898*; that the defendant appeared on the *4th* day of *December*, 1897, by *Franklin Bien*, Esq., his attorney, and demanded a bill of particulars of the various goods, wares and merchandise mentioned in the complaint herein; that the plaintiff thereupon and pursuant to such demand, duly served his said bill of particulars, and that the answer of the defendant was served on the *18th* day of *January*, 1898.

That the complaint in this action alleges that the plaintiff is, and was at the times thereinafter mentioned, carrying on business under the name and style of *Simpson, Crawford & Simpson*, in the city of *New York*, and that between the *1st* day of *February*, 1895, and the *26th* day of *December*, 1896, the plaintiff sold and delivered to the defendant at his special instance and request, goods, wares and merchandise to the amount and agreed price of $9,196.72, that no part of said amount has been paid, except the sum of $5,559.75 paid on

that no part of the rent therefor has been paid, and demands judgment for the sum of $1300. The *third* cause of action is for money laid out and expended to the use of the plaintiff's intestate to the amount of $79 14-100 and demands judgment for the same amount. The demand for judgment is for the sum of $3910 29-100 in the aggregate.

III. The answer denies each and every allegation contained in the complaint, except the allegations therein as to the plaintiff's partnership, the death of the defendant's testator and the issue of letters testamentary to the defendant.

IV. All of the *three* causes of action were the subject of a running account between the plaintiffs and the defendant's testatrix, and the statement of the said account as it appears in the books of the plaintiffs and as annexed to the plaintiffs' proof of claim against the defendant contained more than *two hundred and fifty* (250) items of charges against the defendant's testatrix and more than *one hundred* (100) items of credit for cash paid and merchandise allowed. The trial of the issues in this action will require the examination of all and singular the items of the said account, and will not require the decision of difficult questions of law. The plaintiffs' said proof of claim against the defendant has been presented to him,

Herbert T. Ketcham.

Sworn to before me this *28th* day of *April*, *1900*.

Franklin M. Tomlin, Notary Public,
Kings County, *New York*."

The motion which this affidavit supported was granted, and the order granting it was affirmed. An objection to the reference, on the ground that the examination of a long account would not be required in the determination of the issues arising upon the second and third causes of action, and that defendant's right to a trial of those issues before a jury could not be defeated by joining them with the first cause of action, which was referable by compulsion, was not sustained, the court holding that the trial of the first cause would require the examination of a long account, and that the three separate causes of action could have been properly stated quite as well in the form of one cause of action composed of different items.

1. *New York.* — Code Civ. Proc., § 1013.

See also list of statutes cited *supra*.

account thereof; that in addition the defendant is entitled to a credit of *$346.59* for merchandise returned, leaving a balance due to plaintiff of *$3,290.39*.

That in his verified answer the defendant, on information and belief, denies each and every allegation in the complaint.

That upon the trial of this action it will become necessary to prove the sales and deliveries, amount and price of goods, the sales and deliveries having been made on:

February 12, 1895, of *18* items of specified articles.
" *14*, 1895, " *38* " " " "
" *23*, 1895, " *1* item " " "
April 13, 1895, " *5* items " " "
" *6*, 1895, " *1* item " " "
May 1, 1895, " *1* " " " "
" *2*, 1895, " *1* " " " "
" *10*, 1895, " *12* items " " "
" *22*, 1895, " *2* " " " "
" *27*, 1895, " *5* " " " "

(*There were many more items set out in the affidavit.*)

That the nature and character of said items of specified articles more fully appears from the plaintiff's bill of particulars, and to which reference is hereby made.

That a note of issue was duly filed on the *7th* day of *February*, 1897, and that this cause was duly noticed for trial by the plaintiff and defendant, and is now on the General Calendar of this court, numbered *15615*.

That by the complaint, together with the bill of particulars in this action, it appears that this action involves the examination of a long account, and that on the trial it will become necessary to prove each of the items above referred to of the goods sold and delivered and the number of yards in each piece of lace, ribbon, dress goods, sheeting and other materials, and the sale and delivery of each costume and pair of gloves, flowers, shields, bones, hose and each and every other article sold and delivered. That it will become necessary to so prove *658* items of specified articles and sales and deliveries made on *101* different days.

That deponent has carefully examined the questions arising in this action, and that no difficult questions of law in the opinion of deponent will arise upon the trial.

That this action is one in which a reference is proper.

Jno. J. Adams.

Sworn to before me this *28th* day of *February*, 1898.

Beno. B. Gattell, Notary Public, *N. Y.* Co.

(*b*) *In Action to Foreclose Mechanics' Lien.*

note 1, p. 916; and, generally, *supra*, note 1, p. 933.

This is the form of affidavit in Crawford *v.* Canary, 28 N. Y. App. Div. 135, and is copied from the records. An order of a special term of the supreme court denying the plaintiff's motion for an order of reference was reversed in the appellate division of the supreme court.

Form No. 17372.[1]

Supreme Court, *City and* County of *New York.*

John Weber & Company
against
George A. Hearn.

City and county of *New York*, ss.

John Weber, being duly sworn, says:

1. I am and have been at all the times mentioned in the complaint, the president of the plaintiff, which is a domestic corporation, organized and existing under the laws of the state of *New York.*

2. This action is brought to foreclose a mechanics' lien upon premises owned by the defendant, *George A. Hearn*, on *18th* and *14th* streets, *New York City*; this mechanics' lien was duly filed by the plaintiff for work, labor and services done and performed and goods, wares and materials furnished and supplied by it upon said premises, for and at the request of the said defendant *Hearn.*

3. The allegations concerning the doing of the work and the furnishing of the materials are set forth in paragraphs II and III of the complaint, and these allegations are traversed and denied by paragraphs IV and V of the answer. The items necessary to be proved are parts of a long account or are a series of long accounts, bills of which have been duly sent the said defendant *Hearn* prior to the commencement of the action and are now in the possession of his attorney and held as a bill of particulars; annexed hereto are copies of the said bills of account, all of which are in controversy under the defendant's denial, and as to all of which proof will have to be taken; the said copies are annexed hereto, and reference to them is hereby made with the same force and effect as if incorporated herein.

4. In addition to the defendant's denial placing at issue the plaintiff's account, the said defendant has set up a full defense consisting of *five* counterclaims directly connected with and growing out of the work, labor and services and materials furnished and supplied, which constitute the bases of the complaint; in response to a demand in that behalf, the defendant has furnished a bill of particulars consisting of *four* pages of items, all connected with and growing out of the plaintiff's cause of action, a copy of which bill of particulars is likewise hereto annexed as if herein set forth; to these defenses, which are also set up as a counterclaim, the plaintiff has replied by a denial.

5. Originally there were *two* other defendants, but the action has been discontinued as to them upon consent of all the parties to the action, and an order to that effect has been entered; the sole and

1. *New York.* — Code Civ. Proc., § 1013.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 933.

This is the form of affidavit in Weber *v.* Hearn, 7 N. Y. App. Div. 306, and is copied from the records. The motion which this affidavit supported was granted and a compulsory reference ordered on the ground that a long account was involved. This order was affirmed.

only parties to the action now are the plaintiff and the defendant *Hearn.*

6. As I am advised by my counsel and verily believe, this action cannot be tried in court as it involves the trial and examination of a long account consisting of many items, and the only manner in which the cause can be properly tried is by a reference of the issues.

7. No previous or other application has been made to any court or judge for an order of reference.

John Weber.

Sworn to before me this *21st* day of *April*, 1896.

W. T. Laing, Notary Public, *Kings* Co.

Certificate filed in *N. Y.* Co.

c. Counter-affidavit in Opposition to Motion.[1]

Form No. 17373.[2]

Supreme Court, *Kings* County.

Hugh McAleer, Jr., plaintiff,
against
Andrew M. Moore and *Joseph F. Sinnott*, defendants.

State of *New York*, } ss.
County of *New York.* }

Henry B. Ketcham, being duly sworn, says that he is one of the attorneys for the defendants in the above-entitled action and has had sole charge thereof.

This action is brought to recover the sum of $*4,562.62* with interest from the *1st* day of *April*, 1894, for services alleged to have been rendered by plaintiff at defendants' request. That the answer denies the value of the services alleged to have been rendered by the plaintiff or that said defendants or either of them ever

1. **Requisites of Affidavit, Generally.** — For the formal parts of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

Difficult Questions of Law Involved. — Under a statute which provides that when any difficult question of law arises the action is not referable, an affidavit opposing a motion to refer, upon the ground that difficult questions of law will arise, must set forth specifically what such questions are, to enable the court to judge whether they are questions of real difficulty. Cass *v.* Cass, 61 Hun (N. Y.) 460; Patterson *v.* Stettauer, 39 N. Y. Super. Ct. 413; Ryan *v.* Atlantic Mut. Ins. Co., (N. Y. Super. Ct. Spec. T.) 50 How. Pr. (N. Y.) 321; Dewey *v.* Field, (Supreme Ct. Spec. T.) 13 How. Pr. (N. Y.) 437; Salisbury *v.* Scott, 6 Johns. (N. Y.) 329. And a general allegation that difficult questions of law are involved is not sufficient. Patterson *v.* Stettauer, 39 N. Y. Super. Ct. 413. But see Low *v.* Hallett, 3 Cai. (N. Y.) 82, wherein it was held that in opposing a motion for a reference it is sufficient that the affidavit state that the controversy will involve questions of law "as the party is advised by his counsel and verily believes," without setting forth what those questions are.

2. *New York.* — Code Civ. Proc., § 1013.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, this page.

This is the form of counter-affidavit in McAleer *v.* Sinnott, 30 N. Y. App. Div. 318, and is copied from the records. An order directing a reference of the issues was reversed on the ground that it did not appear that the trial would require any such examination of a long account as was necessary to justify a reference by compulsion.

promised and agreed to pay such sum. The answer further alleges payment to the plaintiff in full of all moneys due him from defendants except the sum of *$861.18*. Defendants' answer also alleges that by the terms of the contract between plaintiff and defendants all bad debts and all contracts made by plaintiff which defendants should refuse to fill were to be deducted in computing plaintiff's compensation, and further demands by way of counterclaim damages in the sum of *$4,561.83* by reason of plaintiff's failure to obey defendants' explicit instructions in making sales to one *J. Stewart McAleer*, a brother of this complainant.

That the issues raised by the pleadings in this action do not involve the examination of a long account within the meaning of section 1013 of the Code of Civil Procedure, and that a long account, if involved at all, is collateral to and not the main issue in said action. That the points to be litigated on the trial of this action are the terms of the contract of plaintiff's employment, and whether compensation is to be made to plaintiff for bad debts which he may have incurred in his capacity as defendants' sales agent, and whether contracts which plaintiff may have made, and which defendants have refused, shall be regarded in determining plaintiff's compensation. It is also vital to determine the validity of defendants' counterclaim and their demand for damages from plaintiff for his violation of their express instructions.

The plaintiff's reply denies absolutely the allegations of defendants' counterclaim. Deponent further says that heretofore and on or about the *30th* day of *October*, 1897, plaintiff obtained from this court an order for the inspection of defendants' books and papers, and that thereafter and pursuant to said order defendants duly furnished the plaintiff a sworn transcript of plaintiff's account with defendants, taken from defendants' books, and showing on the *1st* day of *April*, 1894, a balance due plaintiff from defendants of *$861.18*. That plaintiff, in his complaint, accepts the account as furnished by defendants, but claims compensation for the bad debts incurred by reason of his sales, and compensation also upon contracts which defendants refused to accept.

Deponent further says that at most the question of a long account is involved only collaterally, and defendants are entitled to their constitutional right of a jury trial as to what that contract really was. And deponent further says that the contract of employment between plaintiff and defendants was a verbal contract only, and was not in writing.

That heretofore and after the commencement of this action the defendant *Andrew M. Moore* died at his home in the city of *Philadelphia*, and that the defendant *Joseph F. Sinnott* resides in the city of *Philadelphia*, and is not now within the city, county and state of *New York*, and that deponent has been unable for this reason to obtain for use upon this motion the affidavit of the said *Joseph F. Sinnott*, and therefore is obliged to personally make this affidavit.

Henry B. Ketcham.

Sworn to before me this *22d* day of *March*, 1898.

Geo. W. Simers, Jr., Comr. of Deeds, *N. Y.* Co.

d. Order of Reference.[1]

(1) In Actions Involving Examination of Accounts.[2]

1. Necessity of Order. — It is indispensable that an order of reference be made. Hawley *v.* Simons, 157 Ill. 218; Kent *v.* Dakota F. & M. Ins. Co., 2 S. Dak. 300; Stone *v.* Merrill, 43 Wis. 72. As the authority of master or referee to act is derived from the order. Simmons *v.* Jacobs, 52 Me. 147; Bradshaw *v.* Morse, 20 Mont. 214; Stonington Sav. Bank *v.* Davis, 15 N. J. Eq. 30; Roulston *v.* Roulston, (Supreme Ct. Spec. T.) 5 Misc. (N. Y.) 569; Gore *v.* Poteet, (Tenn. 1898) 46 S. W. Rep. 1050; Ballard *v.* McMillan, 5 Tex. Civ. App. 679; Felch *v.* Hooper, 4 Cliff. (U. S.) 489.

Requisites of Order or Decree, Generally. — For the formal parts of an order or decree in a particular jurisdiction see the titles Judgments and Decrees, vol. 10, p. 645; Orders, vol. 13, p. 356.

Grounds Upon Which Order is Granted. — It is not necessary that the order should recite the grounds upon which it is made. Duncan *v.* Erickson, 82 Wis. 128. But see Terpening *v.* Holton, 9 Colo. 306, wherein the court said that as a question of practice it should be stated whether the order is made on the agreement of parties, on the application of one party or on the motion of the court.

Place of Holding Meetings. — The order of reference may authorize the referee to hold his meetings so as to accommodate the parties. Hart *v.* Trotter, 4 Wend. (N. Y.) 198. And the order may direct the referee to sit in any county of the state. O'Brien *v.* Catskill Mountain R. Co., 32 Hun (N. Y.) 636.

Taking Testimony. — Order need not particularly empower a master to take testimony if the object can be ascertained only by evidence. Story *v.* Livingston, 13 Pet. (U. S.) 359. And in Goodwin *v.* McGehee, 15 Ala. 232, it was held that the master, when directed to ascertain the facts of a case, may receive the testimony of witnesses pertinent to such facts without an order specially directing him to that effect.

Time of Making Report. — Order may direct when the referee shall make his report. Davis *v.* Caldwell, 100 Iowa 658; Goodale *v.* Case, 71 Iowa 434; De Long *v.* Stahl, 13 Kan. 558.

Special Report. — Order may require master to make a special report. Mott *v.* Harrington, 15 Vt. 185.

2. Examination of Accounts. — Where accounts involve large sums of money, and testimony as to the rights of parties is conflicting and unsatisfactory, the cause must, in conformity with the rules of chancery practice, be referred to a master to render a concise and accurate statement of the account, so that the same may readily be comprehended, and any objection taken passed upon understandingly. This is the well recognized and established practice in all cases of a complicated character. Moss *v.* McCall, 75 Ill. 190; Patten *v.* Patten, 75 Ill. 446; Huling *v.* Farwell, 33 Ill. App. 238; St. Colombe *v.* U. S., 7 Pet. (U. S.) 625.

Requisites of Decree or Order, Generally. — For the formal parts of a decree or order in a particular jurisdiction see the titles Judgments and Decrees, vol. 10, p. 645; Orders, vol. 13, p. 356.

Rights of Parties should be Declared. — Where the rights of the parties are involved and an account must be had, the court should first find and declare the rights of the parties by an interlocutory decree and then refer the cause to the master to take and state the account. Moffett *v.* Hanner, 154 Ill. 649; Moss *v.* McCall, 75 Ill. 190; Kay *v.* Fowler, 7 T. B. Mon. (Ky.) 593; Hudson *v.* Trenton Locomotive, etc., Mfg. Co., 16 N. J. Eq. 475; Stonington Sav. Bank *v.* Davis, 15 N. J. Eq. 30; Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495; M'Lin *v.* M'Namara, 1 Dev. & B. Eq. (21 N. Car.) 407.

Principles on Which Accounts are to be Taken. — The order of reference should specify the principles on which the accounts are to be taken or the inquiries to proceed. Moffett *v.* Hanner, 154 Ill. 649; Moss *v.* McCall, 75 Ill. 190; Kay *v.* Fowler, 7 T. B. Mon. (Ky.) 593; Hudson *v.* Trenton Locomotive, etc., Mfg. Co., 16 N. J. Eq. 475; Stonington Sav. Bank *v.* Davis, 15 N. J. Eq. 30; Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495; M'Lin *v.* M'Namara, 1 Dev. & B. Eq. (21 N. Car.) 407; Ballard *v.* McMillan, 5 Tex. Civ. App. 679.

Extent of Account. — Decree must direct to what matters the account shall extend, and in decreeing a general account special directions will be rendered proper and necessary by the particular circumstances of the case. Hudson *v.*

(a) *In General.*

aa. Long Account Involved.

Form No. 17374.[1]

At a *Special* Term of the *Supreme* Court of *New York*, held at the

Trenton Locomotive, etc., Mfg. Co., 16 N. J. Eq. 475.

Direction to Take Testimony. — Upon bill for discovery and for an accounting, the order should refer the case to the master to take the testimony and state the account and report the same to the court, and where the reference is to take the testimony only it is not sufficient. Weary *v.* Andrews, 58 Ill. App. 380.

Precedents. — In Kimball *v.* Lyon, 19 Colo. 266, the trial of the issues required the examination of a long account. The cause was accordingly referred to an attorney of the court "to take testimony herein and report the same, together with his findings of fact and conclusions of law thereon." This was held to be equivalent to a reference with directions that the referee should hear and decide the whole issue.

In McKinney *v.* Pierce, 5 Ind. 422, the master was ordered to take and state an account of all the matters between the parties, in accordance with the decree, and in making said account he was to use the testimony and exhibits in the cause and the parts of the answer responsive to the bill. The decree further proceeded as follows: "And for the better investigation of which accounts, the parties are to produce before such master, upon oath or affirmation, all books or papers and writings in their custody and power relating thereto, and are to be examined upon interrogatories as said master shall direct, who, in making said account, is to make unto said parties all just allowances, and report to the court, at the next term, what, upon the balance of said account, shall appear to be due from either party to the other." No objection was made to this decree.

In Simmons *v.* Jacobs, 52 Me. 147, "it was ordered, adjudged and decreed that the master be required to inquire and report the amount due to the complainants with just and equitable interest thereon, and that for the better taking of the account the master require the production of books, papers and writings in the custody or power of the parties relating thereto under oath, and examine the parties thereto under oath on interrogatories or otherwise as he shall direct." No objection was made to this order.

In Miller *v.* Whittier, 36 Me. 577, a master was appointed "to state an account with *Whittier*, since *November 17, 1845*, exhibiting the sums due to him by the contract, and the claims he justly has against the estate, for services and expenditures; what property, securities and means, including rents and profits, he has received from it; the conveyances made, and the amounts received and receivable therefrom. Also to state the amounts due, bona fide, to *Jones*, on the several mortgages, and the rents, profits and income received by him from the property. And to state the amount originally secured to Mrs. *Whittier*, by the mortgage to *Smith*, and the sum justly due to her on that account."

No objection was made to this order.

In Feige *v.* Babcock, 111 Mich. 538, a portion of a decree in a partnership accounting was as follows: "It will be referred to Hon. *Chauncey H. Gage*, special commissioner, of *Saginaw*, to take and state the account between *Gates* and *Helen M. Babcock* and report the same to this court. Such accounting is to be made upon the files and records of said cause, and the testimony taken herein." No objection was made to this order.

In Izard *v.* Bodine, 9 N. J. Eq. 309, there was a reference to a master to take an account of the yearly rent and values of premises from the twentieth of June, eighteen hundred and forty-eight, until the time of making his report, and also to take an account of the waste, spoil and destruction, if any, committed or suffered on said premises while the defendant or any person claiming under him remained on the premises. No objection was made to this order.

1. *New York.* — Code Civ. Proc., § 1013.

See also list of statutes cited *supra*,

County Court House in the Borough of *Brooklyn*, for the hearing of motions on *May 9th*, 1900.

Present — Honorable *Samuel T. Maddox*, Justice.

John J. Connor and *Michael Connor*, copartners under the firm name and style of *Connor Brothers*, plaintiffs,
vs.
John J. Jackson, as executor under the last will and testament of *Margaret Jackson*, deceased, defendant.

On reading and filing the notice of motion herein and the affidavit of *Herbert T. Ketcham* annexed thereto, with due proof of service thereof, and upon all the pleadings and proceedings in this action, the proof of the claim of the plaintiffs, presented to the defendant, and upon the affidavit of *Edward Swann*, Esq., verified *May 2*, 1900, after hearing *Herbert T. Ketcham*, counsel for plaintiffs, and *C. L. Harwood*, Esq., counsel for defendant, in opposition to said motion, it appearing to the court that the trial of this action will require the examination of a long account and will not require the decision of difficult questions of law, now on motion of *Ketcham & Owens*, attorneys for plaintiffs,

It is ordered that this action and the whole issue herein be referred to *James C. Cropsey*, Esq., who is hereby appointed referee for that purpose, to hear and determine all the issues herein.

Enter: *S. T. M.*, J. S. C.

Granted *May 11*, 1900.

Peter P. Huberty, Clerk.

bb. MUTUAL ACCOUNT INVOLVED.

Form No. 17375.[1]

(Precedent in Galbraith *v.* McCormick, 23 Kan. 707.)[2]

[(*Venue and title of court and cause as in Form No. 14150.*)][3]

Now, in this case come the parties, the plaintiffs by their attorney, *B. F. Hudson*, and defendant *P. Galbraith* by *W. S. Greenlee*, his attorney, and defendant *J. S. Galbraith* by his attorneys, *Everest & Waggener*, and upon examination of the pleadings herein, and under the same, in connection with the statements and admissions of the respective attorneys for said parties, it appears, and is clearly made to appear, and is shown to the court, that this cause, under the issues therein, is properly the subject of reference, and that the trial of the issues therein will require the examination of mutual accounts between the parties respectively; and it will be necessary that the

note 1, p. 916; and, generally, *supra*, note 1, p. 940.

This is the form of order in Connor *v.* Jackson, 53 N. Y. App. Div. 322, and is copied from the records. The order was affirmed.

1. *Kansas.* — Gen. Stat. (1897), c. 95, § 302.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 940.

2. It was held that this case was properly referred, the action involving "the examination of mutual accounts."

3. The matter to be supplied within [] will not be found in the reported case.

said respective parties, plaintiff and defendant, will be required as witnesses to prove and determine said accounts; it is therefore ordered that all the issues in this action, both of fact and of law, be referred to *S. H. Glenn* as referee, to which reference to said *Glenn* said plaintiffs, by their attorney, and said *P. Galbraith*, by his attorney, *W. S. Greenlee*, consent; said referee to report the facts found and conclusions of law separately on the *first* day of the *June* term of this court, A. D. 1879; to which order of reference defendant *J. S. Galbraith* duly excepts.

[(*Signature as in Form No. 14150.*)][1]

(*b*) *Of Administrator or Executor.*

Form No. 17376.[2]

In the *Superior* Court of the *City and* County of *San Francisco*, State of *California*.

Probate.

In the matter of the estate of *John Doe*, deceased. } Order Appointing Referee of Administrator's (or *Executor's*) Account and Adjourning Settlement.

Nathan Hale, the administrator of the estate (or *executor of the last will and testament*) of *John Doe*, deceased, having rendered an account for settlement, and notice of such settlement having been duly given as ordered by this court,

It is hereby ordered that *Calvin Clark*, Esq., be and he is hereby appointed a referee to examine the said account and make report thereon to this court within *sixty* days, and that settlement of said account be adjourned until *Monday*, the *tenth* day of *June*, 1899, at *ten* o'clock *A.* M. *John Marshall*, Judge *Superior* Court.

Dated *April 2*, 1899.

(*c*) *Of State Officer.*

Form No. 17377.[3]

(Precedent in Jones *v.* Smith, 64 Ga. 715.)[4]

Upon consideration it is ordered that *James M. Pace*, of the county of *Newton*, be and he is hereby appointed as auditor to investigate the accounts between the state and said *John Jones*, principal, during the time covered by said bond; that said auditor may subpœna witnesses, administer oaths, and hear testimony upon any disputed facts, always giving notice of his sittings to the defendants in said case or their solicitors; that all interrogatories and depositions in said case may be returned to the clerk and opened and handed to the auditor; that he report the result of his auditing of said accounts

1. The matter to be supplied within] will not be found in the reported case.

2. *California.* — Code Civ. Proc., (1897), § 638 *et seq.*

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 940.

3. *Georgia.* — 2 Code (1895), § 4581.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 940.

4. No objection was made to the order in this case.

to this court by or during its *next* term, and either party to said cause shall have *fifteen* days after notice of filing said report to except thereto. *July 1st*, 1876.

[(*Signature as in Form No. 14188.*)][1]

(2) In Mortgage Foreclosure Proceedings.[2]

(*a*) *To Ascertain Credits to Which Mortgagor is Entitled.*

Form No. 17378.[3]

(Precedent in Miller *v.* Rushforth, 4 N. J. Eq. 176.)[4]

[(*Title of court and cause as in Form No. 12126.*)][1]

This matter coming on to be heard, at the state house, in the city of *Trenton*, before the chancellor, in the presence of *A. O. Zabriskie*, of counsel with *William Rushforth*, the petitioner, and *J. D. Miller*, of counsel with the complainant, and the depositions being read, and the arguments of the respective counsel being heard and considered: it is, on this *twentieth* day of *January*, eighteen hundred and *forty-two*, ordered, adjudged, and decreed by the chancellor, that the decree heretofore made in this cause, bearing date the *fifteenth* day of *February*, eighteen hundred and *thirty-nine*, be opened for the purpose of ascertaining the amount of credits to which the defendant, *William Rushforth*, is entitled, by virtue of receipts not heretofore allowed, and also by virtue of the mortgage assumed to be paid by the said complainant, and in the said petition as well as in the complainant's bill of complaint referred to; and that the same be referred to *Lewis D. Hardenburgh*, esquire, one of the masters of this court, to ascertain the same, and report thereon to this court, with all convenient speed. And it is further ordered, that the execution issued on the said decree, be set aside, and all proceedings on the same be stayed until the further order of this court.

[(*Signature as in Form No. 12126.*)][1]

(*b*) *To Compute Amount Due on Mortgage Upon Failure of Defendant to Answer.*

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **Precedents.** — In Davis *v.* Caldwell, 100 Iowa 658, the record of the appointment of the referee was as follows: "It appearing to the court that this cause is a proper one for reference, requiring an accounting, it is ordered that the partial submission had herein be set aside and *L. W. Ross*, Esq., is hereby appointed referee to take evidence and report herein before the *first* day of the next term of this court." There was no objection made to the appointment, but the report of referee was stricken from the files because not filed within the time specified in the order of appointment.

In Stonington Sav. Bank *v.* Davis, 15 N. J. Eq. 30, an order of reference in a suit for foreclosure of a mortgage, which order was held to be in the usual form, directed the master to take an account of the amount due to the complainants under their bond and mortgage.

3. *New Jersey.* — Gen. Stat. (1895), p. 397, § 128.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 940.

4. No objection was made to the order of reference in this case.

Form No. 17379.[1]

State of *Minnesota*, County of *Ramsey*. } ss. *District* Court, *Second* Judicial District.

John Doe, plaintiff, against *Richard Roe*, defendant.

At *August* term, held *August 2*, 1900.

Upon reading and filing the affidavit of *John Doe*, the plaintiff herein, made the *tenth* day of *June*, 1900, by which it appears that the summons in the above entitled action has been duly served on *Richard Roe*, the defendant therein, and that more than *twenty* days have elapsed since such service, and that no answer has been received by the attorney for the plaintiff herein,

And it appearing that the taking of an account is necessary to enable the court to give judgment herein,

Now, on motion of *Jeremiah Mason*, plaintiff's attorney,

It is ordered that it be referred to *Josiah Crosby*, Esq., an attorney and counsellor of this court, to compute and ascertain the amount due plaintiff herein on the note and mortgage set forth and described in the complaint in this action, and report the same to the court with all convenient speed. *John Marshall*, *District* Judge.

Form No. 17380.[2]

Circuit Court, *Milwaukee* County.

John Doe, plaintiff, against *Richard Roe*, defendant.

It appearing from the proceedings in this action and the papers and proofs on file herein, together with the annexed affidavit of *Jeremiah Mason*, the plaintiff's attorney herein, that the summons and complaint were duly filed in the office of the clerk of this court, on the *tenth* day of *May*, 1899, and that the said summons was duly served upon all the defendants more than *twenty* days ago; that the time for answering the complaint herein has expired; that none of the defendants has appeared herein or put in an answer or demurrer;

And it further appearing that this action is to foreclose a mortgage upon real estate, the whole amount of which has become due; that there are no infant defendants; that none of the defendants is an absentee or a prior incumbrancer, and that due notice of the pendency of this action was filed in the office of the register of deeds in and for *Milwaukee* county more than *twenty* days ago;

Now, on motion of *Jeremiah Mason*, plaintiff's attorney herein,

It is ordered that this action be, and hereby is, referred to *Josiah Crosby*, Esq., as referee, to compute the amount due to the plaintiff on the note and mortgage mentioned in said complaint, and to such of the defendants as are prior incumbrancers of the mortgaged

1. *Minnesota*. — Stat. (1894), §§ 5354, 5392.
See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 940.

2. *Wisconsin*. — Stat. (1898), § 2891, subs. 2.
See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 940.

premises, and to examine and report whether the mortgaged premises can be sold in parcels and whether any and what portion thereof are held as a homestead, and to report the amount due, and as otherwise herein required, to the court.

Dated at *Milwaukee*, *Wisconsin*, this *second* day of *June*, A. D. 1899.

John Marshall, *Circuit* Judge.

(3) To Ascertain Amount Due.

(*a*) *In General.*

Form No. 17381.[1]

The State of *Mississippi*,
Sunflower County.
John Doe, plaintiff,
against
Richard Roe, defendant.
} In the *Circuit* Court,
October Term, 1899.

On motion of the solicitor of the plaintiff in this cause, it is ordered, adjudged and decreed that the bill and proofs, etc., filed by the plaintiff in this cause, be referred to *Charles Sweet*, commissioner and clerk of this court, to ascertain and compute the amount due from defendant to plaintiff, for principal and interest, and that he make report thereon with all due and convenient speed.

John Marshall, *Circuit* Judge.

Form No. 17382.[2]

(*Title of court and cause as in Form No. 11980.*)

The above entitled cause being regularly upon the calendar at this *June* term, 1901, and it appearing to the court that matters of account are involved in said cause, it is

Ordered that the same be referred to *Andrew Jackson*, Esq., to take and state the account between the parties, and to report the same to the court.

Rule actually entered *June tenth*, 1901.

On motion of *Jeremiah Mason*, Attorney for Plaintiff.

(*b*) *On Lien.*

Form No. 17383.[3]

John Doe, complainant,
against
Richard Roe, defendant.
} In Chancery, *Fifth* District,
Northwestern Chancery Division,
At *Birmingham*, *Alabama*,
May Term, A. D. 1899.

This case comes on to be heard at the present term on the original

1. *Mississippi*. — Anno. Code (1892), § 743.
See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 940.

2. *New Jersey*. — Gen. Stat. (1895), p. 2562, § 177 *et seq.*
See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 940.
This is substantially the order of reference set out in Besson's Forms and Entries (1875), p. 94.

3. *Alabama*. — Civ. Code (1896), § 741 *et seq.*
See also list of statutes cited *supra*,

bill of said *John Doe*, complainant, and on considerations it is ordered, adjudged and decreed that the complainant has a lien upon the lands described in the bill, and that he is entitled to relief.

It is therefore ordered that it be referred to the register of this court, to ascertain the amount now due by the defendant to complainant for the amount of the said lien, specified in said bill, including principal and interest to this date, and that he report to the *October* term of this court.

Samuel Gray, Chancellor.

(4) To Ascertain Damages Sustained by Reason of Issuance of Injunction.

Form No. 17384.[1]

At a *Special* Term of the *Supreme* Court of *New York*, held at the county court-house in the city of *New York*, borough of *Manhattan*, on the *27th* day of *May*, 1898.

Present — Hon. *S. Alonzo Kellogg*, Justice.

Frederick B. De Berard, plaintiff,
against
F. P. Prial, *The Dry Goods Chronicle Publishing Company*, *Clucas Publishing Company*, *John R. Anderson Company*, *Charles Clucas* and *John R. Anderson*, and *The Chronicle and Outfitter Company*, defendants.

The motion made by the defendants *Clucas Publishing Company*, *John R. Anderson Company*, *Charles Clucas* and *John R. Anderson*, coming on to be heard to have the damages to said defendants sustained by reason of the injunction issued in this action ascertained by reference.

Now, on reading and filing the notice of motion herein, dated *May 17th*, 1898, and the affidavit of *John H. Parsons*, attorney for the defendants, verified herein *May 14th*, 1898, therein referred to and thereto annexed, and the opposing affidavits of *Frederick B. De Berard*, verified herein *May 24th*, 1898, and of *Henry B. Ketcham*, verified herein *May 7th*, 1898, and filed *May 11th*, 1898, and on the pleadings herein; after hearing *John H. Parsons*, Esq., of counsel for said defendants, in support of said motion, and *Eugene Frayer*, Esq., of counsel for plaintiff, in opposition, and *Charles H. Leescomb*, of counsel for defendants *F. P. Prial* and *The Chronicle and Outfitter Company*, also appearing on said motion and applying for a provision that said reference be made to ascertain the damages sustained also by said last named defendants,

It is ordered that it be and it is hereby referred to *Henry Marshall*,

note 1, p. 916; and, generally, *supra*, note 1, p. 940.

1. *New York.*—Code Civ. Proc., § 623.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 940.

This is the form of order of reference appointing a referee to assess damages sustained by defendant in the case of De Berard *v.* Prial, 34 N. Y. App. Div. 502, and is copied from the records. The order was affirmed.

counsellor-at-law, *New York City*, to ascertain the damages sustained by the said several defendants by reason of the said injunction and to report the same to this court, and that *five* (*5*) days' notice be given to the *Fidelity & Deposit Company* of *Maryland*, the surety named in the undertaking given in obtaining such injunction.

S. A. Kellogg, Jus. *Sp.* Ct.

(5) To Report Pleadings and Facts.

Form No. 17385.[1]

In the *Circuit* court of *Baltimore City*, *January* Term, 1899.

John Doe
against
Richard Roe.

This case being submitted, without argument, it is ordered by the court, this *tenth* day of *January*, 1899, that the same be and it is hereby referred to *Josiah Crosby*, Esq., auditor and master, to report the pleadings and the facts and his opinion thereon.

John Marshall, *Circuit* Judge.

e. Notice of Appeal from Order of Reference.[2]

(1) To Ascertain Damages Sustained by Reason of Issuance of Injunction.

Form No. 17386.[3]

Supreme Court, *New York* County.

Frederick B. De Berard, plaintiff,
against
F. P. Prial, *The Dry Goods Chronicle Publishing Company*, *Clucas Publishing Company*, *John R. Anderson Company*, *Charles Clucas* and *John R. Anderson*, and *The Chronicle and Outfitter Company*, defendants.

Please take notice that the plaintiff appeals to the Appellate Division of this court, for the *First* Department, from the order of the court herein entered in the office of the clerk of the county of *New York* on the *27th* day of *May*, 1898, referring to *Henry Marshall*, counsellor at law, of *New York City*, to ascertain the damages

1. *Maryland.*—Pub. Gen. Laws (1888), art. 16, § 18 *et seq.*
See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 940.

2. **For forms relating to appeals, generally**, see the title Appeals, vol. 1, p. 890.

3. *New York.*—Code Civ. Proc., § 623.
See also list of statutes cited *supra*, note 1, p. 916.
This is the form of notice of appeal in the case of De Berard *v.* Prial, 34 N. Y. App. Div. 502, and is copied from the records. No objection was made to the form of this notice.

sustained by the several defendants in this action by reason of the injunction issued therein.

Dated *New York*, *June 15*, 1898.

Esselstyn, *Ketcham & Safford*,
Attorneys for *Frederick B. De Berard*, plaintiff.

To *Wm. Sohmer*, Clerk of *New York* County.

To *John H. Parsons*, Esq.,
Attorney for defendants *Charles Clucas*,
John R Anderson,
Clucas Publishing Company and
John R. Anderson Company.

To *Charles Luscomb*, Esq.,
Attorney for defendants *F. P. Prial* and
The Chronicle and Outfitter Company.

(2) Where Examination of Account is Involved.

Form No. 17387.[1]

Supreme Court, *Kings* County.

John J. Connor et al., plaintiffs,
against
John J. Jackson, as executor, etc., defendant.

Sirs — Please take notice that the defendant appeals to the Appellate Division of the *Supreme* Court of the State of *New York*, *Second* Department, from the order made by the Honorable *Samuel T. Maddox* in the above entitled action, dated *May 9th*, 1900, and entered in the office of the County Clerk of the County of *Kings*, on the *11th* day of *May*, 1900, granting a motion of the plaintiffs herein to refer this action to a referee to hear and determine the issues, and from each and every part thereof.

Dated *New York*, *May 14th*, 1900.

Edward Swann, Attorney for Defendant.

To *Peter P. Huberty*, Esq., Clerk of the County of *Kings*, and to *Ketcham & Owens*, Esqs., Attorneys for the Plaintiffs.

II. Commission to Referee.

Form No. 17388.[2]

State of *Rhode Island and Providence Plantations*.

Providence, Sc. Court *of Common Pleas*.
(SEAL) *October* Term, A. D. 1899.

To *Samuel Ireland*, *Amos Springall*, *Nathan Daggett*, Greeting:

1. *New York.* — Code Civ. Proc., § 1013.
See also list of statutes cited *supra*, note 1, p. 916.
This is the form of notice of appeal in the case of Connor *v.* Jackson, 53 N. Y. App. Div. 322, and is copied from the records. The order granting motion to refer was affirmed.

2. *Rhode Island.* — Gen. Laws (1896), c. 245, § 1 *et seq.*
See also list of statutes cited *supra*, note 1, p. 916.

John Doe, plaintiff,
against
Richard Roe, defendant.

Whereas, by agreement of the parties to the above entitled action (the papers of which are herewith enclosed) and by our said court you were appointed referees to hear and determine said case, (*specifying nature of reference, if necessary*).

You are therefore hereby authorized and empowered, being first duly engaged, faithfully and impartially to hear and examine the cause, and make a true and just report, according to the best of your skill and understanding, to notify the parties of the time and place by you designated for hearing them, and then and there meet and proceed to execute and discharge the duties of said appointment; hear the said parties, their several pleas, allegations and evidence, and having duly considered the same, your report, or that of any *two* of you agreeing, make unto our said court as soon as may be.

And if either party neglect or refuse to attend (having been duly notified), you are hereby further authorized to proceed *ex parte*, and your report make as aforesaid.

Hereof fail not and make true return of this writ, with your doings thereon.

Witness, Hon. *Thomas Durfee*, chief justice of our *Supreme* Court, at *Providence*, this *tenth* day of *October*, in the year 1899

Charles Sweet, Clerk.

III. OATH OF REFEREE.[1]

1. Necessity of Oath — *Generally.* — In the absence of statute, rule of court, and direction in the order making the reference, the referee is not required to be sworn. Sloan *v.* Smith, 3 Cal. 406; Pardridge *v.* Ryan, 35 Ill. App. 230; Daggy *v.* Cronnelly, 20 Ind. 474; Underwood *v.* McDuffee, 15 Mich. 361; Thompson *v.* Smith, 2 Bond (U. S.) 320.

Under Statute. — In many states, it is provided by statute that the referee shall take an oath before assuming the duties of his office.

Delaware. — Rev. Stat. (1893), p. 859, c. 116, § 4.

Kansas.—Gen. Stat. (1897), c. 95, § 306.

Missouri. — Rev. Stat. (1899), § 703.

Montana. — Code Civ. Proc. (1895), § 1133.

Nebraska. — Comp. Stat. (1899), § 5877.

New Jersey. — Gen. Stat. (1895), p. 70, § 4.

New Mexico. — Comp. Laws (1897), § 2685, subs. 114.

New York. — Code Civ. Proc., § 1016.

North Dakota. — Rev. Codes (1895), § 5461.

Oklahoma. — Stat. (1893), § 4187.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 1845, § 2.

South Dakota. — Laws (1891), c. 100.

Utah. — Rev. Stat. (1898), § 3178.

Wyoming. — Rev. Stat. (1887), § 2580.

In the jurisdictions where such statutes exist, the provisions thereof must be complied with. Kinney *v.* Short, 2 Harr. (Del.) 357; Ray *v.* Hall, 1 Harr. (Del.) 106; Pardridge *v.* Ryan, 134 Ill. 247; Bissell *v.* Warde, 129 Mo. 439; Fassett *v.* Fassett, 41 Mo. 516; Toler *v.* Hayden, 18 Mo. 399; Katt *v.* Germania F. Ins. Co., 26 Hun (N. Y.) 429; Province *v.* Lovi, 4 Okla. 672. But a judgment entered upon the referee's report will not be set aside because of the failure of the referee to be sworn. Katt *v.* Germania F. Ins. Co., 26 Hun (N. Y.) 429.

Form of Oath — *Generally.* — The statutes in the various states providing for an oath by a referee, as a general rule, prescribe what the form of the oath shall be. See list of statutes cited *supra*, note 1, this page. But the words of the statute need not be followed:

Form No. 17389.[1]

State of *Kansas*, } ss. In the *District* Court in and for the county and
Cowley County. } state aforesaid.

John Doe, plaintiff, }
against } Oath of Referee.
Richard Roe, defendant. }

State of *Kansas*, }
Cowley County. } ss.

You, *Andrew Jackson*, do solemnly swear (or *do solemnly, sincerely and truly declare and affirm*) that having been duly appointed a referee in the above entitled cause under an order of the above court, dated the *tenth* day of *November*, 1900, to (*Here state purpose of reference*), you will well and faithfully hear and examine the cause so referred to you as referee and make a just and true report therein according to the best of your understanding, so help you God. (Or, *This you do under the pains and penalties of perjury.*)

Andrew Jackson.

(*Jurat as in Form No. 830.*)

Form No. 17390.[2]

New Jersey Supreme Court.

John Doe }
against } On contract.
Richard Roe. }

Bergen County, ss.

I, *Andrew Jackson*, the referee appointed by an order of this court made and entered in the above entitled action, and bearing date the *seventh* day of *November*, 1901, do swear that I will faithfully and fairly hear and examine the cause in question and make a just and true report according to the best of my skill and understanding, so help me God.

Andrew Jackson.

(*Jurat as in Form No. 858.*)

Form No. 17391.[3]

Supreme Court, *Suffolk* County.

equivalent words are sufficient. Province *v.* Lovi, 4 Okla. 672.

Precedent. — In Province *v.* Lovi, 4 Okla. 672, the oath, omitting title of cause, signature and jurat, was as follows:

"*Territory of Oklahoma*, *Oklahoma* County, ss.

I, *A. P. Bond*, heretofore, on the —— day of *November*, 1894, appointed referee to take testimony concerning damages in said case and report herein on questions both of law and fact concerning said damages, do solemnly swear that I will faithfully perform the duties of referee in said cause, according to the best of my ability, so help me God."

It was held that this form satisfied the statutory provision that a referee must be sworn or affirmed well and faithfully to hear and examine the cause, and to make a just and true report therein according to the best of his understanding.

1. *Kansas.* — Gen. Stat. (1897), c. 95, § 306.

See also, generally, *supra*, note 1, p. 950.

2. *New Jersey.* — Gen. Stat. (1895), p. 70, § 4.

See also, generally, *supra*, note 1, p. 950.

3. *New York.* — Code Civ. Proc., § 1016.

See also, generally, *supra*, note 1, p. 950.

John Doe, plaintiff,
against
Richard Roe, defendant. } Oath of Referee.
Suffolk County, ss.

I, *Josiah Crosby*, the referee appointed by an order of this court, made and entered in the above entitled action, and bearing date the *seventh* day of *May*, 1899, to (*Here state purpose of reference*), do solemnly swear that I will faithfully and fairly determine the questions so referred to me, and make a just and true report thereon according to the best of my understanding.

Josiah Crosby.

(*Jurat as in Form No. 8805.*)

IV. NOTICE OF HEARING OF REFERENCE.[1]

1. By Auditor.

Form No. 17392.[2]

(2 Rev. Swift's Dig. 712.)

John Doe
against
Richard Roe. } *New Haven* County, *Superior* Court.

The subscribers, having been appointed auditors in said case, hereby give notice that they will attend to the duties of said appointment at the dwelling-house of *Samuel Ireland*, No. *10 West* street,

1. Necessity for Notice. — The parties in interest are entitled to notice of the time and place at which a hearing will be held. Johnson *v.* Meyer, 54 Ark. 437; Bernie *v.* Vandever, 16 Ark. 616; Le Baron *v.* Overstreet, 39 Fla. 628; Ballard *v.* Lippman, 32 Fla. 481; Adams *v.* Fry, 29 Fla. 318; Strang *v.* Allen, 44 Ill. 428; Acme Copying Co. *v.* McLure, 41 Ill. App. 397; Rice *v.* Schofield, 9 N. Mex. 314; Dickinson *v.* Earle, 31 N. Y. App. Div. 236; Williams *v.* Sage, (Supreme Ct. Spec. T.) Code Rep. N. S. (N. Y.) 358; Sage *v.* Mosher, (Supreme Ct. Spec. T.) 17 How. Pr. (N. Y.) 367; Thompson *v.* Krider, (Supreme Ct.) 8 How. Pr. (N. Y.) 248; Wardlaw *v.* Erskine, 21 S. Car. 359; De Walt *v.* Kinard, 19 S. Car. 286; Holt *v.* Holt, 37 W. Va. 305; Bassett *v.* McDonel, 13 Wis. 444. And such notice must be reasonable. Bernie *v.* Vandever, 16 Ark. 616. A notice to appear within a few hours after a reference, between eight and twelve o'clock at night, is not reasonable notice, and is insufficient. Bernie *v.* Vandever, 16 Ark. 616. A letter mailed to the attorney of a party about three days previous to the time fixed for the hearing, when he resides in a distant city, is an insufficient notice. Strang *v.* Allen, 44 Ill. 428.

Requisites of Notice, Generally. — For the formal parts of a notice in a particular jurisdiction see the title NOTICES, vol. 13, p. 212.

Statutory Requisites. — For statutory requisites as to notice see list of statutes cited *supra*, note 1, p. 916.

In Writing. — It is advisable that the notice should be in writing, although this is not essential to its validity. Sage *v.* Mosher, (Supreme Ct. Spec. T.) 17 How. Pr. (N. Y.) 367; Stephens *v.* Strong, (County Ct.) 8 How. Pr. (N. Y.) 339.

Time of hearing must be stated in the notice. Bernie *v.* Vandever, 16 Ark. 616; Wardlaw *v.* Erskine, 21 S. Car. 359; Bassett *v.* McDonel, 13 Wis. 444.

Place of hearing must be stated in the notice. Bernie *v.* Vandever, 16 Ark. 616; Wardlaw *v.* Erskine, 21 S. Car. 359; Bassett *v.* McDonel, 13 Wis. 444.

2. *Connecticut.* — Gen. Stat. (1888), § 1037.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, this page.

in the city of *New Haven*, in said county, on the *tenth* day of *October*, 19*00*, at *ten* o'clock in the *fore*noon.

To any proper officer or indifferent person to serve and return.

Dated at *New Haven*, this *twenty-ninth* day of *September*, *1900*.

Samuel Ireland,
David H. Mudgett, } Auditors.

2. By Master or Register in Chancery.

Form No. 17393.[1]

The State of *Alabama*, } In Chancery, at *Birmingham*, *Ala.*, *Fifth*
Jefferson County. } District, *Northwestern* Chancery Division.
John Doe, complainant,
against
Richard Roe, defendant.

To *Richard Roe*, or to Messrs. *Mason & Ellsworth*, his solicitors:

Take notice that the undersigned, register of our said Court *of Chancery*, will execute a decree of reference in this cause rendered at the last *May* term of said court, at his office in *Birmingham*, on *Monday*, the *first* day *October*, 1*899*, at which time and place you will attend if you choose to do so.

Witness this the *tenth* day of *September*, 1*899*.

Charles Sweet, Register in Chancery.

Form No. 17394.[2]

John Doe, complainant, } Office Clerk and Master *Chancery* Court,
against } *Chattanooga*, *March 1*, 1*899*.
Richard Roe, defendant. } Notice to *John Doe*.

You are hereby notified that at my office in *Chattanooga*, on *Monday*, the *tenth* day of *March*, 1*899*, I shall proceed to execute the decree rendered in this cause at the *April* term, 1*899*, ordering me to hear proof and report to the next term of the court upon the several matters referred to me in said cause.

You will therefore be present. Subpœnas will be issued for such witnesses as you may desire. On your failure to attend, I shall proceed *ex parte*.

Josiah Crosby, Clerk and Master.

3. By Moving Party.

Form No. 17395.[3]

(*Title of court and cause, as in Form No. 17390.*)

To *Oliver Ellsworth*, Esq., Attorney for Defendant:

You will please take notice that on *Friday*, the *twenty-first* day of *March*, 19*02*, at *ten* o'clock in the *fore*noon of said day, I shall bring

1. *Alabama*. — Civ. Code (1896), § 742. See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 952.

2. *Tennessee*. — Code (1896), § 6291. See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 952.

3. *New Jersey*. — Gen. Stat. (1895), p. 2563, § 179 *et seq*.

the above entitled action to a hearing before *Andrew Jackson*, Esq., the referee appointed in said action, at his office, No. *20 Liberty* street, in the city of *Jersey City*.

Very truly yours,

Jeremiah Mason, Attorney for Plaintiff.

Dated this *tenth* day of *March*, 1902.

4. By Referee.

Form No. 17396.[1]

(*Title of court and cause as in Form No. 5915.*)

To *John Doe*:

Please take notice that the above entitled cause will come on for trial before me, the referee appointed therein, at my office, No. *302 State* street, in the city of *Indianapolis*, on the *twentieth* day of *May*, 1900, at *ten* o'clock in the *fore*noon.

Very truly yours,

Andrew Jackson, Referee.

Dated *May 10th*, 1900.

V. SUBPŒNA TO WITNESSES TO ATTEND REFERENCE.[2]

1. Writ of.

a. By Court.

Form No. 17397.[3]

The People of the State of *New York* to *Samuel Short*, Greeting:

(SEAL) We command you that all and singular business and excuses being laid aside, you and each of you appear and attend before *Andrew Jackson*, Esq., the referee appointed under an order of the *Supreme* Court, at his office in the town of *Huntington*, in the county of *Suffolk* and state of *New York*, on the *tenth* day of *May next*, at *ten* o'clock in the *fore*noon, to testify and to speak the truth in a certain action now pending in said court, then and there to be tried, between *John Doe*, plaintiff, and *Richard Roe*, defendant, on the part of the defendant, and for failure to attend you will be deemed guilty of a contempt of court and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit *fifty* dollars in addition thereto.

Witness, *William J. Gaynor*, Esq., one of the justices of our said *Supreme* Court, at *Riverhead*, the *twenty-ninth* day of *April*, in the year one thousand *nine hundred*.

Calvin Clark, Clerk.

Oliver Ellsworth, Defendant's Attorney.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 952.

1. *Indiana.* — Horner's Stat. (1896), § 557.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 952.

2. **For the formal parts** of a subpœna in a particular jurisdiction see the title SUBPŒNAS.

3. *New York.* — Code Civ. Proc., §§ 852, 854, 1017.

See also list of statutes cited *supra*, note 1, p. 916.

b. By Referee.[1]

Form No. 17398.[2]

State of *Indiana*, } ss.
Posey County. }

The State of *Indiana* to the Sheriff of *Posey* County, Greeting:

You are hereby commanded to summon *Samuel Short* to appear before me, the undersigned referee, at my office, at No. *10 State* street, in the city of *Mount Vernon*, in said county of *Posey* and state of *Indiana*, on the *tenth* day of *September*, 1899, at *ten* o'clock in the *fore*noon, to testify on the part of the plaintiff in an action before me as referee wherein *John Doe* is plaintiff and *Richard Roe* is defendant, referred to me by an order of the *Posey Circuit* Court dated the *tenth* day of *August*, 1899, to hear and determine, and not to depart without my leave.

Witness my hand this *twenty-ninth* day of *August*, 1899.

Andrew Jackson, Referee.

2. Ticket of.

Form No. 17399.[3]

By virtue of a writ of subpœna, to you directed and herewith shown, you are commanded, that all business and excuses being laid aside, you appear and attend in your proper person, before *Andrew Jackson*, Esq., the referee appointed by the *Supreme* Court at his office in the town of *Huntington*, county of *Suffolk*, and state of *New York*, on the *tenth* day of *May next*, at *ten* o'clock in the *fore*noon, to testify and speak the truth in a certain action now pending in the *Supreme* Court then and there to be tried between *John Doe*, plaintiff, and *Richard Roe*, defendant, on the part of the defendant. And for a failure to attend you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sus-

1. **Statutes** relating to subpœna of witnesses by referee are set out *supra*, note 1, p. 916.

When Referee must Make. — In *New York*, it is provided by section 854 of the Code of Civil Procedure that when a judge or referee has been heretofore or is hereafter expressly authorized by law to hear, try or determine a matter, or to do any other act in any particular capacity in relation to which proofs may be taken and the attendance of a person or a witness may be required, a subpœna may be issued by and under the hand of the judge or referee requiring the person to attend. Guinan *v.* Allan, 40 N. Y. App. 137. But this section does not apply to a matter arising or an act to be done in an action in a court of record. N. Y. Code Civ. Proc., § 854.

In People *v.* Ball, 37 Hun (N. Y.) 245, it was held that in supplementary proceedings instituted on a county court judgment before the recorder of the city of Oswego, and referred to a referee to take and report evidence, it was error for the subpœna to witnesses to attend reference to bear teste of the judge of the county court. The subpœna should have issued under the hand of the referee.

2. *Indiana.* — Horner's Stat. (1896), § 557.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, this page.

3. *New York.* — Code Civ. Proc., §§ 854, 1017.

See also list of statutes cited *supra*, note 1, p. 916.

tained thereby to the party aggrieved, and forfeit *fifty* dollars in addition thereto.

Dated the *first* day of *May*, 1900.

By the court: *Oliver Ellsworth*, Defendant's Attorney.

VI. REPORT.[1]

1. Nature and Object of Report. — A master's or referee's report settles no rights. Its office is to present the case to the court in such a manner that intelligent action may be there had, and it is this action by the court, not the report, that finally determines the rights of the parties. North Carolina R. Co. *v.* Swasey, 23 Wall. (U. S.) 405. The report is not in itself the judgment. Brown *v.* Cochran, 11 N. H. 199. It is the authority only for entering the judgment, and, therefore, merely states in general terms what the judgment is to be. Otis *v.* Spencer, 16 N. Y. 610.

May be General or Separate. — Masters' or referees' reports are either general or separate. A general report embraces the whole matter referred by a particular decree or order; a separate report embraces only one distinct object of the reference. 2 Daniell's Ch. Pl. and Pr. p. 1294.

Special report need not be made by master upon importunity of counsel or of their clients, unless he is required so to do by direction of the court, or in his own judgment is satisfied of the propriety of so doing. Mott *v.* Harrington, 15 Vt. 185.

Requisites of Report — *In General.* — Artificially drawn, a master's report should first recite the issue; secondly, determine the facts to be found from the evidence; thirdly, the law arising upon the findings; and, finally, the form of decree. Agnew *v.* Whitney, 11 Phila. (Pa.) 298, 33 Leg. Int. (Pa.) 139. The report should be as succinct as possible, reserving the matter clearly for the judgment, and without recital of the several points of the order of reference or the debates of counsel. Mott *v.* Harrington, 15 Vt. 185. And should be confined to the matters in issue between the parties. Fountain *v.* Harrington, 3 Harr. (Del.) 22.

Report should not be in the form of a judgment. Brown *v.* Cochran, 11 N. H. 199. But should be sufficient to sustain the judgment. Weirich *v.* Cook, 39 Mich. 134.

Under Statute. — Where the reference is made pursuant to statute, the report must comply with all the requirements of the statute. Califf *v.* Hillhouse, 3 Minn. 311.

Must be in Writing. — The report of the master or referee must be in writing. Lee Sack Sam *v.* Gray, 104 Cal. 243; Watson *v.* Lockwood, 2 Harr. (Del.) 364.

See also list of statutes cited *supra*, note 1, p. 916.

Findings of Fact and Law — *Of Fact.* — The master or referee must report his conclusions of fact arising from the evidence submitted. Mahone *v.* Williams, 39 Ala. 202; Lee Sack Sam *v.* Gray, 104 Cal. 243; Lambert *v.* Smith, 3 Cal. 408; Goodman *v.* Jones, 26 Conn. 264; Wabash, etc., Canal *v.* Huston, 12 Ind. 276; Parker *v.* Nickerson, 137 Mass. 487; Jones *v.* Keen, 115 Mass. 170; Dean *v.* Emerson, 102 Mass. 480; Weirich *v.* Cook, 39 Mich. 134; Lundell *v.* Cheney, 50 Minn. 470; Jackson *v.* Jackson, 3 N. J. Eq. 96; Dolan *v.* Merritt, 18 Hun (N. Y.) 27; Avery *v.* Foley, 4 Hun (N. Y.) 415; Jarvis *v.* Jarvis, 66 Barb. (N. Y.) 331; Beck *v.* Sheldon, 48 N. Y. 365; Van Slyke *v.* Hyatt, 46 N. Y. 259; Havemeyer's Estate, (Surrogate Ct.) 25 Civ. Proc. (N. Y.) 59; Patterson *v.* Graves, (Supreme Ct. Gen. T.) 11 How. Pr. (N. Y.) 91; Dorr *v.* Noxon, (Supreme Ct.) 5 How. Pr. (N. Y.) 29; Lane *v.* Borst, 5 Robt. (N. Y.) 609; Hartford, etc., R. Co. *v.* New York, etc., R. Co., 3 Robt. (N. Y.) 411; Foushee *v.* Beckwith, 119 N. Car. 178; Pilkington *v.* Cotten, 2 Jones Eq. (55 N. Car.) 238; Illstad *v.* Anderson, 2 N. Dak. 167; Agnew *v.* Whitney, 11 Phila. (Pa.) 298, 33 Leg. Int. (Pa.) 139; Evans *v.* Evans, 2 Coldw. (Tenn.) 143; Mott *v.* Harrington, 15 Vt. 185; Herrick *v.* Belknap, 27 Vt. 673; Park *v.* Mighell, 3 Wash. 737. And judgment cannot be given upon a report of the evidence, no matter how strongly it may tend to establish the facts. Jarvis *v.* Jarvis, 66 Barb. (N.Y.) 331. And such findings should be set forth clearly, succinctly and articulately. Agnew *v.* Whitney, 11 Phila.

1. In General.

(Pa.) 298, 33 Leg. Int. (Pa.) 139; Evans *v.* Evans, 2 Coldw. (Tenn.) 143.

Of Law. — Where the order of reference so directs or the statute under which the reference is made so provides, the referee must report his conclusions of law arising from the evidence. Lambert *v.* Smith, 3 Cal. 408; Nims *v.* Nims, 20 Fla. 204; Parker *v.* Nickerson, 137 Mass. 487; Jones *v.* Keen, 115 Mass. 170; Dean *v.* Emerson, 102 Mass. 480; Havemeyer's Estate, (Surrogate Ct.) 25 Civ. Proc. (N. Y.) 59; Lane *v.* Borst, 5 Robt. (N. Y.) 609; Van Slyke *v.* Hyatt, 46 (N. Y.) 259; Pilkington *v.* Cotten, 2 Jones Eq. (55 N. Car.) 238; Illstad *v.* Anderson, 2 N. Dak. 167; Agnew *v.* Whitney, 11 Phila. (Pa.) 298, 33 Leg. Int. (Pa.) 139; Kent *v.* Dakota F. & M. Ins. Co., 2 S. Dak. 300; Herrick *v.* Belknap, 27 Vt. 673; Park *v.* Mighell, 3 Wash. 737.

In McNaught *v.* McAllister, 93 Ind. 114, it was held that under a reference to a master "to hear the evidence, find the facts and report the same with the evidence," it was error to report conclusions of law.

Facts and Conclusions of Law Separately Stated. — Statutes provide that report of referee must state the facts found and the conclusions of law separately. Cal. Code Civ. Proc. (1897), § 643; Mills' Anno. Code Colo. (1896), § 212; Iowa Code (1897), § 3740; Mich. Comp. Laws (1897), § 10092; Mont. Code Civ. Proc. (1895), § 1139; Clark's Code Civ. Proc. N. Car. (1900), § 422; N. Dak. Rev. Codes (1895), § 5460; Bates' Anno. Stat. Ohio (1897), § 5213; Okla. Stat. (1893), § 4183; Hill's Anno. Laws Oregon (1892), § 227; S. Dak. Laws (1891), c. 100, § 8; Utah Rev. Stat. (1898), § 3177; Ballinger's Anno. Codes & Stat. Wash. (1897), § 5039; Wis. Stat. (1898), § 2865; Wyo. Rev. Stat. (1887), § 2576.

The statement of facts required by statute to be contained in the report may consist of a statement of the material facts necessary to support the conclusions of law based thereon and no more. No detailed findings are required, specifying the particulars of the general conclusions of fact or explaining the means or process by which such general conclusions were reached. Livingston *v.* Manhattan R. Co., (N. Y. Super. Ct. Gen. T.) 21 Civ. Code Proc. (N. Y.) 309 (*citing* Avery *v.* Foley, 4 Hun (N. Y.) 415; Wilson *v.* Knapp, 42 N. Y. Super. Ct. 25; Beck *v.* Sheldon, 48 N. Y. 365).

In Kent *v.* Dakota F. & M. Ins. Co., 2 S. Dak. 300, it was held that the statute must be construed to mean that when all the issues of fact are referred the referee must state his findings of fact and conclusions of law separately. If only the issues of fact are referred, no conclusions of law need be stated by referee.

But in *Kansas* it is held that a general finding is not sufficient. The facts must be found specifically. Walker *v.* Hosack, 56 Kan. 468; Oaks *v.* Jones, 11 Kan. 443.

Insufficient Finding. — In Lindsay *v.* Waymart Water Co., 4 Pa. Dist. 765, the plaintiff requested the referee to find as follows: "That *James Lindsay*, as the agent of *Lindsay & Van Loon*, had no authority to settle the claim of *Lindsay & Van Loon* otherwise than according to the bid." This request was answered by the referee in his twelfth finding of fact thus: "*James Lindsay* had no authority from the plaintiffs to settle for less than the amount of the bid, but this was unknown to the defendant company. So far as dealings with the defendant were concerned, he apparently had full power and authority to transact the business." It was held that this was not a finding of fact. At best it was only a conclusion and might be a mixed conclusion of law and fact. The facts upon which this conclusion was based should have been found.

Separate Findings. — Where several distinct causes of action are stated or there are several important matters in controversy, there must be separate and specific findings as to each and a general finding is insufficient. Walker *v.* Hosack, 56 Kan. 468; State *v.* Peterson, 142 Mo. 526. But see Caruth-Byrnes Hardware Co. *v.* Wolter, 91 Mo. 484, wherein it is held that in the absence of any statute requiring specific findings a general finding will be sufficient unless the order of reference directs otherwise.

Request for Special Findings. — Statutes in some states provide for special findings by the referee upon the request of any party to the action. Walker *v.* Hosack, 56 Kan. 468; McMullen *v.* Schermerhorn, 48 Kan. 739; Dodd *v.* Hills, 21 Kan. 707; Oaks *v.* Jones,

11 Kan. 443; Crim *v.* Starkweather, 136 N. Y. 635; Livingston *v.* Manhattan R. Co., (N. Y. Super. Ct. Gen. T.) 21 Civ. Proc. (N. Y.) 309. And under such statutes, where request is properly made, the report must contain the findings of fact and conclusions of law made at the request of the party. Van Slyke *v.* Hyatt, 46 N. Y. 259; Havemeyer's Estate, (Surrogate Ct.) 25 Civ. Proc. (N. Y.) 59.

Where no request is made, the failure of the referee to find certain facts is not ground for an exception to the report. Ashley *v.* Marshall, 29 N. Y. 494; Hartford, etc., R. Co. *v.* New York, etc., R. Co., 3 Robt. (N. Y.) 411; New York Car Oil Co. *v.* Richmond, 6 Bosw. (N. Y.) 213; Philadelphia Co. *v.* United Gas Imp. Co., 180 Pa. St. 235.

Reporting Evidence — *In General.* — Where all the issues in the action are referred to a master or referee, he need not report the evidence. Mahone *v.* Williams, 39 Ala. 202; Howe *v.* Russell, 36 Me. 115; Lundell *v.* Cheney, 50 Minn. 470; Jarvis *v.* Jarvis, 66 Barb. (N. Y.) 331; Patterson *v.* Gravès, (Supreme Ct. Gen. T.) 11 How. Pr. (N. Y.) 91; Dorr *v.* Noxon, (Supreme Ct.) 5 How. Pr. (N. Y.) 29; Lane *v.* Borst, 5 (N. Y.) 609; Mott *v.* Harrington, 15 Vt. 185; Union Sugar Refinery *v.* Mathiesson, 3 Cliff. (U. S.) 146. Unless required by statute. Hayes *v.* Hammond, 162 Ill. 133; Kent *v.* Dakota F. & M. Ins. Co., 2 S. Dak. 300. Or directed by the order or decree of reference. Mahone *v.* Williams, 39 Ala. 202; Ronan *v.* Bluhm, 173 Ill. 277; Gleason, etc., Mfg. Co. *v.* Hoffman, 168 Ill. 25; McNaught *v.* McAllister, 93 Ind. 114; Freeland *v.* Wright, 154 Mass. 492; Parker *v.* Nickerson, 137 Mass. 487; Clapp *v.* Sherman, 16 R. I. 370. Or requested so to do by a party in interest. McKinney *v.* Pierce, 5 Ind. 422; Sparhawk *v.* Wills, 5 Gray (Mass.) 423; Clapp *v.* Sherman, 16 R. I. 370; Harper *v.* McVeigh, 82 Va. 751.

Where it is required that the evidence be reported and the report, when returned to the court, shows upon its face that some of the evidence is not reported, the court, before discharging the master, should require him to perfect his report by supplying the omitted evidence. McNaught *v.* McAllister, 93 Ind. 114.

Under a reference "to report facts and such of the evidence as either party may desire," it is the master's duty to report his own conclusions of fact upon all matters referred to him, and also, as directed by the court or requested by either party, so much of the evidence heard by him as may be necessary to enable the court to test the correctness of the findings in any respect, or specific exceptions taken by any party to the report. Dean *v.* Emerson, 102 Mass. 480.

In Enright *v.* Amsden, 70 Vt. 183, the court said: "The orators requested the master to report all the testimony on which he based the finding that they had reasonable cause to believe that Whitcomb was insolvent and that the transaction was intended to prevent his property from going to his assignee in insolvency. But inasmuch as the master states specifically the facts on which he based that finding, and it is not claimed that those facts were found without evidence, and as they tend to support the inference drawn from them, the orators are not entitled to have the report set aside nor recommitted for a noncompliance with that request."

To Take Proofs and Report Conclusions. — Where the cause is referred "to take proofs and report conclusions," the master or referee is not required to report the proofs presented to him. Friedman *v.* Schoengen, 59 Ill. App. 376.

Where Directed to Report Facts. — Where a master is required to examine and report as to particular facts, it is his duty to draw the conclusion from the evidence produced before him, and to report that conclusion only, and not report the evidence. Bailey *v.* Myrick, 52 Me. 132; Silva *v.* Turner, 166 Mass. 407; Bowers *v.* Cutler, 165 Mass. 441; Mott *v.* Harrington, 15 Vt. 185. Unless specially directed so to do by the court. Simmons *v.* Jacobs, 52 Me. 147; Matter of Hemiup, 3 Paige (N. Y.) 305.

But in Parker *v.* Nickerson, 137 Mass. 487, it was held that where the order of reference directed the master to find and report the facts to the court, the master, though not obliged to report the whole of the evidence, should, on the request of a party in interest, have reported so much of the evidence as was necessary to present to the court any question of law raised at the hearing, and that he might have reported the evidence bearing upon any question of law which in his discretion he thought ought to be referred to the court.

When exceptions are taken, the evidence which furnishes the ground of exceptions must, upon request of parties, be reported by the master. Warren *v.* Lawson, 117 Ala. 339; Heffron *v.* Gore, 40 Ill. App. 257; Union Sugar Refinery *v.* Mathiesson, 3 Cliff. (U. S.) 146.

By statute, in *West Virginia*, it is provided that, upon exceptions taken to the report of a commissioner in chancery, the commissioner shall in his report return the evidence filed in the case, including all the evidence taken upon the execution of the reference. Central City Brick Co. *v.* Norfolk, etc., R. Co., 44 W. Va. 286.

Process of Reasoning. — The master or referee need not set out process of reasoning by which he arrived at the conclusions stated. Lundell *v.* Cheney, 50 Minn. 470; Jackson *v.* Jackson, 3 N. J. Eq. 96; Dolan *v.* Merritt, 18 Hun (N. Y.) 27; Wilson *v.* Knapp, 42 N. Y. Super. Ct. 25; Livingston *v.* Manhattan R. Co., (N. Y. Super. Ct. Gen. T.) 21 Civ. Proc. (N. Y.) 309; Evans *v.* Evans, 2 Coldw. (Tenn.) 143; Bates *v.* Sabin, 64 Vt. 511. But see Frazier *v.* Swain, 36 N. J. Eq. 156, to the effect that the report should show in what way the master arrived at his conclusions, so far as to enable the court to determine from the report itself whether his method was right or not.

Argument of counsel should not be stated in the report. Jackson *v.* Jackson, 3 N. J. Eq. 96; Evans *v.* Evans, 2 Coldw. (Tenn.) 143.

Reciting Order of Reference. — The report need not recite the order of reference. Shaw *v.* Wise, 166 Mass. 433.

Reporting Account — *In General.*—The master or referee should report the account at length, and all the facts found by him, so that the report may be intelligible without reference to the testimony. Nims *v.* Nims, 20 Fla. 204; Herrick *v.* Belknap, 27 Vt. 673.

"The object of a reference in matters of account is to have a plain and full statement of the figures and facts, so as to enable the parties, on exceptions, to present to the court such matters as may be controverted in an intelligible manner, and to enable the court to dispose of them without the labor of wading through all of the testimony, and, in fact, of trying the whole case over again. To this end, the master should set out the facts found by him; and not content himself with a general reference to the many depositions he has taken pro and con, thus leaving the court to find the facts from the pleadings and proofs, in regard to the whole case; whereas, the matter should have been so stated as to have the ruling of the master, upon any contested question of law or of fact, presented to the court by exceptions." Hurdle *v.* Leath, 63 N. Car. 366.

Account should accompany report, so that the court may see the correctness of the master's inferences. Nims *v.* Nims, 20 Fla. 204.

Itemized Statement. — Report should contain a statement of all the items of the account between the parties. Nims *v.* Nims, 20 Fla. 204; Gage *v.* Arndt, 121 Ill. 491; Sharpe *v.* Eliason, 116 N. Car. 665; Park *v.* Mighell, 3 Wash. 737; Dewing *v.* Hutton, 40 W. Va. 521. And the items should be so presented that exceptions may be taken thereto. Nims *v.* Nims, 20 Fla. 204; Gage *v.* Arndt, 121 Ill. 491; Sharpe *v.* Eliason, 116 N. Car. 665. And an aggregation of items in accordance with the referee's conclusions is insufficient. Dewing *v.* Hutton, 40 W. Va. 521.

Items allowed and disallowed should be stated. Nims *v.* Nims, 20 Fla. 204; Gage *v* Arndt, 121 Ill. 491; Park *v.* Mighell, 3 Wash. 737.

Reference to Schedules. — The master may state the result of the account in the body of the report and refer to schedules as to particular items. Craig *v.* McKinney, 72 Ill. 305; Snell *v.* De Land, 36 Ill. App. 638.

Points Made by Counsel. — The report should contain a succinct statement of all the points made by counsel and the facts found by him upon each point. Herrick *v.* Belknap, 27 Vt. 673.

Testimony Taken. — Testimony given *viva voce* before the master in the taking of an account, or a copy of it, should be returned to the court with the report. Herrick *v.* Belknap, 27 Vt. 673.

Accounts of Partnership. — The report of a master or referee stating the account of a partnership should show whether the partnership resulted in a profit or loss, and to what extent. Nims *v.* Nims, 20 Fla. 204.

Ascertaining Value of Property. — In a reference to a clerk and master in equity to ascertain the value of property, the general rule is that he should report his own judgment, according to his belief, on the testimony, and not a

Form No. 17400.[1]

The State of *Alabama*, *Jefferson* County. } In *Chancery.*

John Doe, complainant, against *Richard Roe*, defendant. } At *Birmingham*, *Alabama*, *Fifth* District, *Northwestern* Chancery Division.

To Hon. *Thos. Cobbs*, Chancellor *Northwestern* Chancery Division:

Whereas, it was referred to the register of this court to ascertain and report, as soon as may be, what amount of principal and interest is still due, and to become due, and owing to the complainant from the defendant on the demand in the bill mentioned.

Now, therefore, in obedience to said order, I do certify and report that I find the amount of principal and interest now due the complainant from the defendant in said demand to be the sum of *six hundred* dollars, as more fully appears from Exhibit *A*, hereto attached.

That, in addition to the said sum now due as above, there is *one* promissory note not yet due, but which bears interest from date, viz., *first* day of *June*, 1898, for the sum of *one hundred* dollars.

All of which is respectfully submitted, etc.

This *tenth* day of *May*, 1899.

Charles Sweet, Register.

Exhibit *A*.

Amount of original debt	$550 00
Interest to date of this report	50 00
Total	$600 00

Form No. 17401.[2]

(Precedent in State *v.* Lancaster County, 20 Neb. 420.)[3]

[State of *Nebraska*, *ex rel.* *J. R. Webster*, against *Board of County Commissioners of Lancaster County.* } In the *Supreme* Court of the State of *Nebraska*.

To the Honorable the *Supreme* Court of the State of *Nebraska*:][4]

In pursuance of an order of this court, appointing the undersigned sole referee to find and report the facts at issue in this case, I took the oath required by law, and fixed the *23d* day of *March*, 1886,

conclusion arrived at by averaging the sums estimated by the witnesses. Pilkington *v.* Cotten, 2 Jones Eq. (35 N. Car.) 238.

Must be Signed. — The report of the master or referee must be signed. Kissam *v.* Hamilton, (Supreme Ct. Spec. T.) 20 How. Pr. (N. Y.) 369.

See also list of statutes cited *supra*, note 1, p. 916.

1. *Alabama.* — Civ. Code (1896), § 741 *et seq.*; Ch. Ct. Rules, § 88 *et seq.*

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 956.

2. *Nebraska.* — Comp. Stat. (1899), § 5872.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 956.

3. Judgment was entered upon this report.

4. The matter enclosed by [ ] will not be found in the reported case.

at the office of the county clerk of said county, as the time and place for hearing, and notified the parties thereof.

At the time and place above stated, I proceeded to the trial of the matters above referred to me, the relator appearing in person, and the respondents by *Walter J. Lamb*, their attorney, and the intervenors, by *O. P. Mason* and *D. G. Courtnay*, their attorneys, and after hearing the evidence offered by the parties and the arguments of their attorneys, I find the following facts:

1st. That at the several dates hereinafter mentioned, and for several years prior thereto, the relator was a practicing attorney in the city of *Lincoln* in said state.

2d. That on the *1st* day of *May*, 1871, the said county of *Lancaster* issued to the *Midland Pacific Railway Company three hundred* bonds with interest coupons attached, each bond for the sum of *five hundred* dollars, to aid in the construction of the railway of said company from *Nebraska City*, in the county of *Otoe*, to *J* street, in *Lincoln*, in *Lancaster* county, *Nebraska*.

3d. That on the *1st* day of *January*, 1873, the said county of *Lancaster* issued to the *Midland Railway Company two hundred* bonds, with interest coupons attached, each bond for the sum of *five hundred* dollars, to aid in the construction and completion of the railway of said company from the city of *Lincoln*, in the county of *Lancaster*, to the *Union Pacific Railroad*, in said state.

4th. That each and all of said bonds bore interest at the rate of *ten* per cent. per annum, payable annually.

5th. That all of said bonds were issued in pursuance of propositions adopted by the electors of said county, pursuant to the several acts of the legislature of the state of *Nebraska* in such cases made and provided.

6th. The proposition so adopted by the electors of said county under which the first series of said bonds were issued, provided that said bonds should be payable "on or before the expiration of *twenty-five* years from the *1st* day of *May*, 1871."

The proposition so adopted by the electors of said county under which the second series of said bonds were issued, provided that said bonds should be payable "on or before the expiration of *thirty* years from the date thereof."

7th. The first series of said bonds contained a recital that the same were payable "on or before the *1st* day of *May*, 1896."

The second series of said bonds contained a recital that the same were payable "on or before the *first* day of *January*, 1903."

8th. A copy of said propositions so adopted by the electors of said county were duly spread upon the commissioners' records of said county.

9th. No copy of the bonds of either series was preserved among the records of the commissioners' or county clerk's office.

10th. A copy of the first series of said bonds was recorded in the office of the auditor of the state of *Nebraska*, but no such copy was recorded of the second series of said bonds.

11th. That the bond register of said county showed that the first series of said bonds matured *May 1st*, 1896, and that the second

series of said bonds matured *January 1st*, 1903, but did not show that the same were payable "on or before" said dates.

12th. The interest on both series of said bonds had been paid down to and including the *first* day of *January*, 1884, the principal being outstanding and unpaid.

13th. On the *11th* day of *January*, 1884, the relator addressed the board of county commissioners of said county the following letter:

"*January 11th*, 1884.

To the *Board of County Commissioners*, *Lancaster* County, *Nebraska*:

Gentlemen — I have devised a plan by which I can obtain a surrender of some portion of the outstanding county bonds not due, at par, and fund the same into a lower interest bond, without bad faith or repudiation. Some of the bonds I can force in without expense to the county, or any weakening of its good credit and good name.

I propose to do so for *one-sixth* part of the sum saved. I desire this may be kept confidential until you may determine what you will answer, and until after you have conferred and advised with me on the matter. Respectfully,

J. R. Webster."

14th. Negotiations were thereafter had between relator and the board of county commissioners of said county until the *3d* day of *March*, 1884, when a contract was entered into between relator and said board of county commissioners, which contract was spread upon the commissioners' record of said county, and contained, among other recitals, the following:

"Whereas certain outstanding bonds of *Lancaster* county, *Nebraska*, hereinafter mentioned, were voted to be issued, and were issued, payable on or before their dates of maturity; and whereas *J. R. Webster* desires authority to undertake, on behalf of the county, to recall and redeem such bonds, without expense or hazards of cost to the county, and agrees to be at the expense and trouble to discover the whereabouts of the holders thereof, and notify them, the said bonds are called in by said county, and are now payable. Now, therefore, be it

Resolved, By the board of county commissioners, that *J. R. Webster* be and he is hereby authorized, for the purpose and upon the conditions aforesaid, to act as agent of the county of *Lancaster* in the premises.

2. Resolved further, That the issue of bonds dated *May 1st*, 1871, in the sum of $*150,000*, to the *Midland Pacific R. R. Company*, also the issue of bonds dated *January 1st*, 1873, in the sum of $*100,000*, to the *Midland Pacific R. R. Company*, with accrued interest on each of said bonds to *May 1st*, 1884, be and the same are declared due and payable at the county treasury *May 1st*, 1884, and after *May 1st*, 1884, interest on said bonds and each and every one of them shall cease.

4. Resolved, That for the purpose of raising money with which to redeem said bonds so called, there be executed and negotiated *six* per cent. interest bonds; said bonds to be negotiated, but not delivered or issued, until old bonds in like amount are surrendered to county treasurer; none of said bonds to be negotiated or sold at less than their par value. And for his compensation for services in and about this business said *Webster* shall and is hereby allowed the premium

which said bonds on negotiation may bring, without other claim than such premium for any service rendered, for any expense incurred, or for any disbursement of moneys required to be made in any way connected with or arising out of the matter of calling in said outstanding indebtedness or bonds, or of the funding of the above, these series of bonds, or the negotiation or sale of the same.

The authority of said *Webster* to terminate one year from this date; and the said *J. R. Webster* accepts such employment on the above terms, and binds himself to the diligent and faithful performance of said service, and now agrees to hold the county harmless for all costs and expenses, from litigation or otherwise, that may or can in any way arise out of the said matter."

15th. That prior to the time relator addressed his letter of *January 11th*, 1884, to the said board of county commissioners, it was not known by said commissioners that said bonds were made payable "on or before" the date of maturity; but after the receipt of said letter, and before said contract was entered into, such investigation was made as resulted in their learning the form of the first series of said bonds, and that the same were made payable "on or before" the date of maturity; but said commissioners did not know the form of the second series of said bonds, or whether they were optional, until some time after the execution of said contract (although it is recited in the contract that they were all payable "on or before").

16th. That prior to the execution of said contract, relator solicited various citizens and tax-payers of said county to advise the said board of commissioners as to the propriety of making a contract with said *Webster* for the purpose of funding said bonds. That several of such persons wrote letters to said commissioners stating, in substance, that in their opinion it would be for the best interest of the county to fund such bonded indebtedness, and in their opinion relator's proposition was a fair and reasonable one. That some of said letters were written under the impression and belief on the part of the writers that said bonds were voted optional but issued absolute in reference to time of payment. But relator did not state to any of the persons who wrote such letters that the bonds were issued absolute, and relator did not know whether the second series were issued absolute or conditional until some time after the execution of said contract; but he did know that the first series was issued conditional before the execution of the contract.

17th. That in the month of *January*, 1884, and before said contract was entered into, the board of county commissioners employed *Walter J. Lamb* as the attorney for said *Lancaster* county for the year 1884, at the agreed price of $50 per month ($600 per year); that during all of said year 1884 said *Lamb* acted as the attorney for said county, and attended all the meetings of said board of commissioners, and advised them generally upon all matters, and was paid the price above stated therefor.

18th. That in pursuance of said contract, and after the same was entered into, relator prepared form of call of said bonds, with resolutions for entry upon the commissioners' journal, and prepared form of new bond to be issued. He obtained the names and

addresses of the holders, or nearly all, of such bonds, served notices personally on many of the holders, and on banking institutions through which the interest coupons had been collected, and made the call as generally known as possible. He visited many places where such bonds were held, for that purpose leaving home on or about the *3d* of *April*, went to *Baltimore*, *Philadelphia*, *New York*, *Boston*, and *Manchester*, *N. H.*, saw many of the holders, and notified them for the most part; so that between the *first* of *May* and the middle of *July*, 1884, nearly the entire amount of the $250,000 was presented for payment, he being absent about *three* weeks. He also, at the suggestion of said board of commissioners, prepared and printed a prospectus or circular about the new issue of bonds and call of old bonds, which was approved by said board. His expenses, paid out in the printing above referred to, stationery, expressage, traveling expenses, in and about the foregoing matters, amounted to the sum of $453, no part of which has been paid him.

19th. That on the *25th* day of *April*, 1884, a suit was commenced in the *district* court of said county by one *Wm. C. Griffith*, against the commissioners of said county, the county clerk, county treasurer, and county attorney, the object and prayer of which was to restrain the issue of said funding bonds; the petition in said action reciting the said contract between relator and said board of county commissioners. A temporary order of injunction was granted in said action.

20th. That thereafter, on the *25th* day of *April*, 1884, relator stated to said board of commissioners that his construction of the pleading and object of the *Griffith* action in its legal interpretation was not to prevent the funding of the bonds, but to prevent their being funded under the contract, and his compensation for the premium that they might bring; that to wait and litigate that matter would cause the county a large loss in difference of interest, and that the interests of the public in effecting the funding operation and saving default upon its call was, to his mind, a matter of paramount importance to his individual interest. He at the same time tendered a rescission of the contract by a written communication, in which written communication, among other things, he said: "In regard to my own compensation, in case these suggestions are adopted, for services already done, in giving information of the redeemable character of these outstanding tens, and advice therewith connected, I will leave that wholly to the discretion of the board at a future time to adjust."

That thereafter, on the *25th* day of *April*, 1884, at a session of said board of commissioners, an agreement was entered into between relator and said board of commissioners, which agreement was spread upon the commissioners' record, and was in words as follows:

"Office of the Clerk of *Lancaster* County, *Nebraska.*

The board of commissioners of said county being in session, and having the matter of the proposed refunding of certain outstanding bonds under consideration, as well as a proposition and contract made and entered into by and between the board and one *J. R. Webster*, said agreement being recorded in commissioners' record '*E*,' at page *32*, and his rights under said contract being by said *J. R.*

Webster waived by his report filed *April 26th*, 1884, make the following order in the premises, that is to say, that said contract be and the same is hereby rescinded, and the said *J. R. Webster* concurs in this action.

Dated at *Lincoln*, *April 29th*, 1884.

H. C. Reller,
W. J. Weller,
W. E. Caldwell,
County Commissioners.
J. R. Webster."

21st. That such proceedings in said suit brought by said *Wm. C. Griffith* were had that on the *30th* day of *March*, 1885, at a session of the *district* court of said *Lancaster* county, a decree was rendered in said action as follows:

"And now on this day this cause came on for final hearing before the court, the same having been previously argued and submitted, and upon consideration the court doth find the issues in this cause in favor of the plaintiff, and that at the commencement of this action the temporary order of injunction allowed herein was properly and rightfully allowed, and the said court doth further find that since the commencement of this action, the contract sought to be enjoined, and which was enjoined by the temporary order of injunction allowed herein, has been by the parties thereto annulled and cancelled and abrogated, and there is no necessity for any further order or decree in the premises, and the said petition is dismissed, and the parties hereto go hence without day, and it is further considered, ordered, adjudged and decreed, that said suit be dismissed, and that the plaintiff pay *one-fourth* of the costs, taxed at $*130.60*, and the said defendants *three-fourths* of the costs herein, taxed at $*91.75*, and that execution issue therefor; and it is further ordered, adjudged, considered and decreed, that the principal and securities on the injunction bond, given in this cause, be and are hereby released, and forever discharged from liability thereon."

22d. That prior to the time relator addressed his first letter to said board, *Jan. 11*, 1884, it was not known by said board of commissioners that any of said bonds could be funded, that by reason of the letter thus written by relator and the contract entered into between him and the said board, such investigation was had as led to the finding out that said bonds were payable "on or before" the final date of maturity. That by reason of the action of the relator in having the call for payment made in finding out the names and residence of the holders and service of notices for redemption, the first series of said bonds were finally redeemed and the new funding bonds issued therefor, bearing interest at *6* per cent. per annum, which funding bonds were sold to the state of *Nebraska* at par and the money used in payment of said first series of bonds. But said matter was not completed and such sale to the state of *Nebraska* was not finally consummated until after the rescission of said contract, *April 29*, 1884.

23d. Relator rendered no further services for said county after the rescission of said contract.

24th. That a large portion of said second series of bonds were

under said call presented for payment, but at the suggestion of certain tax payers that said second series were illegal, the said board on the ——— day of ———, 1884, ordered no further payment of interest, and no payment of principal to be made until the validity of the same should be judicially determined.

25th. That by reason of the funding of said first series of bonds, from a *10* per cent. to a *6* per cent. interest bond the annual debt charge of said county was reduced *$6,000.*

26th. The services rendered by relator, as before stated, under said contract were of benefit and value to said county.

27th. On the *eighth* day of *May*, 1884, relator filed with the county clerk of said county his bill for services and expenses, a copy of which is set forth in his information in this case, which said bill was duly verified by the oath of said relator.

28th. Relator has not been paid anything for his said services or expenses rendered and expended as before stated.

28 1-2. The services rendered relator, as above stated, were not voluntary, but under the agreement and expectation that he would receive compensation therefor.

29th. The said board of county commissioners have failed and refused to take any action whatever upon said bill of relator.

30th. In *January*, 1884, the board of county commissioners, in their estimate of revenue required for bonded debt for fiscal year, estimated, and in *July* following levied taxes to pay the interest on said two series of bonds in the sum of *$25,000.*

31st. In *January*, 1885, the county board did not include the bill of claim of relator for services and expenses so rendered in their estimate of expenses.

32d. No judgment at law had been rendered, adjudging said two series of bonds so proposed to be redeemed valid and legal.

33d. No vote of the electors of said county was had upon the question of the issuing of said proposed refunding bonds, or for the redemption of the first and second series of the *Midland Pacific* bonds.

34th. There is no fraud or collusion between relator and the board of county commissioners in the matter of making a proper defense to this action.

All of which is respectfully submitted.

Wm. H. Munger, Referee.

Form No. 17402.[1]

State of *South Carolina*, } Court *of Common Pleas.*
County of *Spartanburg.* }

John Doe, plaintiff, }
against } Referee's Report.
Richard Roe, defendant. }

To the Court *of Common Pleas*:

In pursuance of an order of this court, made in the above entitled action, on the *twentieth* day of *May*, in the year one thousand eight

1. *South Carolina.* — Code Civ. Proc. (1893), § 294. note 1, p. 916; and, generally, *supra*, note 1, p. 956.
See also list of statutes cited *supra*,

hundred and *ninety-nine*, by which it was referred to the undersigned referee, *Josiah Crosby*, to report (*Here state what referee was ordered to report*).

I, *Josiah Crosby*, the referee in the said order named, do report that I have (*Here state findings of fact and conclusions of law, from the evidence*).

Respectfully submitted. *Josiah Crosby*, Referee.

2. In Action for Breach of Conditions of Lease.[1]

Form No. 17403.[2]

Supreme Court, *Rockland* County.

Robert McCulloch
vs.
John and *James Dobson.*

To the Honorable the *Supreme* Court:

I, *Horace W. Fowler*, to whom by order of this court dated the *eighth* day of *January*, 1887, it was referred to hear and determine the issues in this action, do respectfully report as follows:

That I was attended by both of the parties to this action and their counsel, and having first taken the prescribed oath proceeded to take the testimony upon the issues therein, and I do further report the following

Findings of Fact.

First. — That the defendants *John* and *James Dobson* were at the times referred in the complaint in this action copartners doing business under the firm name of *John* and *James Dobson*.

Second. — That by lease bearing date the *4th* day of *September*, 1884, the plaintiff rented to the defendants certain factory premises together with the machinery therein contained, for the term of *two* years from the *30th* day of *September*, 1884.

Third. — That the defendants entered into possession of the said property and occupied the same during the term granted by the said lease.

Fourth. — That at the time the said lease was made the premises were in a poor condition of repair.

Fifth. — That the plaintiff stipulated in said lease to put the premises in repair before the defendants entered into possession, but failed to perform this stipulation.

Sixth. — That the plaintiff by parol agreed that if the defendants would make such repairs the plaintiff would pay the costs thereof.

1. **Incorporating Lease in Report.** — Where the lease and every part of it is in evidence on the trial, it is not necessary that the referee should incorporate the lease in his report or make separate findings in regard to all its stipulations. McCulloch *v.* Dobson, 133 N. Y. 114.

2. *New York.* — Code Civ. Proc., § 1019 *et seq.*

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 956.

This is the report of the referee in the case of McCulloch *v.* Dobson, 133 N. Y. 114, and is copied from the records. A judgment in favor of defendant was entered upon the report of the referee, and on motion by plaintiff to set aside the report said judgment was affirmed at the general term of the supreme court and by the court of appeals.

Seventh. — That thereupon the defendants proceeded to make such repairs and expended thereon the sum of $877 upon the water wheels belonging to said property, and the sum of $1,536.15 on other repairs which should have been made by the plaintiff under the above mentioned stipulation.

Eighth. — That by the provisions of said lease the plaintiff agreed to keep and maintain the demised property in good repair.

Ninth. — That upon the surrender of the said premises the defendants failed to turn over to the plaintiff certain tools and machinery part of the demised property, which tools and machinery were of the value of *twenty* ($20) dollars.

Tenth. — That otherwise at the expiration of said lease the defendants surrendered the said property in as good condition, reasonable wear and tear excepted, as that in which they received it from the plaintiff, and bettered by at least the amount above specified as having been expended by them in repair of the property.

Eleventh. — That in addition to the sums above mentioned the defendants expended a large sum of money in keeping and maintaining the demised property in good order, and did keep and maintain the demised property in as good order and condition as that in which they received it.

Twelfth. — That it was stipulated in said lease that in case the defendants ran the demised property overtime the defendants should pay the extra premium received by the Insurance Company from the plaintiff on the policies upon the demised property.

Thirteenth. — That the defendants did run the said factory overtime, and that thereby the plaintiff became liable to and did pay the sum of $362.12 extra premium for fire insurance.

Fourteenth. — That the defendants have not repaid to the plaintiff any part of the amount so expended by him for extra premiums.

Fifteenth. — That the plaintiff represented to the defendants before the lease of the property was signed that the water power and wheels were ample to drive the machinery.

Sixteenth. — That these representations were not true in the condition in which the water wheels then were.

Seventeenth. — That certain stoppages to the mill occurred owing to the defective condition of the water wheels, and before the defendants had put them in proper state of repair.

Eighteenth. — That the testimony as to the loss arising from such stoppage is not sufficient to enable any proper estimate of its amount.

And I find as

Conclusions of Law.

First. — That the defendants are entitled to recover from the plaintiff the amount of $2,031.03.

Second. — That the complaint in this action should be dismissed with costs.

I, therefore, award judgment in favor of the defendants for $2,031.03, and that the complaint in this action be dismissed with costs.

Respectfully submitted.

Horace W. Fowler, Referee.

Dated *N. Y., 14th July*, 1888.

3. In Action on Commercial Paper.[1]

a. Check.

Form No. 17404.[2]

(Precedent in Hooker *v.* Franklin, 2 Bosw. (N. Y.) 501.)[3]

1. Precedent — Bill of Exchange. — In Lysaght *v.* Phillips, 5 Duer (N. Y.) 106, is set out the following report of a referee in an action by plaintiff as holder and indorser of an accepted bill of exchange against the drawer upon protest of the same for nonpayment.

"To the Justices of the *Superior* Court of the city of *New York*:

The undersigned, a referee in the above entitled action, appointed by the honorable court, respectfully reports:

That he has been attended by the attorneys of the respective parties, plaintiff and defendant, and has heard the proofs and allegations of the parties, and the arguments of the counsel thereon, and having duly considered the same, he finds as facts in this action —

That the defendant, under the name of *Jonas Phillips & Co.*, made and drew the certain bill of exchange in the complaint described, addressed to the persons doing business in the name of *Lawrence Phillips and Sons*; also, in the pleadings in this action mentioned, which bill of exchange was made payable to the order of the said *Jonas Phillips & Co.*, and was endorsed by and with the name of the said *Jonas Phillips & Co.*

That the said bill of exchange was accepted by the said firm of *Lawrence Phillips and Sons*, as stated in the said complaint.

That the said bill of exchange was drawn by the defendants at the request and for the accommodation of the firm of *Lawrence Phillips and Sons* aforesaid, and that no value or consideration passed from the last-mentioned firm to the said defendant for or on account of said bill of exchange.

That the said bill of exchange, endorsed as aforesaid, was, before its maturity, transferred and delivered to the plaintiff for a good and valuable consideration, and that the said plaintiff became and was the bona fide holder thereof.

That the said bill of exchange was duly presented for payment, as stated in the complaint, and payment thereof demanded and refused, as in the complaint stated; and the said bill of exchange was protested for non-payment, as in the complaint stated, and that notice of said presentment, demand, nonpayment, and protest was given to the defendant, as in said complaint alleged.

That some time thereafter, to wit, on or about the *7th* day of *April*, 18*48*, a certain indenture was made between the persons comprising, as aforesaid, the said firm of *Lawrence Phillips and Sons*, of the first part, and *James Bonar* and *Edward Hawley Palmer* of the second part, and several other persons, of whom the plaintiff was one, being creditors of *Lawrence Phillips and Sons*, of the third part, such deed being known in the law as a deed of inspection, which said deed is set forth in the schedule hereto annexed, marked *A*, to which the referee refers; and makes part of this his report.

And as matter of law, the said referee decides and adjudges that the said plaintiff did not, by said deed, nor in any other manner, so far as the said referee is advised, release or discharge the said defendant from his liability, upon or by reason of said bill of exchange.

And further, that the said plaintiff, upon the facts of this case, is entitled to recover against the defendant the amount of said bill, together with *ten* per cent. damages thereon, and interest on said amount of said bill and damages, less the credits allowed in the complaint as claimed in said complaint, besides the costs of suit to be taxed, which said amount of said bill, damages and interest, to the date of this report, is the sum of $7,400.62.

The referee decides that judgment be entered in this cause for the plaintiff against the defendant, for the sum of $7,400.62, with costs to be taxed.

W. Kent, Referee."

A judgment for plaintiff on the report was affirmed.

2. *New York.* — Code Civ. Proc., § 1019 *et seq.*

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 956.

3. A judgment was entered on this report for the plaintiff, which was affirmed.

[(*Title of court and cause as in Form No. 6954.*)
To the *Supreme* Court:

I, *John L. Mason*, the referee appointed by this court in the above entitled action by an order made herein bearing date the *fifteenth* day of *June*, 1857, to hear, try and determine the issues therein, do respectfully report as follows:

That I have taken the oath required by law.

That the plaintiff appeared before me by *William Allen Butler*, his attorney, and the defendant appeared by *Gerardus Clark*, his attorney.][1]

And I do find, certify and report, that the following facts were established before me:—

I. The defendant, *Joseph F. Franklin*, was, on the *fifteenth* day of *April*, one thousand eight hundred and *fifty-seven*, the holder of the check for the sum of *ten thousand* dollars mentioned in the complaint, dated on the day and year last mentioned, drawn by the *Chicago, St. Paul and Fond du Lac Railroad Company*, by *Charles Butler*, their treasurer, upon and directed to the *American Exchange Bank* in the City of *New York*.

II. The said defendant endorsed the said check and deposited the same with the *Continental Bank*, of which the plaintiff is president, at or about *11* o'clock in the *fore*noon of the said *fifteenth* day of *April*, aforesaid, and received credit for the same in cash in account with the said bank.

III. The said check was sent by the said *Continental Bank* to the *American Exchange Bank* through the Clearing House, according to the established usage of the banks of the City of *New York*, on the following day, at or shortly after the opening of the bank.

IV. The said check was returned by the *American Exchange Bank* to the *Continental Bank*, about *twelve* o'clock of the same day, unpaid, payment thereof having been stopped by the drawers, of which fact the defendant, *Franklin*, was immediately notified by the said bank.

V. The said check was also duly presented before *three* o'clock of the same day to the paying teller of the *American Exchange Bank* by a notary public, and, payment thereof being refused, the same was protested for non-payment, and notice given at or about *three* o'clock of the same day to the defendant.

VI. It was admitted by the parties that there was, on the closing of the bank on the *16th* day of *April*, and still is, a balance in the *Continental Bank*, to the credit of the defendant, *Franklin*, of *four thousand and forty-four* dollars and *sixty* cents, which was agreed should be credited on the said check if the plaintiff shall recover in this action.

My conclusion of law upon the above facts is:

That the plaintiff is entitled to recover, against the said defendant, *Joseph F. Franklin*, the balance of the said *ten thousand* dollars, for which the said check was given, after deducting therefrom the sum of *four thousand and forty-four* dollars and *sixty* cents, with interest

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

from the *sixteenth* day of *April*, one thousand eight hundred and *fifty-seven*, to the date of this report. Wherefore, I respectfully certify and report, that the plaintiff should recover against the said defendant, *Franklin*, the principal sum of *five thousand nine hundred and fifty-five* dollars and *forty* cents, and also *one hundred and thirteen* dollars and *forty-six* cents for interest thereon, amounting in the whole to the sum of *six thousand and sixty-eight* dollars and *eighty-six* cents, with costs. All which is respectfully submitted.

Dated *New York, July 24th*, 1857.

Jno. L. Mason, Referee.

b. Promissory Note.

Form No. 17405.[1]

Supreme Court.

William S. Gerity
against
The Seeger & Guernsey Company, Charles L. Seeger and *George A. Dounce.*

To the *Supreme* Court:

The above entitled action having been referred to me to hear, and determine the same, and the issues of fact therein, upon the complaint of the plaintiff and the answers of the defendants, *The Seeger & Guernsey Company*, and *Charles L. Seeger* having been tried before me, I hereby report as my decision, that the plaintiff is entitled to judgment against the defendants as hereinafter directed.

The grounds of my decision correctly stated are, that said defendants are indebted to the plaintiff upon the promissory note set out in the complaint in the sum of ($4,634.72) *four thousand six hundred thirty-four* dollars and *seventy-two* cents, which is the amount of said note and protest fees therein with interest to the date of this decision; and that the plaintiff is entitled to a judgment against the defendants for the recovery of that sum with costs. And I hereby direct judgment accordingly.

Dated *November 23*, 1896.

Roswell R. Moss, Referee.

Fees	$50 00
Stenographer's fees	28 48
	$78 48

4. In Assumpsit to Recover for Goods Sold to Defendant, Claiming a Rescission for Misrepresentation.

1. *New York.* — Code Civ. Proc., §§ 1019, 1022.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 956.

This is the form of report in the case of Gerity *v.* Seeger, etc., Co., 163 N. Y. 119, and is copied from the records. A judgment in favor of plaintiff, entered upon the report of the referee, was affirmed in the appellate division of the supreme court and in the court of appeals.

Form No. 17406.[1]

(Precedent in Badger *v.* Whitcomb, 66 Vt. 125.)[2]

[(*Title of court and cause as in Form No. 15229.*)

I, *Josiah Crosby*, the referee appointed in the above entitled action by an order of said court bearing date the *fifteenth* day of *May*, 1893, to (*state purpose of reference*), respectfully report as follows:][3]

The defendants are partners. In *July*, 1891, the plaintiff and defendant, *W. H. Whitcomb*, met and had negotiations looking to the sale by plaintiff to defendants of about *eight thousand* feet of clapboards then owned by plaintiff at *Barre* and stored upon the premises of one *Nye*, on *Main* street, opposite the dwelling of the plaintiff.

Plaintiff asked *six* dollars per *thousand*, but in the course of the negotiations lowered his price to *five* dollars per *thousand*. Defendant told plaintiff that if they were good No. *2* boards they would answer defendant's purpose. Plaintiff requested defendant to inspect the boards for himself; that he (plaintiff) bought them for No. *2* boards and as such offered them for sale. Defendant said that he did not care to look at the boards, as he knew nothing about clapboards, and that he would consult his partner and let plaintiff know whether they would take the boards or not. *July 30* plaintiff and said defendant again met and defendant told plaintiff that if the boards were good No. *2* boards they were cheap enough and that defendants would take them. Plaintiff replied, "look at the boards for yourself," and insisted that defendant should examine the boards, saying that he bought the boards for No. *2* and supposed that was what they were. On the next day defendants sent a team and drew away *three thousand eight hundred and forty* feet of the boards, and on the following day drew them back and tendered them to the plaintiff, claiming that they were not what they bought, and plaintiff refused to receive and forbade the teamster to unload them on his premises, whereupon the teamster drew the boards to the premises of a neighbor and unloaded them; of which the plaintiff had knowledge and knew that defendants claimed there was no sale of the boards for the reason that they were not of the quality defendants claimed to have purchased and that defendants would not pay for them.

The plaintiff made no representations whatever to defendants in relation to the quality of these boards; he obtained them in the way of trade from one *Densmore* for No. *2* clapboards, had never inspected them himself and believed them to be merchantable boards of that grade.

Clapboard manufacturers put up their boards in *four* grades, sorting the boards into these several grades as they come from the saw; the boards are then tied into bundles of about *sixty* feet each, and the outside board is marked to indicate the grade of boards contained in the bundle. Whether the grade is in fact what is marked can only

1. *Vermont.* — Stat. (1894), § 1438.
See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 956.

2. Judgment was entered in this case for the plaintiff, for the sum named in the report. The judgment was affirmed.

3. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

be ascertained by opening the bundles. These boards were marked No. *2*, which is the lowest grade and poorest quality put upon the market, and when used in siding buildings are subject to considerable waste.

When defendants got this *three thousand eight hundred and forty* feet of the boards to the building where they intended to use them, their mechanic opened three or four of the bundles and it was ascertained that about *one-third* of the boards in these bundles so opened were broken, "shaky," and otherwise so defective that clapboard manufacturers ordinarily would not have put them into even this low grade, and should have been thrown aside at the mill as waste; the remainder of the boards being good, merchantable No. *2* clapboards.

Plaintiff claims to recover for the *three thousand eight hundred and forty* feet of boards taken by defendants as above set forth. If he is entitled to recover, his damages are *twenty-one* dollars and *sixty-seven* cents, interest computed to the *first* day of term.

[*Josiah Crosby*, Referee.][1]

5. In Foreclosure Proceedings.

a. Of Mechanics' Lien.

Form No. 17407.[2]

[*Supreme* Court, *New York* County.][3]

Richard Hoar, plaintiff,
against
Alexander McNeice, defendant.

To the [*Supreme* Court of the State of *New York*:][3]

I, the undersigned referee appointed by this court in the above entitled action, by an order made herein, bearing date the *fifteenth* day of *October*, 18*94*, to hear, try and determine the issues therein,

Respectfully report

I. That before proceeding to a hearing of the matters referred to me by such order, I took and subscribed the referee's oath required by law, which is hereto annexed.

II. That on the proceedings before me, as such referee, I was attended by counsel for the respective parties, and from the allegations and proofs submitted, I find the following

Facts.

III. That at all the times stated in the complaint, the defendant herein was the owner in fee and in possession of all those certain lots, pieces or parcels of land, situate, lying and being in the *twelfth* ward

1. The matter enclosed by [ ] will not be found in the reported case.

2. *New York.* — Code Civ. Proc., § 1019 *et seq.*

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 956.

This is the form of report in the case of Hoar *v.* McNeice, 1 N. Y. App. Div. 549, and is copied from the records. Judgment was entered upon the report in favor of plaintiff. This judgment was affirmed.

3. The matter enclosed by [ ] has been substituted for the words "Court of Common Pleas," the court of common pleas having been abolished since the filing of the report.

of the city of *New York*, and bounded and described as follows: (*describing the property*), and as such owner the defendant was during the time stated in the complaint in this action, engaged in the erection of certain buildings and improvements upon said lots or parcels of land.

IV. That at the special instance and request of the defendant, the plaintiff performed certain work, labor and services, and furnished certain materials to the defendant, of the reasonable value of *six hundred and sixty 65-100* dollars, which reasonable value the defendant undertook and agreed to pay the plaintiff for such work and materials.

V. That no part of said sum has been paid, except the sum of *three hundred and eighty-eight 62-100* dollars, leaving due and owing this plaintiff from the defendant at the time of the filing by the plaintiff of the notice of claim of mechanics' lien hereinafter stated, the sum of *two hundred and seventy-two 03-100* dollars.

VI. That all of said work, labor, service and materials were actually used by the defendant in the erection and construction of the buildings upon said above described lots or parcels of land.

VII. That on the *twenty-fourth* day of *August*, 1894, after the said sum of *two hundred and seventy-two 03-100* dollars had become due and payable, and after payment thereof had been duly demanded and refused, and within *ninety* days after the final performance of the labor and final furnishing of the materials above stated, the plaintiff, in pursuance of the statute, in such case made and provided, duly filed in the office of the clerk of the city and county of *New York*, a notice of claim and lien for the principal and interest of the price and value of the labor performed and materials furnished, as above stated, upon and against the lands, buildings and premises hereinbefore described, which said notice was duly verified, specified the name and residence of the plaintiff, a statement of the amount and value of the labor performed and materials furnished, the name of the owner and person against whose interest said lien was claimed, the name of the person by whom plaintiff was employed, and for whom he performed the labor and furnished the material aforesaid; it also contained a description of the property charged with the lien sufficient for identification, which is the same property described in paragraph *I* of the complaint in this action; it also contained all other statements required by and in all respects complied with the statute in such case made and provided, and said notice was thereupon on said *twenty-fourth* day of *August*, 1894, duly docketed by the clerk of the city and county of *New York*, in the docket kept by him for that purpose called the "Lien docket," and that within *ten* days after the filing and docketing of said lien, a true copy thereof was in conformity with the statute, in such case made and provided, duly served on the defendant.

VIII. That plaintiff's said lien and claim has not been paid, satisfied or discharged, except that since the commencement of this action the defendant procured an order of this court, directing that upon the approval and filing of a bond in pursuance of the statute, in such case made and provided, the aforesaid lien be discharged by the county clerk, and that thereupon a bond was duly approved and

filed, and said lien was by the county clerk of the county of *New York* discharged of record.

IX. That except this action, no other action or proceeding has been brought for the foreclosure of plaintiff's said lien, or for the recovery of the moneys intended to be secured thereby.

X. That, except this plaintiff, no other person, firm or corporation have filed mechanics' liens against said premises, or have claims thereon, subsequent to plaintiff's lien by judgment, decree, mortgage, conveyance or otherwise.

As Conclusions of Law.

I. That on the *twenty-fourth* day of *August*, 1894, at the time of the filing by the plaintiff in the office of the clerk of the city and county of *New York* of the notice of claim of mechanics' lien described in the complaint, there was due, owing and unpaid, from the defendant to the plaintiff, for work done and materials furnished upon the property described in the complaint, the sum of *two hundred and seventy-two 03-100* dollars and interest thereon from the *fourteenth* day of *August*, 1894, that such interest amounts at the date of this report to the sum of *five 98-100* dollars.

II. That by the filing of said notice of claim in the office of the clerk of the city and county of *New York* on the *twenty-fourth* day of *August*, 1894, the plaintiff acquired a valid and subsisting lien upon all the right, title and interest which the defendant then had in the real property described in my finding of fact numbered *I* for said sum and interest, and the costs and disbursements of this action.

III. That the defendant and all persons claiming under him, subsequent to the commencement of this action, be barred and foreclosed of all equity of redemption, or other interest in said premises; that said premises be sold as provided by law and the rules and practice of this court and that from the proceeds of the sale the plaintiff be paid the expenses of said sale, the costs and disbursements of this action, and the said sum of *two hundred and seventy-eight 1-100* dollars, the amount of his said claim and interest, with interest from the date of this report.

IV. That the plaintiff is entitled to a personal judgment against the defendant for the said sum of *two hundred and seventy-eight 1-100* dollars, with costs and disbursements of this action, hereby allowed and awarded to the plaintiff and against the defendant.

V. That as the lien to foreclose which this action was brought, has been discharged by the approval and filing of a bond, under an order of this court in pursuance of the statute in such case made and provided, the judgment to be entered herein be in form only, so that the plaintiff may have leave to proceed against the sureties on said bond, in such form as plaintiff may be advised.

And I direct judgment accordingly.

Dated *New York*, *December 27*, 1894.

Wm. H. Boyhan, Referee.

The following is all the evidence given upon said trial, and all the proceedings had thereat:

(*Setting out the evidence and proceedings.*)

b. Of Mortgage.[1]

1. Precedent.— In Morisey *v.* Swinson, 104 N. Car. 555, which was an action to correct a deed of mortgage in certain respects on account of a mutual mistake, to foreclose the same, and to that end to have an account taken, the material parts of the report were as follows, to wit:

"I find the following facts:

1. On the *29th* day of *November*, 1867, the defendant executed and delivered to plaintiff a mortgage upon the real estate described in the complaint, which recited an indebtedness of $700, with interest from some time in 1857, which was recited in said mortgage to be due by note or bond, which mortgage purported to secure the payment to plaintiff of said note or bond; that no note or bond was ever executed for said sum of $700; that the recital in said mortgage that said indebtedness was due by note or bond was inserted therein by the inadvertence and mistake of both parties, and that said recited indebtedness is evidenced in no other manner than by the recital in said mortgage; that the said mortgage was executed for the purpose of securing to the plaintiff the balance due on a certain judgment held by plaintiff against defendant, which, at the time of the execution of said mortgage, amounted to $207.61, some other small indebtedness due by account, and to secure such advances as the plaintiff might, from time to time, make defendant, and for no other purpose.

2. That, at the time of the execution of said mortgage, the plaintiff, at the request of the defendant, went into possession of the lot described in the complaint as the town lot in the town of *Warsaw* under an agreement entered into with defendant to the effect that plaintiff was to take possession of the property and do the best he could with it, applying the rents received therefrom to the payment of defendant's indebtedness; that he has remained in possession except one year — 1877 or 1878 — when defendant was in possession of the store on said lot, though the plaintiff has not been himself the actual occupant of said property, except the vacant lot, which he has cultivated; that the property was of such a character that the class of tenants to whom it could be rented was utterly insolvent, and the plaintiff was compelled to rely upon their honor rather than upon their financial responsibility for the payment of rent; that the tenants were frequently changing, and the plaintiff was sometimes able to procure tenants and sometimes not; that the store was sometimes rented for a month or two at a time to persons who desired it for special seasons and for special and temporary purposes, and who would vacate after a month or two of occupancy; that the houses upon said premises have been gradually falling into decay, and, during the possession of plaintiff, business has moved largely to another part of the town; that the plaintiff has done the best he could with the property, and that he has received rents therefrom to the sum of $759.97, as in referee's statement of rent account filed herewith as a part of this report, which, considering all the circumstances and surroundings, is, for the time plaintiff has been in possession, a fair rent for the same.

Conclusions of Law.

1. That the insertion of the recital in said mortgage that $700 was due by note or bond was made by the inadvertence and mistake of both parties, and that the said mortgage was executed to secure the balance due upon said judgment, to wit, the sum of $209.61, some small items of account due by defendant to plaintiff, and to secure further advances made by plaintiff, from time to time, to defendant; and it is ordered that said mortgage be corrected so as to show its real intent and purpose to be to secure the said balance and the amount of advances made by plaintiff to defendant, and the plaintiff held the same only as a security for said sums.

2. That the sum with which plaintiff is charged in the account herewith filed ($759.97) is, all things considered, a fair rent for said property.

3. That defendant is not indebted to the plaintiff, but plaintiff is indebted to defendant in the sum of $77.03.

4. It is ordered, adjudged and decreed that defendant recover of plaintiff the sum of $77.03 and the costs of this action."

Exceptions to the report were overruled; the report was confirmed and judgment was rendered in favor of the defendant, which was affirmed on appeal.

Form No. 17408.[1]

Circuit Court for the County of *Montcalm.*

In *Chancery.*

John Doe, complainant, against *Richard Roe*, defendant. } To the *Circuit* Court for the County of *Montcalm.* In *Chancery.* Report of Amount Due.

In pursuance and by virtue of an order of this court, made in the above cause, dated the *tenth* day of *September*, A. D. 1899, by which it was, among other things, referred to one of the commissioners of this court in and for the county of *Montcalm*, to compute the amount due to the said complainant for principal and interest money on the promissory note and mortgage mentioned and set forth in the bill of complaint filed in this cause, up to and including the date of this report, and to report the same to this court with all convenient speed, I, the subscriber, one of the commissioners of this court in and for the county of *Montcalm*, do respectfully certify and report that I have computed the amount due to the complainant as aforesaid.

And I further certify and report that there is due to the said complainant as aforesaid, for principal and interest up to and including the date of this report, the sum of *seven hundred* dollars, principal, and the sum of *one hundred and twenty-six* dollars, interest on said principal sum, to and including the *tenth* day of *November*, A. D. 1899.

And I further certify and report that Schedule *A*, hereto annexed, contains a statement and account of the principal and interest money due to the complainant as aforesaid, the period of the interest, its rate per cent., and the mode of computation, to which I refer.

All of which is respectfully submitted.

Josiah Crosby,

Circuit Court Commissioner, *Montcalm* County, *Michigan.*

Dated the *tenth* day of *November*, A. D. 1899.

(*Attach schedule.*)

Form No. 17409.[2]

Circuit Court, *Milwaukee* County.

John Doe, plaintiff, against *Richard Roe*, defendant. }

To the *Circuit* Court of the County of *Milwaukee*:

In pursuance of an order of this court, made in the above entitled action, on the *tenth* day of *May*, A. D. 1899, by which it was referred to the undersigned, referee, to ascertain and compute the amount due to the plaintiff upon and by virtue of the note and mortgage mentioned and set forth in the plaintiff's complaint, which is filed in this action (and to such of the defendants as are prior incumbrancers of the mortgaged premises), and also to take proof of the facts and

1. *Michigan.* — Comp. Laws (1897), § 516.
See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 956.

2. *Wisconsin.* — Cir. Ct. Rules, § 1 (Stat. (1898), p. 2180).
See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 956.

circumstances stated in the plaintiff's complaint and to examine the plaintiff or his agent on oath as to any payments which have been made, and also to ascertain and report the amount of each instalment of principal and interest secured to be paid by said note and mortgage, and hereafter to grow due, and the several times when they become due; and also to ascertain and report the situation of the mortgaged premises, and whether in the opinion of the undersigned the same can be sold in parcels without injury to the interests of the parties, and if in the opinion of the undersigned a sale of the whole of said premises in one parcel would be most beneficial to the parties, then to report his reasons for such opinion:

I, *Josiah Crosby*, the referee in the said order named, do report, that I have taken proof of the facts and circumstances stated in said plaintiff's complaint, and have examined the plaintiff on oath as to any payments which have been made on account of the demand mentioned in said complaint, and which ought to be credited thereon, and I am of opinion, and hereby report, that the facts and circumstances stated in said complaint are true; and that I have computed and ascertained the amount due the plaintiff upon and by virtue of the said note and mortgage, and that I find, and accordingly report, that there is due to the plaintiff for principal and interest on the said note and mortgage, at the date of this my report, the sum of *eleven hundred and sixty-three* dollars. Schedule *A*, hereunto annexed, forming part of this my report, shows a statement of the amounts due for principal and interest respectively, the period of the computation of the interest, and its rate.

I further report that there are prior incumbrances of the mortgaged premises, to wit: that the following defendants have prior incumbrances, of the dates, amounts and descriptions hereinafter given, upon which incumbrances there are due respectively the amounts set opposite said incumbrances: (*stating the facts*).

I further report that the amount of each instalment of principal and interest secured to be paid by the said note and mortgage, and hereafter to grow due, and the several times when they become due, is shown by Schedule *B*, hereunto annexed and made a part of this my report.

I further report that the mortgaged premises are situated as follows: (*Here describe premises*), and that, in the opinion of the undersigned, the same can be sold in parcels without injury to the interests of the parties (or *and that, in the opinion of the undersigned, a sale of the whole of said premises would be most beneficial to the parties, and that the reasons of the undersigned for such opinion are the following*: stating reasons).

Dated the *first* day of *September*, A. D. 1899.

Josiah Crosby, Referee.

(*Attach schedules.*)[1]

1. **Schedules** referred to in the text may be as follows:

Schedule *A*.

Referred to in the preceding report.

Mortgage given to secure a promissory note for $2,000, bearing interest at 6 per cent. per annum, payable in *four* equal instalments, the first of said instalments being payable on the *first* day of *September*, 1899, and one

6. In Partnership Proceedings.

Form No. 17410.[1]

[*Supreme* Court, *New York* County.][2]

James H. Snyder, plaintiff,
against
Lloyd I. Seaman, defendant.

To the [*Supreme* Court of the State of *New York*:][2]

I, *Charles H. Truax*, the referee appointed herein by the above named court, do respectfully report as follows:

That I have taken the oath required by law.

That the plaintiff appeared before me, by Mr. *Lloyd*, of the firm of *Murphy, Lloyd & Boyd*, and the defendant appeared by Mr. *Weed*, of the firm of *Weed, Henry & Meyers*.

On or about the *first* day of *May*, 1885, the plaintiff and the defendant formed a partnership for the purpose of dealing in butter, cheese and produce as commission merchants under certain articles of partnership, which are annexed to the complaint, and carried on such copartnership business under said agreement until about the *30th* day

other of said instalments being payable on the *first* day of every *September* thereafter until all thereof are paid.	
Principal sum due.....	$500
Interest on $500 from *September 1st*, 1898, to *November 1st*, 1899, being *one* year and *two* months.....	35
Amount paid out on account of (*stating on what account paid*).....	100
Interest thereon from *March 1st*, 1899, to *November 1st*, 1899, being *eight* months, at 6 per cent. per annum	4
Amount now due.....	$639

Schedule *B*.

Referred to in the preceding report.

Mortgage given to secure a promissory note for $2,000, bearing interest at 6 per cent. per annum, payable in *four* equal instalments, the *first* of said instalments being payable on the *first* day of *September*, 1899, and one other of said instalments being payable on the *first* day of every *September* thereafter until all thereof are paid.

First instalment of principal growing due hereafter, maturing the *first* day of *September*, A. D. 1900.....	$500
Second instalment of principal growing due hereafter, maturing the *first* day of *September*, A. D. 1901.....	500
Third instalment of principal growing due hereafter, maturing the *first* day of *September*, A. D. 1902.	$500
First instalment of interest growing due hereafter, maturing the *first* day of *September*, A. D. 1900.....	30
Second instalment of interest growing due hereafter, maturing the *first* day of *September*, A. D. 1901.	60
Third instalment of interest growing due hereafter, maturing the *first* day of *September*, A. D. 1902.....	90
	$1,680

Dated *November 1*, A. D. 1899.

Josiah Crosby, Referee.

1. *New York*. — Code Civ. Proc., § 1019 *et seq*.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 956.

This is the form of referee's report in the case of Snyder *v.* Seaman, 2 N. Y. App. Div. 258, and is copied from the records. A judgment in favor of the plaintiff entered upon this report was reversed in the appellate division of the supreme court, but in the court of appeals it was held that the judgment in the appellate division should be reversed and that entered upon the report of the referee affirmed.

2. The matter enclosed by [ ] has been substituted for "Court of Common Pleas," such court having been abolished since the report was filed.

of *April*, 1886, on or about which date said partnership was changed, so that each person became entitled to and should have received *one half* of the net proceeds of the business; and said copartnership continued under the above named modification until on or about the *30th* day of *April*, 1892, when said copartnership was dissolved by mutual consent. At the time of the dissolution of said copartnership certain accounts between plaintiff and defendant as copartners were unsettled, and plaintiff has requested defendant to settle and adjust the accounts between them, and pay the amount due plaintiff from defendant, which defendant has refused and still refuses so to do.

The principal subject of litigation before me related to the payment of certain personal taxes of the defendant assessed against the defendant by the authorities of the city of *New York*, which said taxes were paid with the firm money and charged on the firm books to store expenses; in 1885, the sum of $180 was so charged; in 1886, the sum of $171.75; in 1887, the sum of $162; in 1888, $166.50; in 1889, $146.25; in 1890, $197, and in 1891, $190. When the tax of 1885 was charged against the firm the plaintiff was entitled to *one third* of the profits of the business, but when the tax for the years above mentioned were so charged, he was entitled to *one half* of the profits of the business.

I am of the opinion that these taxes should not have been charged against the firm as part of the expenses of carrying on the firm. They were no part of any such expenses. The defendant might as well have charged his living expenses. They are not within the spirit or the letter of the articles of copartnership; and, in fact, there is no evidence that these taxes were assessed solely upon the defendant's capital employed in the business.

Nor can it be rightly said that the plaintiff ratified the defendant's act. There is no consideration passing from the defendant to the plaintiff to uphold any claim of ratification.

I do not think that the yearly balances that were struck can be considered as an accounting between the parties.

I am also of the opinion and I find that plaintiff is entitled to *one third* of the accounts charged to profit and loss on the *30th* day of *April*, 1886, and to *one half* of the accounts charged to profit and loss on each succeeding year. These accounts are shown in plaintiff's exhibit No. *5*, and are hereto annexed and made a part of this report.

For the reasons above stated I am of the opinion that plaintiff is entitled to recover from defendant $576.75, with interest thereon from the *30th* day of *April*, 1892. Said interest amounts to $112. The plaintiff is also entitled to recover the costs of this action.

Dated *New York*, *July 26*, 1895.

Charles H. Truax, Referee.

7. In Proceedings to Sell Land of Infant.

Form No. 17411.[1]

1. *New Jersey.* — Gen. Stat. (1895), p. 1712, § 3.
See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 956.

In Chancery of *New Jersey*.

In the matter of the application on behalf of *John Doe*, infant, for Sale of Lands.

I, the undersigned, one of the special masters of this court, do respectfully report to the chancellor that pursuant to an order of reference in the above matter, bearing date the *tenth* day of *May*, eighteen hundred and *ninety-nine*, I have been attended by *Jeremiah Mason*, solicitor for and of counsel with the petitioner, and have taken the depositions of witnesses hereto annexed, and have considered the matters referred to me by said order.

And I do further report that all the material facts stated in the petition in this matter are true, and that the interest of the said infant requires and will be substantially promoted by a sale of the whole of the lands described in the said petition; that my reasons for this opinion are that said lands and premises are productive of little or no revenue (*stating other reasons, if any exist*).

And I do further report that in my opinion the said lands will not increase in value during the minority of said infant, to an extent equal to the advantage to be derived from a sale.

And I do further report that in my opinion it will be for the interest of the said infant to have the said lands sold upon the following terms and conditions: (*Here state terms and conditions*).

And I do further report that *Samuel Ireland* is the guardian of said *John Doe*, that he is a resident of the county of *Bergen* and is a suitable and responsible person to be appointed special guardian of the said infant to sell the said lands.

And I do further report that the persons proposed as his sureties, viz: *Amos Springall* and *James Kirby*, reside in the said county of *Bergen*, and are each of them, in property and estate, sufficient sureties under the rules of this court.

And I do further report that the said *John Doe* is of the age of *ten* years; that the value of the said premises, according to the evidence before me, and which is hereto annexed, is the sum of *seven thousand* dollars, and that the said guardian should give bond to said infant in the sum of *fourteen thousand* dollars, with the said *Amos Springall* and *James Kirby* as sureties.

And I do further report that it should be left to the sound discretion of the said guardian whether the said lands should be sold at public or private sale; but that the same should not be sold below the sum of *six thousand* dollars, for the interest of the infant in the same.

Respectfully submitted, this *fourteenth* day of *August*, eighteen hundred and *ninety-nine*.

Josiah Crosby, Special Master.

8. On Book Account.[1]

a. In General.

1. Requisites of Report, Generally.— See *supra*, note 1, p. 956.

Report must be confined to matters arising under the pleadings. Kendall *v.* Hackworth, 66 Tex. 499; Barkley *v.* Tarrant County, 53 Tex. 251.

Method Adopted in Computing Interest. — An auditor need not report the

Form No. 17412.[1]

(2 Rev. Swift's Dig. 712.)

John Doe vs. *Richard Roe.* } *New Haven* County, *Superior* Court.

To the Honorable *Superior* Court.

We, the subscribers, having been appointed at the term of said court, held on the *fourth Tuesday* of *September*, in the year of our Lord *nineteen hundred*, auditors in said action, respectfully report that, having taken the oath by law required, we met on the *tenth* day of *October* in the said year, when said parties were heard, and on consideration * we find that the defendant is indebted to the plaintiff, to balance book accounts, in the sum of *three hundred* dollars, and do award the same to him accordingly.

Dated at *New Haven* this *eleventh* day of *October*, 1900.

Samuel Ireland, *David H. Mudgett*, } Auditors.

Form No. 17413.[2]

method adopted by him in computing interest unless requested to do so. Bates *v.* Sabin, 64 Vt. 511.

Stating Law. — If, in the reference of an account, a dispute arises as to the law applicable to any particular point, and the auditor is not instructed by the court upon it, it is not improper for him to state what he supposes the law to be and his conclusion of fact, upon the hypothesis that his opinion of the law is correct. If correct, his findings of fact are conclusive if not excepted to, but if not correct, they should be disregarded by the court. Richie *v.* Levy, 69 Tex. 133.

Items of Account. — The report should contain a statement of the items of the respective accounts as well as the conclusions of the auditor in respect to the various matters embraced in them. Whitehead *v.* Perie, 15 Tex. 7; Cameron *v.* Decatur First Nat. Bank, 4 Tex. Civ. App. 309.

Reporting Evidence. — The evidence on which the conclusions of the auditor are founded need not be stated in the report. Richie *v.* Levy, 69 Tex. 133; Whitehead *v.* Perie, 15 Tex. 7.

Report in Alternative. — It is not a good reason for the suppression of the report of an auditor that he failed to find absolutely upon each of the matters of law and fact to which his report related. Where he states the facts found by him and the conclusion reached by him from such facts, and further recites that if this conclusion be incorrect then another consequence would result than that indicated in his finding, the report is sufficient, and the court, upon consideration of exceptions, may correct any improper finding of the auditor or adopt either of the alternative results suggested by the report, provided they are sustained by law. Hudson *v.* Hudson, 98 Ga. 147.

Precedent. — In Hubbard *v.* Dubois, 37 Vt. 94, is set out the following form of report:

"And now, to wit, at the term last aforesaid, come the said parties by their attorney, and also comes the said auditor and makes report as follows: The undersigned auditor reports that he notified the parties before him at, etc., * * * to audit their accounts as per rule and notice annexed; at which time and place he attended, and the said parties before him, in person and by counsel, — and the auditor finds that there is due from the defendants to the plaintiff, to balance accounts, the sum of $458.81.

J. Pierpoint, Auditor."

No objection was made to the report.

1. *Connecticut.* — Gen. Stat. (1888), §§ 1036, 1037.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 981.

2. *Vermont.* — Stat. (1894), §§ 1449, 1450.

See also list of statutes cited *supra*,

(Precedent in Stone *v.* Winslow, 7 Vt. 338.)[1]

[(*Title of court and cause as in Form No. 15329.*)
To the Honorable the *County* Court within and for the county of *Windsor*:][2]

The auditor, after being duly sworn, proceeded to examine and try the matters in issue in book between the parties, and reports the following facts: At the commencement of the accounts between the parties, it was agreed that interest should be cast upon the balance of the account at the end of each *ninety* days to the time of settlement. The item of interest, hereafter mentioned, was computed agreeably to said contract. At the justice trial, the plaintiff presented to the court his account, of which the within is a transcript. He also presented a transcript of the said account, which account, so presented, contained no item of interest, and did amount to $*97.80*. The plaintiff, at the same time, brought into court on a separate slip of paper, the item of interest amounting to $*6.10*, and declined presenting the same on the ground that said item added would increase the amount of his account to a sum without the jurisdiction of the justice. The defendant at the same time consented that said item might be presented and go in to make up said judgment, and requested of the plaintiff that the same might be done, saying that it was fair and right, at the same time saying that that should be the end of the said suit. The defendant, at the same time, wrote upon the back of said writ and signed the following agreement: — "I agree that I will not take any exception to the jurisdiction of the justice in this case on the ground of the plaintiff's account amounting to more than an hundred dollars on the debtor side, or on any other ground existing previous to the decision or judgment of court this day." The plaintiff then and previous to the rendition of the judgment by the justice added to the transcript of his said account the said item of interest, being $*6.10*, which said item went into and was made a part of the judgment rendered by the justice, (which judgment was about $*35*.) The said item of interest was entered on ledger by plaintiff after the trial before the justice, and on the trial before the auditor the said ledger stood footed on the debit side at $*103.90*. On the trial before the auditor the plaintiff presented the transcript of account without the item of interest, which transcript is endorsed, and did not insist in being allowed the said item of interest. The defendant's counsel objected to any proceeding on the part of the auditor, on the ground that the court had no jurisdiction of the subject matter of the suit; but the auditor overruled said objection on the ground that it was his duty to pre-

note 1, p. 916; and, generally, *supra*, note 1, p. 981.

1. The action in which this report was filed was commenced before a justice of the peace, but was appealed to the county court, where a judgment to account was rendered against the defendant and an auditor was appointed. To the acceptance of this report the defendant excepted, on the ground that the justice of the peace had no jurisdiction of the action. The judgment of the county court was affirmed.

2. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

sent the facts to the court. The auditor allows all the items in the plaintiff's account. — He also allows all the defendant's account enclosed, except the item marked No. *1*, which he allows at $*1*; also No. *2*, which he allows at $*2*; also No. *3*, which he allows at $*3.42*. He therefore finds due from the defendant to plaintiff to balance book accounts the sum of *thirty-six* dollars and *eighty* cents.

O. P. Chandler, Auditor.

b. Conditional Upon Proof of Agency.

Form No. 17414.[1]

(2 Rev. Swift's Dig. 712.)

(*Commencing as in Form No. 17412, and continuing down to* *) we do find that the plaintiff sold and delivered the articles charged in his account to one *Charles Hatch*, as the agent of the defendant. The only proof of the agency of the said *Charles Hatch* was a writing or power of attorney, signed by the defendant, of the form following, to wit: (*Here set out said writing or power of attorney*); which was objected to by the defendant as not constituting the said *Charles Hatch* his agent for the purchase of said articles. If this court shall be of opinion that said writing constituted the said *Charles Hatch* the agent of the defendant to purchase said articles, then we find that the defendant is indebted to the plaintiff, to balance book accounts, *three hundred* dollars; otherwise we find that the defendant owes the plaintiff nothing to balance book accounts.

Dated at *New Haven* this *eleventh* day of *October*, 1900.

Samuel Ireland,
David H. Mudgett, } Auditors.

VII. Notice of Filing Report.[2]

Form No. 17415.[3]

(*Title of court and cause as in Form No. 17390.*)

To *Oliver Ellsworth*, Esq., Attorney for Defendant:

Sir: You will please take notice that *Andrew Jackson*, Esq., the referee to whom it was referred to state and make the account between the above named parties and report the same, on the *twentieth* day of *September*, 1899, filed his report with the clerk of the *Hudson* County *Circuit* Court.

Very truly yours,

Jeremiah Mason, Attorney for Plaintiff.

Dated this *twenty-third* day of *September*, 1899.

VIII. Objections to Report.[4]

1. *Connecticut.* — Gen. Stat. (1888), §§ 1036, 1037.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 1, p. 981.

2. **For the formal parts** of a notice in a particular jurisdiction see the title Notices, vol. 13, p. 212.

3. *New Jersey.* — Gen. Stat. (1895), p. 2565, § 179 *et seq.*

See also list of statutes cited *supra*, note 1, p. 916.

4. **Necessity of Objections.** — If a party is dissatisfied with the report of the master, he should file objections to it before it is returned into court. En-

Form No. 17416.[1]

(*Title of court and cause as in Form No. 15245.*)

Objections taken by the said defendant *Richard Roe* to the report of *Josiah Crosby*, master in chancery, to whom the said case stands referred, bearing date the *fifteenth* day of *November*, 1897.

First objection: For that the said master has (*stating grounds of objection*).

Second objection: (*Continuing as in case of first objection*).

In all which particulars said defendant *Richard Roe* objects to the said master's said report and submits that the same ought to be changed to conform to said objections.

Jeremiah Mason, Solicitor for Defendant.

IX. EXCEPTIONS OR REMONSTRANCE TO REPORT.

1. The Exception or Remonstrance.[2]

nesser *v.* Hudek, 169 Ill. 494; Springer *v.* Kroeschell, 161 Ill. 358; Brockman *v.* Aulger, 12 Ill. 277; McClay *v.* Norris, 9 Ill. 369; Ricardi Apartment House Co. *v.* Beaudet, 64 Ill. App. 261; Coffeen *v.* Thomas, 65 Ill. App. 117; Waska *v.* Klaisner, 43 Ill. App. 611; Mechanics, etc., Sav., etc., Assoc. *v.* Farmington Sav. Bank, 41 Ill. App. 32; Darby *v.* Rouse, 75 Md. 26; Cobb *v.* Fogg, 166 Mass. 466; Copeland *v.* Crane, 9 Pick. (Mass.) 73; Newcomb *v.* White, 5 N. Mex. 435; Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495; Byington *v.* Wood, 1 Paige (N. Y.) 145; Story *v.* Livingston, 13 Pet. (U. S.) 359; Gordon *v.* Lewis, 2 Sumn. (U. S.) 143; Gaines *v.* New Orleans, 1 Woods (U. S.) 104.

Objections must be in writing. Bucksport *v.* Buck, 89 Me. 320.

Grounds of objection must be pointed out with reasonable definiteness. Springer *v.* Kroeschell, 161 Ill. 358; Farwell *v.* Huling, 132 Ill. 112; Waska *v.* Klaisner, 43 Ill. App. 611.

In *Maine*, by rule of court, the grounds of objection must be specifically set forth. Bucksport *v.* Buck, 89 Me. 320.

Insufficient Objections. — An objection to a master's report that "said report and finding is contrary to the evidence" is too general to raise any question. Cook *v.* Meyers, 54 Ill. App. 590. And so is an objection that "the findings and each of them are not warranted by the evidence." Waska *v.* Klaisner, 43 Ill. App. 611.

1. See, generally, *supra*, note 4, p. 984.

2. **Nature of Exceptions.** — Exceptions to the reports of masters partake of the nature of special demurrers. Haller *v.* Clark, 21 D. C. 128; Hayes *v.* Hammond, 162 Ill. 133; Wilkes *v.* Rogers, 6 Johns. (N. Y.) 566. Robinson *v.* Allen, 85 Va. 721; Cralle *v.* Cralle, 84 Va. 198; Simmons *v.* Simmons, 33 Gratt. (Va.) 451; Stewart *v.* Stewart, 40 W. Va. 65; Crislip *v.* Cain, 19 W. Va. 438; Chapman *v.* Pittsburg, etc., R. Co., 18 W. Va. 184.

But see *contra* Foster *v.* Goddard, 1 Black (U. S.) 506.

Requisites of Exceptions, Generally. — All that is necessary is that the exception should distinctly point out the findings and conclusions of the master which it seeks to reverse. Having done so, it brings up for examination all questions of fact and law arising from the report of the master relative to that subject. Hayes *v.* Hammond, 162 Ill. 133; Central Trust Co. *v.* Wabash, etc., R. Co., 57 Fed. Rep. 441; Foster *v.* Goddard, 1 Black (U. S.) 506.

Confined to Matters Apparent on Face of Report. — Exceptions must be made to matters apparent upon the face of the report, or in the accompanying documents and proofs laid before the court. Dexter *v.* Arnold, 2 Sumn. (U. S.) 108.

Must Conform to Objections. — Exceptions filed to a master's report after it is returned into court should correspond to the objections made before the master, and be confined to such objections as were allowed or overruled by him. Springer *v.* Kroeschell, 161 Ill. 358; Cook *v.* Meyers, 54 Ill. App. 590; Mechanics, etc., Sav., etc., Assoc. *v.* Farmington Sav. Bank, 41 Ill. App.

a. In General.

32; Huling *v.* Farwell, 33 Ill. App. 238; Copeland *v.* Crane, 9 Pick. (Mass.) 73; Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495; Byington *v.* Wood, 1 Paige (N. Y.) 145.

Must Specify Grounds of Exception — *Generally.* — Exceptions must specify with reasonable certainty the particular grounds of objection made to master's report. York *v.* Tyler, 21 D. C. 265; Haller *v.* Clark, 21 D. C. 128; Richardson *v.* Van Auken, 5 App. Cas. (D. C.) 209; Hayes *v.* Hammond, 162 Ill. 133; Moffett *v.* Hanner, 154 Ill. 649; Farwell *v.* Huling, 132 Ill. 112; Comstock-Castle Stove Co. *v.* Baldwin, 63 Ill. App. 255; Waska *v.* Klaisner, 43 Ill. App. 611; White *v.* Hampton, 10 Iowa 238; Dallas *v.* Brown, 16 Mo. App. 493; Singer Mfg. Co. *v.* Givens, 35 Mo. App. 602; Newcomb *v.* White, 5 N. Mex. 435; Wilkes *v.* Rogers, 6 Johns. (N. Y.) 566; Tilley *v.* Bivens, 110 N. Car. 343; Robinett *v.* Robinett, 92 Va. 124; Robinson *v.* Allen, 85 Va. 721; Cralle *v.* Cralle, 84 Va. 198; Nickels *v.* Kane, 82 Va. 309; Simmons *v.* Simmons, 33 Gratt. (Va.) 451; Crockett *v.* Sexton, 29 Gratt. (Va.) 46; Stewart *v.* Stewart, 40 W. Va. 65; Kester *v.* Lyon, 40 W. Va. 161; Crislip *v.* Cain, 19 W. Va. 438; Story *v.* Livingston, 13 Pet. (U. S.) 359; Harding *v.* Handy, 11 Wheat. (U. S.) 103; Dexter *v.* Arnold, 2 Sumn. (U. S.) 108; Greene *v.* Bishop, 1 Cliff. (U. S.) 186. Stating article by article those parts of the report which are intended to be excepted to. Huling *v.* Farwell, 33 Ill. App. 238; Story *v.* Livingston, 13 Pet. (U. S.) 359.

Exceptions which show only the dissatisfaction of the exceptor with particular findings of the master, but give the court no clue to the data upon which the master acted, are insufficient. Huling *v.* Farwell, 33 Ill. App. 238.

Exceptions that the finding of the referee is against the law and against the evidence are too general. They must inform the court in what respect the finding is against the law or the evidence. Dallas *v.* Brown, 60 Mo. App. 493; Singer Mfg. Co. *v.* Givens, 35 Mo. App. 602.

In Matters of Account. — Where matters of account are involved, the exceptions must be specific and not general. Moffett *v.* Hanner, 154 Ill. 649. And must specify the items of the account that are objected to. Mahone *v.* Williams, 39 Ala. 202; Newcomb *v.* White, 5 N. Mex. 435; State *v.* Foy, 71 N. Car. 527.

Must Not be Argumentative. — Exceptions must not be prolix or argumentative. Hayes *v.* Hammond, 162 Ill. 133.

Pointing Out Evidence. — Exceptions to the report of a master in chancery are to be regarded so far only as they are supported by the special statements of the master or by evidence brought before the court by a reference to the particular testimony on which the exceptor relies. Mahone *v.* Williams, 39 Ala. 202; Friedman *v.* Schoengen, 59 Ill. App. 376; United Shirt, etc., Co. *v.* Pitzile, 66 Ill. App. 475; Brown *v.* McKay, 51 Ill. App. 295; Miller *v.* Whittier, 36 Me. 577; Jones *v.* Lamar, 39 Fed. Rep. 585; Jaffrey *v.* Brown, 29 Fed. Rep. 476; Harding *v.* Handy, 11 Wheat. (U. S.) 103.

In *Alabama*, it is provided by Ch. Ct. Rule No. 94 that "in filing exceptions to the report of the register or any part thereof, it shall be the duty of the solicitor filing the same to note at the foot of each exception to the conclusions of facts drawn by the register, the evidence or parts of evidence he relies on in support of the exceptions, with such designation and marks of reference as to direct the attention of the court to the same, and if the opposing solicitor desires to do so, he can note in writing such other parts of the evidence as he may deem material to the inquiry." It is not a compliance with this rule to refer to the entire testimony introduced by the party excepting, covering the whole field of litigation and embracing matters not relevant to the exception. Warren *v.* Lawson, 117 Ala. 339.

In Hayes *v.* Hammond, 162 Ill. 133, the court said: "In the absence of any statute the master did not report the evidence to the court, and it was necessary for the parties to apply to him for certified copies of such evidence as they might require relating to matters excepted to; but by our statute the whole of the evidence is reported to the court, and the parties may select from it such portions as are relevant to the exceptions and present them to the court. It seems to be supposed that the chancellor is required to do this work, and will be compelled to search through the evidence to find testimony which will sustain the exceptions, unless it is

pointed out in the exceptions themselves. But this is not the duty of the chancellor, nor is it the practice. As the hearing is only upon the exceptions, the chancellor is not required to hear any evidence except such as relates to the matters excepted to, and may, by any proper rule, effect that object, such as by requiring the evidence as to such matters to be abstracted or otherwise presented in convenient and proper form; but it is not the practice in this state to recite the evidence in the exceptions. The rule is the same as stated by the Supreme Court of the United States in Foster *v.* Goddard, 1 Black (U. S.) 506, as follows: 'All that is necessary is that the exception should distinctly point out the finding and conclusion of the master which it seeks to reverse. Having done so, it brings up for examination all questions of fact and of law arising upon the report of the master on that subject.'"

But it was held in Jones *v.* Lamar, 39 Fed. Rep. 585, that the statement in Foster *v.* Goddard, above quoted, was directed only to the question raised by objection of counsel; that the exceptions were "not so full and specific that the court can consider them." The court said, "to be sufficiently explicit to raise any issue of law is one thing; to point out the facts relied upon to sustain an exception to a finding upon the facts is quite a different thing."

Sufficient Exceptions. — In Dawson *v.* Dawson, 110 Ill. 279, the second and third exceptions to the master's report, which were sustained, were as follows:

"Second exception. — For that the said master has evidently made said report taking as a basis for the same the evidence produced before him as to the income of the said defendant after the *third* day of *November*, 18*82*, such testimony having been ruled out by said court, as will more fully appear from the said testimony marked entitled *Dawson* v. *Dawson*, testimony before the master, page *143*, record.

Third exception. — For that the said master has incorrectly and erroneously stated in the said report the net income of the said defendant for the year 18*82*, and prior to the said *third* day of *November*, 18*82*, in figures far exceeding the actual sum of net income to the said defendant for the said year of 18*82*, and prior to the said *third* day of *November*, 18*82*, as will more fully appear from the said testimony."

In Robinett *v.* Robinett, 92 Va. 124, are set out the following exceptions filed to the report of a commissioner of accounts settled by him:

"1st. Though called a report, it is but an argument, not sustained by facts, law or reason.

2d. The report and settlement is not made upon proper or legal principle, if the data on which its assumptions are based really existed as assumed.

3d. There is absolutely no testimony whatever, verbal or written, in the case, that warrants the commissioner in any way in disturbing the *ex parte* settled accounts of the administrator, *James Robinett*; and his assuming to do so in this case, in violation of law, without evidence, after the long lapse of time and death of Administrator *James Robinett*, deceased, makes his conclusions simply monstrous.

4th. The commissioner, instead of taking the *ex parte* settlements as *prima facie* correct, and valid and binding, as the law and chancery practice prescribes, counts the said settled accounts as *prima facie* wrong, and proceeds to take up each voucher, and item by item to pass judgment upon them, without any testimony whatever to support his conclusion, and reject such of said vouchers and items as seem to him to be wrong. This is in violation of all well-settled principles governing such settlements.

5th. The report is wrong and contrary to law in every particular. It is excepted to as a whole, and to every part of it. The testimony in the case, instead of impeaching, fully sustains the *ex parte* settlements in every particular."

A decree overruling these exceptions was reversed, and the exceptions were held sufficient.

In Central Trust Co. *v.* Wabash, etc., R. Co., 57 Fed. Rep. 441, the exceptions filed were as follows:

"(1) The master has not correctly recited in his report the facts established by the evidence he reports, wherein he says that 'during *36* years since the building of the embankment and culvert in question the waters of Fall branch have been backed up on *two* occasions.' The evidence reported by him shows, on the contrary, that it was backed up very many times more than '*two* occasions' during such period, and this without any conflict in the evidence. (2) For that what the

Form No. 17417.[1]

(Precedent in Perry *v.* Young, 105 N. Car. 465)[2]

[(*Venue and title of court and cause as in Form No. 5927.*)][3]

Plaintiff's Exceptions.

The plaintiff excepts to the referee's report, filed herein at this term, on the following grounds:

1. The referee erred in his first conclusion of law. He ought to have held that the transaction there mentioned did not constitute a mortgage. The title to the horse passed to plaintiff, for whom *Bullock* then held him as bailee.

2. The referee erred in his second conclusion of law.

[Dated *August 17th*, 1889.

Jeremiah Mason, Plaintiff's Attorney.][4]

b. Allowing Defendant Commissions as Executor.

master terms in said report 'the floods of 1886 and 1882,' and which he reports resulted from unusual, extraordinary, and unprecedented rainfalls, is not sustained by, and is contrary to, the evidence which he reports. Said rains were not unprecedented, as said evidence shows. (3) For that the finding upon the foregoing ground that the receiver is not liable for the damages, to wit, $1,700, which he correctly finds *Hanes & Porch* sustained by the flooding of their mill on said *two* occasions, is contrary to equity, and contrary to law and the evidence. (4) For that the master very erroneously finds by way of recital at the conclusion of said report that *Hanes & Porch* located their mill *30* years after the embankment and culvert were built, with full knowledge, or abundant opportunities for knowing, the extent of country drained, and the effect of ordinarily heavy rains. It shows, says said report, that they supposed them, as the builders of the railway supposed *30* years before, that the culvert was sufficient. (5) They except to the finding of the master that the flood which occasioned the injuries to petitioners was extraordinary, and the act of God. (6) They except to the conclusion that the injuries to petitioners were caused by the act of God. (7) They except to the finding that the petitioners were guilty of contributory negligence. (8) They except to the conclusion that the claims of petitioners be disallowed."

The court held that while the exceptions were not artistically drawn they were sufficient in form and substance to present for review the findings of fact and conclusions of law contained in the master's report.

Insufficient Exceptions. — In Story *v.* Livingston, 13 Pet. (U. S.) 359, some of the exceptions were:

"Second. The master has erred in not allowing to the defendant $1,000 with interest, paid to *Morse*, or some part thereof.

Fourth. The master in making his estimates and calculations has not pursued the mandate of the court.

Fifth. It appears from the master's report, that the stores were rented from *November* to *November*; and he erred in assuming the *first* of *April* as the period of payment of annual rent.

Sixth. A reasonable allowance should have been made to *Story* for the cost and risk of collecting rents.

Seventh. The master erred in all his charges against the defendant; and he failed to allow the defendant his proper credits."

All of these exceptions were held to be irregularly taken, because too general, indicating dissatisfaction with the entire report, but not showing specifically wherein the defendant had suffered any wrong.

1. *North Carolina.* — Clark's Code Civ. Proc. (1900), § 422.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 2, p. 985.

2. The overruling of the exceptions in this case was held to be erroneous.

3. The matter to be supplied within [ ] will not be found in the reported case.

4. The matter enclosed by [ ] will not be found in the reported case.

Form No. 17418.[1]

In Chancery of *New Jersey.*

Between
Ann Freeman and *Jane Smith*, complainants,
and
W. Fairlie, defendant.

Exceptions taken by the said complainants to the general report of *Josiah Crosby*, one of the masters of the Court *of Chancery* of the state of *New Jersey*, to whom the said cause stands referred, made in pursuance of the decree made on the hearing of the said cause bearing date the *third* day of *February*, 1816.

1st Exception. — For that the said master hath in and by his said general report, and the *second* schedule to which it refers, allowed to the said defendant, by way of discharge, various sums of money, amounting together to *five hundred* dollars, or thereabouts, by way of commission, at the rate of *five* per cent. on principal and interest, moneys received by the said defendant on account of the personal estate of his testatrix in the pleadings named; whereas, the complainants submit, the said sums of money by way of commission, or any of them, ought not to have been allowed to the said defendant in respect of such his receipts, he the said defendant being an executor, and his testatrix having, by a codicil to her will, desired her executors would accept each *one hundred* dollars, as some small acknowledgment for the trouble they would necessarily have in the execution of the trusts reposed in them.

2d Exception. — For that the said master hath in and by his said general report, and the *second* schedule to which it refers, allowed to the said defendant, by way of discharge, various other sums of money, amounting together to *two hundred* dollars, by way of commissions at the rate of *five* per cent. on sums annually credited by the said defendant in his account as executor for interest from time to time in his hands, and with which interest he is charged in the *first* schedule to the said report; whereas, the complainants submit, the said defendant is not entitled to and ought not to have been allowed such last-mentioned commission for the following (among other) reasons: — First, Because the sums credited for interest were not in fact received by the said defendant and invested as part of the personal estate of the said testatrix, but were (as appears by the *two* examinations of the said defendant), together with the aforesaid principal moneys, mixed with the funds of the different mercantile houses in which the said defendant was and is a partner and used in their business of merchants; and secondly, Because by virtue of the said decree the said master is directed to inquire what interest and profit has been made by the said defendant of the personal estate of the said testatrix, and what balance he had from time to time in his hands belonging thereto, and that therefore the complainants are advised the said master is not at liberty to make to the said defendant

1. *New Jersey.* — Gen. Stat. (1895), p. 397, § 128 *et seq.*
See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 2, p. 985.
This form of exceptions to a master's

any allowance or abatement from the interest admitted by the said defendant to have been made by him, or with which he has submitted to be charged.

Wherefore the said *Ann Freeman* and *Jane Smith* except to the said master's report, and humbly appeal therefrom to the judgment of this honorable court.

Jeremiah Mason, Solicitor for Complainants.

c. Holding Answer Insufficient.

(1) In General.

Form No. 17419.[1]

In Chancery of *New Jersey*.

Between
John Doe, complainant,
and
Richard Roe, defendant.

An exception taken by the said defendant *Richard Roe* to the report of *Josiah Crosby*, one of the masters of the Court *of Chancery* of the state of *New Jersey*, to whom the said cause stands referred, bearing date the *fifteenth* day of *November*, 1897.

For that the said master has in and by his said report certified that the answer of the said defendant *Richard Roe* is insufficient in all the points excepted unto; whereas the said master ought to have disallowed all and every the exceptions taken by the said complainant to the said answer of the said *Richard Roe*, and to have reported that the said answer is sufficient in all the points excepted unto by the said complainant.

In all which particulars said defendant *Richard Roe* excepts to the said master's said report.

Jeremiah Mason, Solicitor for Defendant.

(2) After Second Answer Put In.

Form No. 17420.[2]

(*Title of court and cause as in Form No. 17419.*)

Exceptions taken by the said defendant *Richard Roe* to the report of *Josiah Crosby*, Esq., one of the masters of this honorable court made in this cause and dated the *fourteenth* day of *March*, 1897.

1st Exception. — For that the said master hath in and by his said

report is substantially the form set out in Curt. Eq. Prec. 258.

1. *New Jersey*. — Gen. Stat. (1895), p. 378, § 34 *et seq*.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 2, p. 985.

This is substantially the form set out in Curt. Eq. Prec. 262.

2. *New Jersey*. — Gen. Stat. (1895), p. 378, § 34 *et seq*.

See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 2, p. 985.

This is substantially the form of exceptions set out in Curt. Eq. Prec. 263.

report certified that the said defendant's first and second answers put in to the said complainant's bill are insufficient as to part of the *tenth* exception taken by the said complainant to the said defendant's said answer, and the said master hath thereby certified that the said defendant has not answered and set forth according to the best of his knowledge, remembrance, information and belief, for whose benefit and whose account the trade in the pleadings in this cause and in the said report mentioned hath been carried on from time to time since the same ceased to be carried on for the benefit or on account of the persons interested in the estate of *Oliver Smith*, or the income thereof; whereas the said master ought not to have so certified.

2d Exception. — For that the said master hath in and by his said report certified that the said defendant's said answer is insufficient in the *twelfth* and *thirteenth* exceptions throughout, which the said master ought not to have done.

3d Exception. — For that the said master in and by his said report hath certified that the said defendant's said answer is insufficient in part of the *seventeenth* exception taken thereto by the said complainant; whereas the said master ought not to have so certified.

4th Exception. — For that the said master hath in and by his said report certified that the said defendant's said answer is insufficient as to the *nineteenth*, *twentieth*, *twenty-first*, *twenty-second*, *twenty-third*, *twenty-seventh*, *twenty-eighth* and *twenty-ninth* exceptions throughout; whereas the said master ought not to have so certified.

In all which said particulars the said defendant *Richard Roe* excepts to the said master's said report, and humbly appeals therefrom to the judgment of this honorable court.

Jeremiah Mason, Solicitor for Defendant.

d. In Action for an Account.

Form No. 17421.[1]

(2 Rev. Swift's Dig. 713.)

John Doe against *Richard Roe.* } *New Haven* County, *Superior* Court.

The defendant (or *plaintiff*) remonstrates against the acceptance of the report of the auditors in this case made, for the following reasons, to wit: —

1. On the trial of said case the plaintiff offered evidence of the sale of certain goods, constituting the charge in his account, under date of *January tenth, 1900*, which he admitted were sold, if sold at all, to the defendant and one *William Smith*, who, the plaintiff admitted, is still living, and not a party to this suit. To this evidence the defendant objected, and claimed to said auditors that said charge could not by law be allowed. But the auditors allowed the same.

1. *Connecticut.* — Gen. Stat. (1888), § 1035 *et seq.* See also list of statutes cited *supra*, note 1, p. 916; and, generally, *supra*, note 2, p. 985.

2. The auditors found the fact proved that, at the time when the articles constituting the first charge in the plaintiff's account were purchased by and delivered to the defendant, the defendant was a minor, under the age of twenty-one years, and that the said articles were not necessaries, and that the defendant never promised to pay for them after he arrived at full age. The defendant claimed that said charge could not therefore be allowed against the defendant; but the auditors allowed the charge, which the defendant is ready to verify; wherefore he prays that said report be not accepted.

Jeremiah Mason, Attorney for Defendant.

2. Reply to Remonstrance.

Form No. 17422.[1]

(2 Rev. Swift's Dig. 713.)

John Doe against *Richard Roe.* } *New Haven* County, *Superior* Court.

The plaintiff replies and says that the *first* reason assigned in said remonstrance is insufficient in law, and that the *second* is not true (or *that said remonstrance is not true, and, if true, is insufficient*).

Jeremiah Mason, Attorney for Plaintiff.

X. Motion to Set Aside Report.[2]

Form No. 17423.

(Precedent in Simmons *v.* Jacobs, 52 Me. 150.)[3]

[(*Venue, title of court and cause as in Form No. 15246.*)][4]

And now, on the *tenth* day of the above term, the master's report having been presented to the Court, the following defendants, viz: — *Joseph W. Jacobs, William Medcalf, William H. Medcalf, Cyrus Patterson, Edmund B. Hinckley, Mary T. O'Brien, Stephen B. Starrett, John Lermond* and *John A. Lermond*, come and move this honorable Court that said report may be set aside, and that further proceeding against said defendants may be stayed until the further order of the Court, for the following reasons, viz.: — (*Here were set out the reasons*).

[*Jeremiah Mason*, Attorney for Defendants.][5]

XI. Notice of Motion to Confirm Report.[6]

1. *Connecticut.* — Gen. Stat. (1888), § 1035 *et seq.*

See also list of statutes cited *supra*, note 1, p. 916.

2. **For the formal parts** of a motion in a particular jurisdiction see the title Motions, vol. 12, p. 938.

3. Only one of the reasons for setting aside the report was sustained, but the form of the report was not objected to.

4. The matter to be supplied within [ ] will not be found in the reported case.

5. The matter enclosed by [ ] will not be found in the reported case.

6. **For the formal parts** of a notice of motion in a particular jurisdiction see the title Motions, vol. 12, p. 938.

Form No. 17424.[1]

Supreme Court.

The People of the State of New York
vs.
The Bushwick Chemical Works, and others.
In the Matter of the Receivership of
William Brookfield.

Take notice that the report of *John E. Ward*, Esq., the referee in the above entitled action and proceeding, a copy whereof is herewith served upon you, was filed in the office of the clerk of the *city and* county of *New York* on the *twelfth* day of *June*, 1891; and that all exceptions filed thereto will be brought on for hearing and a motion made to confirm said report, and that said *William Brookfield* be discharged as such receiver and the recognizance entered into by him and his sureties should be vacated and the clerk directed to cancel the same, at a *Special* Term of this court to be held at the *New Court House* in the city of *New York* on the *twenty-ninth* day of *June*, 1891, at *eleven* o'clock in the *fore*noon of that day, or as soon thereafter as counsel can be heard.

And further take notice, that on the said report and the testimony taken and proceedings had upon the reference wherein said report is made, and on the referee's opinion herein, and on the affidavit of *William Brookfield*, verified *June 20th*, 1891, and upon all the pleadings, papers and proceedings herein, a motion will be made at the same time and place, that the *Merchants National Bank of Burlington, Vermont*, and the *Second National Bank of Mauch Chunk, Pennsylvania*, be charged with the costs of said reference and be directed to pay the same to said *William Brookfield*, and for such other and further relief in the premises as to the court shall seem proper.

Dated *June 20*, 1891.

Charles F. Maclean,
Attorney for *Brookfield*, Receiver.

To *Charles F. Tabor*, Esq.,
Attorney-General.
To *Bergen & Dykman*, Esqs.,
Attorneys for Defendants.
To *C. Bainbridge Smith*,
Attorney for *Merchants Nat. Bk.*

XII. ORDER DENYING MOTION TO CONFIRM REPORT.[2]

1. This is the form of notice of motion in the case of People *v.* Bushwick Chemical Works, 133 N. Y. 694, and is copied from the records. An order of the special term overruling exceptions to the referee's report was affirmed in the general term and in the court of appeals.

2. **For the formal parts** of an order in a particular jurisdiction consult the title ORDERS, vol. 13, p. 356.

Court may Find Facts on Sustaining Exceptions. — It has been held in accounting cases that although the general rule is that when exceptions to the master's report are sustained the court should by decree settle the matters involved and again refer the cause to the master to state the account as determined by the court, yet where the exceptions sustained relate to but a few items and the account to be restated is simple, and the facts before the court are sufficient to enable it to dispose of

Form No. 17425.[1]

At a *Special* Term of the *Supreme* Court, held at the Court House, in the *city and* county of *New York*, on the *17th* day of *November*, 1885.

Present — Hon. *George P. Andrews*, Justice.

The People of the State of New York,
vs.
The Knickerbocker Life Insurance Company,
Claim of *Jane Wright*.

Policy No. *55,333*.
Claim No. *507*.

A motion coming on at this time to confirm the report of *Leroy B. Crane*, referee herein, upon the above claim, dated *November 9th*, 1885, and the receiver having this day filed exceptions to said report,

Now, on reading and filing the referee's report, the exceptions of the receiver and the stenographer's minutes of the testimony taken upon the trial of this claim, and after hearing Mr. *Freeman*, attorney for the claimant, for the motion to confirm the report, and Mr. *Hobbs* for the receiver and opposed thereto,

It is ordered, that the motion to confirm the said report of the referee be and the same is hereby denied, and that the exceptions so filed by the receiver are hereby sustained; and the said report, so far as thus excepted to, is hereby set aside and the claim herein is dismissed.

(*Signature as in Form No. 14696.*)

XIII. JUDGMENT OR DECREE CONFIRMING REPORT.[2]

the cause without subjecting the parties to further expense, it may properly do so. McHenry *v.* Moore, 5 Cal. 90; Smyth *v.* McKernan, 41 Ill. App. 132 (*citing* Matter of Hemiup, 3 Paige (N. Y.) 305). See to the same effect Patterson *v.* Kellogg, 53 Conn. 38; School Dist. No. One *v.* Bishop, 46 Neb. 850.

Precedent. — In Missouri Pac. R. Co. *v.* Texas Pac. R. Co., 41 Fed. Rep. 311, is set out the following order: "This cause came on to be further heard upon the intervention of *Owen Sullivan*, and the master's report thereon, and exceptions thereto, and was argued, whereupon it is ordered, adjudged, and decreed, that the exceptions to the master's report be, and the same are hereby, sustained. It is further ordered that the intervenor do have and recover from the receiver, in this cause, the sum of $5,000, with 8 per cent. interest per annum thereon from the *4th* day of *May*, 1887, and the costs of this intervention, and that the *Texas & Pacific Railroad* be condemned to pay the said judgment under the order of this court rendered on *October 26*, 1888, under which the said company retook possession of its railway property." No objection was made to this order.

1. This form is copied from the records in the case of People *v.* Knickerbocker L. Ins. Co., 106 N. Y. 619. The order was affirmed on appeal.

See, generally, *supra*, note 2, p. 993.

2. Order Instead of Judgment, When Proper. — In the case of a special proceeding, it is not the correct practice to enter a formal judgment on the referee's report. The proper termination is an order; but where a judgment is entered granting the same relief as would have been granted by an order the error is immaterial and should be disregarded. Auerbach *v.* Marks, 94 Wis. 668.

Requisites of Judgment, Decree or Order, Generally. — For the formal parts of a judgment, decree or order in a particular jurisdiction see the titles JUDGMENTS AND DECREES, vol. 10, p. 645; ORDERS, vol. 13, p. 356.

Must Conform to Report. — Judgment must conform to report of referee. Joshua Hendy Mach. Works *v.* Pacific Cable Constr. Co., 99 Cal. 421; Piper *v.* Johnston, 12 Minn. 60; Howland *v.* Howland, 20 Hun (N. Y.) 472; Ingersoll *v.* Bostwick, 22 N. Y. 425; Coddington *v.* Bowen, (Supreme Ct. Gen. T.) 6 N. Y. Supp. 355; Stafford *v.* Van

1. In General.

Zandt, 2 Johns. Cas. (N. Y.) 66. But in Piper *v.* Johnston, 12 Minn. 60, it was held that strict conformity of the judgment with the legal conclusions of the referee is not essential, if it is supported by the facts found by him.

Finding of Facts Reported. — In Lavette *v.* Sage, 29 Conn. 577, it was held that the acceptance of the report is an adoption of the findings of the committee and a sufficient finding of the facts reported.

Repeated Findings.—Where the statute declares the referee's findings to be those of the court, they need not be reiterated in the judgment. Currie *v.* Cowles, 7 Robt. (N. Y.) 3.

Separate Findings. — Where a decree confirms the separate findings of fact and law by a referee, the decree need not make separate findings. Coln *v.* Coln, 24 S. Car. 596. Although such a course is regular. Wolfe *v.* Bradberry, 140 Ill. 578. In this case the court said: "We know of no rule of practice which forbids the court to make additional findings upon the coming in of the master's report, besides those set forth in the report, if the evidence accompanying the report warrants and supports such additional findings."

Conclusions by Court — *Generally.* —It has been held that in the case of an auditor's report the judge is not obliged to accept the conclusions of the auditor upon the facts stated in the report, but may consider all of the facts in their relation to one another and draw any proper inferences from them and reach any conclusion that they will warrant. Livingston *v.* Hammond, 162 Mass. 375 (*citing* Hamilton *v.* Boston Port, etc., Aid Soc., 126 Mass. 407; Emerson *v.* Patch, 129 Mass. 299).

Wrong Conclusions Reported. — Under an order of reference in a partition suit "to inquire and report," if the referee has found the facts correctly, but has found wrong conclusions of law, it is proper for the court to draw legal conclusions from the facts found without sending the report back to the referee, and to direct judgment accordingly. Freiot *v.* La Fountaine, (Supreme Ct. Spec. T.) 16 Misc. (N. Y.) 153; Austin *v.* Ahearne, 61 N. Y. 6.

Formally Overruling Exceptions. — Although exceptions are not formally overruled or allowed, yet if it is plain from the decree that they were all disposed of, some being allowed and others disallowed, the decree is sufficient. Oliver *v.* Piatt, 3 How. (U. S.) 333.

Overruling Exceptions Confirms Report. — The overruling of exceptions to the report has the effect of confirming the same. White *v.* Hampton, 10 Iowa 238; Pomeroy *v.* Benton, 77 Mo. 64.

Costs. — A judgment entered upon the report of a referee should contain the costs awarded in the action. Mason *v.* Corbin, 29 N. Y. App. Div. 602.

Must be Entered by Clerk. — Under statutes, in several states, providing that a report of a referee upon the whole issue shall stand as the decision of the court, it is held to be the duty of the clerk to enter judgment as of course. Peabody *v.* Phelps, 9 Cal. 213; Sloan *v.* Smith, 3 Cal. 406; Terpening *v.* Holton, 9 Colo. 306; Matter of Baldwin, 87 Hun (N. Y.) 372; McCready *v.* Farmers' L. & T. Co., 79 Hun (N. Y.) 241; McMahon *v.* Allen, 27 Barb. (N. Y.) 335; Bouton *v.* Bouton, (Supreme Ct. Gen. T.) 42 How. Pr. (N. Y.) 11; Griffing *v.* State, (Supreme Ct. Spec. T.) 5 How. Pr. (N. Y.) 205; Currie *v.* Cowles, 7 Robt. (N. Y.) 3; Crook *v.* Crook, 14 Daly (N. Y.) 298; Heinemann *v.* Waterbury, 5 Bosw. (N. Y.) 686.

Precedents.—The following judgment is copied from the records in Gerity *v.* Seeger, etc., Co., 163 N. Y. 119:

"*Supreme* Court — *Chemung* County.

William S. Gerity against *The Seeger & Guernsey Company, Charles L. Seeger* and *George A. Dounce.*

This action has been referred upon the oral consent of all parties given in open court and duly entered in the minutes, to *Roswell R. Moss*, Esq., to hear and determine the whole issues herein, and after trial had on due notice to all parties, said referee having on the *23d* day of *November*, 1896, duly made his report herein, whereby he decides that the defendants are indebted to the plaintiff in the sum of *four thousand six hundred thirty-four* dollars and *seventy-two* cents ($*4,634.72*) and directing judgment as hereinafter stated; and said report having been duly filed and plaintiff's costs having been duly adjusted at *one hundred seventy-two* dollars and *forty-eight* cents ($*172.48*).

Now, on motion of *Reynolds, Stand-*

Form No. 17426.[1]

John Doe, complainant, against *Richard Roe*, defendant. } In *Chancery*, *Fifth* District, *Northwestern* Chancery Division, at *Birmingham*, *Alabama*. *May* Term, A. D. *1899*.

This cause coming on to be further heard, upon the report of the register, and said report having been read in open court at a former day, and having lain over one entire day for exceptions, and no excep-

field & Collin, attorneys for the plaintiff, it is adjudged that the plaintiff, *William S. Gerity*, recover of the defendants, *The Seeger & Guernsey Company*, *Charles S. Seeger* and *George A. Dounce*, *four thousand six hundred thirty-four* dollars and *seventy-two* cents ($*4,634.72*) with *one hundred and seventy-two* dollars and *forty-eight* cents ($*172.48*), costs and disbursements of this action, amounting in all to *four thousand eight hundred seven* dollars and *twenty* cents ($*4,807.20*), and have execution therefor.

Judgment, signed and entered this *24th* day of *November*, *1896*.

David N. Heller, Clerk."

This judgment was affirmed in the appellate division of the supreme court and in the court of appeals.

The following form is copied from the records in the case of Snyder *v.* Seaman, 2 N. Y. App. Div. 258.

" Court *of Common Pleas* of the *city and* county of *New York*.

John H. Snyder, plaintiff, against *Lloyd I. Seaman*, defendant. } Judgment.

This court having, by its certain order entered on the *26th* day of *June*, *1895*, referred the issues in this action to *Charles H. Truax*, Esq., to hear and determine the same, and the said referee having rendered to this court his certain report in writing bearing date the *26th* day of *July*, *1895*, and filed in the office of the clerk of this court on the *5th* day of *August*, *1895*.

Now, on the said report and the proceedings herein, and on motion of *Murphy*, *Lloyd & Boyd*, attorneys for plaintiff, it is

Considered and adjudged, that the plaintiff above named recover of the defendant *Lloyd I. Seaman*, the principal sum of *five hundred and seventy-six and 75-100* dollars ($*576.75*), with interest thereon from the *30th* day of *April*, *1892*, said interest amounting to *one hundred and twelve* dollars ($*112*), together with *two hundred and seventy-nine 72-100* dollars ($*279.72*) plaintiff's costs as taxed, and the further sum of *thirty-three 44-100* dollars ($*33.44*) granted to plaintiff by the court herein as an extra allowance, and being in all the sum of *one thousand and one 91-100* dollars ($*1001.91*), and that plaintiff have execution therefor; and it is

Further adjudged, that the plaintiff is entitled to *one-third* and defendant to *two-thirds* of the accounts charged to profit and loss on the *30th* day of *April*, *1896*, which said accounts are as follows:

(*Setting out the accounts.*)

And that plaintiff is entitled to *one-half* of the accounts charged to profit and loss in *1897* and subsequent years, which accounts are as follows:

(*Setting out the accounts.*)

(SEAL) *Alfred Wagstaff*, *Clerk*.

Dated *August 5th*, *1895*.

Approved as to form.

Weed, *Henry & Meyers*, Attys. for Deft."

The judgment was affirmed in the court of appeals.

In Perry *v.* Young, 105 N. Car. 463, the judgment was as follows:

" This cause coming on to be heard upon the referee's report, and the plaintiff's exceptions to the same, it is ordered, adjudged and decreed that the two exceptions be each overruled (to which the plaintiff excepts); that said report be confirmed; that the defendants go without day, and that the plaintiff pay the costs of this action, to be taxed by the clerk.

From the foregoing judgment the plaintiff appeals to the *Supreme* Court, assigning as error (1) the overruling of his *first* exception, and (2) the overruling of his *second* exception."

No objection was made to the form of this judgment, but it was held by the supreme court, on appeal, that it was error to overrule the exceptions.

1. *Alabama.* — Ch. Ct. Rules, § 95, provides that reports of the register read in open court on one day may be con-

tions having been taken, it is ordered, adjudged and decreed that said report be in all things ratified and confirmed.

And it appearing from the report of the register that the sum of *six hundred* dollars is still due and unpaid, a judgment is now rendered for said sum of *six hundred* dollars against *Richard Roe*, for which let execution issue.

Samuel Gray, Chancellor.

Form No. 17427.[1]

Supreme Court.
William Hulbert and *La Fayette Hulbert* vs. *Nelson C. Rae.* } Judgment.

This action being at issue, and having been duly referred to the Hon. *William Kent*, as sole referee to hear and determine the issue joined therein, and the report of the said *William Kent*, referee, having been duly filed, whereby he finds to be due from the said *Nelson C. Rae* to said *William Hulbert*, and *La Fayette Hulbert*, the sum of *ten thousand three hundred and forty-two* dollars and *seventy-six* cents: Now, on motion of *William D. Booth*, the plaintiff's attorney, it is hereby adjudged that the said *William Hulbert* and *La Fayette Hulbert*, the said plaintiffs, recover of the said *Nelson C. Rae*, the defendant, the aforesaid sum of *ten thousand three hundred and forty-two* dollars and *seventy-six* cents, together with the sum of *two hundred and thirty* dollars and *sixty-nine* cents costs, disbursements, and extra allowance granted by this court, amounting in the whole to the sum of *ten thousand five hundred and seventy-three* dollars and *forty-five* cents.

(*Signature and entry as in Form No. 11868.*)

2. In Action for Account.

a. In General.

Form No. 17428.[2]

(Conn. Prac. Act, App., p. 13, No. 485.)

(*Title of court and cause as in Form No. 11844.*)

This action, by complaint claiming judgment for an account, and such sum as might be found due on such accounting, came to the *January* Term of this court, 1880, when the parties appeared and were at issue, as on file, and said action was referred to *John Stiles*, Esquire, as a committee.

Said action came by continuance to this Term, when said committee returned his report, and the defendant filed his remonstrance against

firmed on the next, unless excepted to.

See also, generally, *supra*, note 2, p. 994.

1. *New York.* — Code Civ. Proc., §§ 1221, 1226, 1228.

See also, generally, *supra*, note 2, p. 994.

This judgment was introduced in evidence and is set out in Rae *v.* Hulbert, 17 Ill. 572.

2. *Connecticut.* — Gen. Stat. (1888), § 1037.

See also, generally, *supra*, note 2, p. 994.

its acceptance, and the court, having heard the parties, finds said remonstrance untrue (or *insufficient*, as the case may be), and overrules the same, and accepts said report, and finds the facts to be as therein stated, and therefore finds the issue for the plaintiff.

Whereupon it is adjudged that the plaintiff recover of the defendant *nine hundred* dollars damages, and his costs, taxed at *twenty-five* dollars and *fifteen* cents.

Calvin Clark, Clerk.

b. And Settlement of Estate in Hands of Administrator.

Form No. 17429.[1]

(*Venue, title of court and cause as in Form No. 11869.*)

This cause coming on to be heard before his Honor *John A. Gilmer*, Judge presiding at *Spring* Term, 1884, of the *Superior* Court of *Yadkin* County, upon the report of *I. N. Vestal*, referee, and it appearing to the Court that no exceptions have been filed to the report —

It is, therefore, on motion of counsel for the plaintiff, ordered and adjudged that the said report be in all things confirmed, and that the plaintiff recover of the defendant *I. A. Jarratt*, administrator of *Isaac Jarratt*, deceased, the sum of $2,500 and the cost of this action, to be taxed by the Clerk of this Court, including the sum of $25, as an allowance to *I. N. Vestal*, referee, for taking and stating this said account.

(*Signature as in Form No. 11869.*)

1. *North Carolina.* — Clark's Code Civ. Proc. (1900), § 422.

See also, generally, *supra*, note 2, p. 994.

This form of judgment is set out in Jarratt *v.* Lynch, 106 N. Car. 422, as part of the statement of facts for the purpose of a proper understanding of that case. It is not the judgment entered therein.

REFORMATION.

See the title RESCISSION, REFORMATION and CANCELLATION.

REHEARING, REARGUMENT.

CROSS-REFERENCES.

For Forms relating to Appeals, see the title APPEALS, vol. 1, p. 890.

For Forms relating to New Trial, see the title NEW TRIAL, vol. 13, p. 97.

I. IN COURTS OF ORIGINAL JURISDICTION.[1]

1. In General.

a. In Court of Record.

(1) NOTICE OF MOTION.[2]

Form No. 17430.[3]

(*Commencing as in Form No. 6954, and continuing down to* *) for an order for a reargument of the motion (*Here designate motion*), upon the following grounds: (*Here state grounds*), and for such other and further relief as may be just.

(*Signature and office address of attorney, date and address as in Form No. 6954.*)

(2) PETITION.[4]

1. **Statutory provisions** relating to rehearing and reargument exist in the following states, to wit:

Alabama. — Civ. Code (1896), § 3342 *et seq.*

Florida. — Rev. Stat. (1892), § 1452 *et seq.*

Maryland. — Pub. Gen. Laws (1888), art. 16, §§ 165, 166.

Mississippi. — Anno. Code (1892), § 520.

North Carolina. — Code (1883), §§ 845, 966.

Tennessee. — Code (1896), § 4847.

West Virginia. — Code (1899), c. 106, §§ 25, 26; c. 124, § 14.

Reargument, When Granted. — A reargument may be granted where an important point was not considered by the court. Weston *v.* Ketchum, 39 N. Y. Super. Ct. 552; Guidet *v.* New York, 37 N. Y. Super. Ct. 124. Or where an obvious mistake has been committed by the court. Taylor *v.* Grant, 36 N. Y. Super. Ct. 259.

2. **Requisites of Notice of Motion, Generally.** — For the formal parts of a notice of motion in a particular jurisdiction see the title MOTIONS, vol. 12, p. 938.

Facts overlooked upon former hearing must be specifically stated in the moving papers. Van Wagener *v.* Royce, (Supreme Ct. Gen. T.) 21 N. Y. Supp. 191.

3. See *supra*, note 2, this page.

4. **Requisites of Petition, Generally.** — For the formal parts of a petition in a particular jurisdiction see the title PETITIONS, vol. 13, p. 887.

Facts which bring the petition within the statute must be stated in the petition. Bingham *v.* Montgomery, 59 Ala. 334. And all facts relied on to obtain the relief sought must be stated. Callahan *v.* Lott, 42 Ala. 167.

Meritorious Defense. — That the petitioner had a good and meritorious defense must be stated, and the facts constituting the defense must be set forth. Chastain *v.* Armstrong, 85 Ala. 215; *Ex p.* Wallace, 60 Ala. 267; Martin *v.* Hudson, 52 Ala. 279.

Surprise, Accident, etc. — That the defendant was prevented from making his defense by surprise, accident, mistake or fraud, and without fault on his part, must be stated. Turner Coal Co. *v.* Glover, 101 Ala. 289; Martin *v.* Hudson, 52 Ala. 279. And although the petition alleges that petitioner was prevented from making his defense by surprise, accident, mistake or fraud, yet, if he fails to show that he was prevented without fault on his part, a rehearing will be denied. Barron *v.* Robinson, 98 Ala. 351; White *v.* Ryan, 31 Ala. 400; Shields *v.* Burns, 31 Ala. 535.

Form No. 17431.[1]

The State of *Alabama*, *Dale* County. } In the *Circuit* Court, *October* Term, 1897.

John Doe, plaintiff, against *Richard Roe*, defendant.

The State of *Alabama*, *Dale* County.

To the Hon. *John Marshall*, Judge of the *Circuit* Court of *Dale* County:

The petition of *Richard Roe* showeth unto your honor,

That he is the defendant in the above entitled action; that at the *October* term of this court the said action was tried before a jury and upon said trial said jury returned a verdict against your petitioner, the said defendant.

That on the *twenty-eighth* day of *October*, 1897, and during said *October* term of said court, judgment was rendered upon said verdict against this petitioner, the said defendant.

That your petitioner had a good and meritorious defense to said action, but was prevented from making his defense by surprise (or *accident* or *mistake* or *fraud*, as the case may be), without fault on his part, and which ordinary prudence could not have guarded against. (*State facts showing that petitioner had a meritorious defense and that the surprise, accident, mistake or fraud was without fault on his part, and also state facts showing an excuse for not applying for a new trial, e. g., showing that the testimony was not discovered until after the adjournment of the term of court at which the trial was had.*)

Wherefore your petitioner prays that the said cause may be opened and that a rehearing may be had thereon upon the merits.

Richard Roe.

Subscribed and sworn to before me this *tenth* day of *March*, 1898.

Abraham Kent, Justice of the Peace.

Ignorance of Facts Constituting Defense. — Where ignorance of the facts constituting a defense is relied on for not making the defense before judgment, the petition must allege clearly and definitely that such ignorance was not due to any want of proper effort or care to ascertain the facts, and all of the facts must be clearly and definitely averred. A general allegation of diligence is not sufficient. Waddill *v.* Weaver, 53 Ala. 58.

Due Diligence. — Facts and circumstances showing that the petitioner acted with due diligence and is chargeable with no defect or neglect in not having the matter of his defense completely presented at the trial must be stated. *Ex p.* Wallace, 60 Ala. 267; Chastain *v.* Armstrong, 85 Ala. 215; Barron *v.* Robinson, 98 Ala. 351; Turner Coal Co. *v.* Glover, 101 Ala. 289; Martin *v.* Hudson, 52 Ala. 279; White *v.* Ryan, 31 Ala. 400; Shields *v.* Burns, 31 Ala. 535. And a general averment of diligence on his part is not sufficient. Chastain *v.* Armstrong, 85 Ala. 215.

Failure to Move for New Trial. — Where the ground of relief would have been available on a motion for a new trial, the application must show an excuse for failure to make the motion before the adjournment of court. Blood *v.* Beadle, 65 Ala. 103; Freeman *v.* Gragg, 73 Ala. 199.

Affidavits of third persons cannot be considered parts of the petition. Callahan *v.* Lott, 42 Ala. 167.

For form of petition held insufficient see Blood *v.* Beadle, 65 Ala. 103.

1. *Alabama.* — Civ. Code (1896), §§ 3342, 3343.

See also, generally, *supra*, note 4, p. 1000.

(3) Order.[1]

(*a*) *To Show Cause.*

aa. Why Motion should Not be Reargued, with Stay.

Form No. 17432.[2]

(*Title of court and cause as in Form No. 6954 or 6957.*)

On reading and filing (*Here enumerate the motion papers*), together with satisfactory proof of service of said notice of motion and papers upon *Jeremiah Mason*, attorney for *John Doe*, the plaintiff above named, and upon reading and filing (*Here specify papers, if any, filed by the plaintiff in opposition to the motion*), and upon hearing *Jeremiah Mason*, attorney for the above named plaintiff in support of said motion, and *Oliver Ellsworth*, attorney for the defendants (or *no one appearing*), in opposition,*

Ordered, that the above named defendants show cause† why the motion (*Here designate the motion*) should not be reargued before this court (or *before me at chambers of this court*), at the court-house in the city of *Albany*, in said county of *Albany*, on the *tenth* day of *September*, 1*899*, at *ten* o'clock in the *fore*noon, or as soon thereafter as counsel can be heard, and also then and there to show cause why, if said reargument is granted, the same should not then and there proceed.

And it is further ordered that the said defendants and each of them, their attorneys and servants until the hearing and determination of this rehearing be and they are hereby stayed from proceeding in any manner (*Here state matter enjoined*) until the further order of this court.

It is further ordered that service of this order and of the affidavits, if made on or before the *fifth* day of *September*, 1*899*, shall be sufficient.

Enter: *J. M.*, J. *S.* C.

(*Or, if it be issued by a judge, signature should be as follows:*
"*September 3*, 1*899*. *John Marshall*, J. *S.* C.")

bb. Why Party should Not Have Leave to Submit Additional Affidavit in Reply to Affidavit in Opposition and Thereupon Have Reargument.

Form No. 17433.[2]

(*Commencing as in Form No. 17432, and continuing down to* †) why the above named defendant, *Richard Roe*, should not have leave to submit an affidavit in reply to the affidavit of *John Doe*, on the motion (*state object of the motion*), why such motion should not be reargued and why the defendant should not have such further and other relief as may be just.

(*Signature as in Form No. 17432.*)

1. **For the formal parts** of an order in a particular jurisdiction see the title Orders, vol. 13, p. 356.

2. See, generally, *supra*, note 1, p. 1000.

cc. WHY MOTION SHOULD NOT BE REARGUED OR PARTY HAVE LEAVE TO RENEW MOTION.

Form No. 17434.[1]

(*Commencing as in Form No. 17432, and continuing down to* †) why the motion heretofore made herein by the plaintiff to (*stating nature of motion*) should not be reargued, or why the said plaintiff should not have leave to renew the motion (*stating nature of motion*) granted herein by an order of this court dated on the *tenth* day of *September*, 1899, and why the said motion should not then and there be heard on the papers filed herein, and why (*stating nature of relief in motion*) should not be vacated on the ground (*stating ground*) or for such other and further relief as may be just.

And it is further ordered that until the hearing and decision on said motion all proceedings on the part of the defendant herein be stayed.

(*Signature as in Form No. 17432.*)

(*b*) *Denying Motion for Reargument and Granting Leave to Renew.*

Form No. 17435.[1]

(*Commencing as in Form No. 17432, and continuing down to* *.)

Ordered, that the said motion be and the same is hereby denied, but leave is given to defendant, on service upon the attorney of the plaintiff herein of copies of the affidavits which it is proposed by defendant to read in reply to the affidavit of the plaintiff read in the original motion, to renew said motion for a reargument of the original motion for (*state nature of motion*).

(*Signature as in Form No. 17432.*)

(*c*) *Denying Motion After Reargument Had.*

Form No. 17436.[1]

(*Title of court and cause as in Form No. 6954 or 6957.*)

A motion having been made herein on behalf of the plaintiff to (*state nature of the motion*) and the said motion having been duly heard by the court, and having been decided against said plaintiff on the ground that (*Here state reason for denying motion*), and after the rendering of such decision by the court and before the entry of the order therein, a motion having been made by the said plaintiff for a reargument of the aforesaid motion, and reargument having been allowed by the court, and such reargument having been duly heard,

Now upon reading and filing (*Here enumerate the motion papers*) and upon reading and filing on the reargument the affidavit of *Samuel Short*, verified the *second* day of *September*, 1899, and upon hearing *Jeremiah Mason*, attorney for the above named plaintiff, in argument in support of said motion, and *Oliver Ellsworth*, attorney for defendant,

1. See, generally, *supra*, note 1, p. 1000.

in opposition thereto, now on motion of *Oliver Ellsworth*, attorney for said defendant, it is

Ordered, that the said motion be and the same is hereby in all respects denied.

(*Signature as in Form No. 17432.*)

b. In Justice's Court.

(1) Affidavit for Rehearing.[1]

Form No. 17437.[2]

North Carolina, *Macon* County, *Franklin* Township.

John Doe
against
Richard Roe.
} Before *Abraham Kent*, Justice of the Peace.

North Carolina, *Mason* County, ss.

Richard Roe, the defendant (or *John Doe*, *the plaintiff*) in the above entitled action, being duly sworn, upon his oath says that he was unavoidably absent from the trial of the above entitled action on the *third* day of *June*, 1898, at which trial judgment was rendered against him in favor of the above named plaintiff (or *defendant*); that such absence on the part of the affiant was caused by the sickness of affiant (or *state other matters showing excusable mistake or neglect*); that by such absence affiant was prevented from defending (or *prosecuting*) the said action.

Affiant therefore prays that said action may be opened, to the end that it may be reconsidered upon its merits.

Richard Roe, Defendant (or *John Doe*, Plaintiff).

Sworn and subscribed to before me this *tenth* day of *June*, 1898.

Abraham Kent, Justice of the Peace.

(2) Summons to Attend Rehearing.

Form No. 17438.[3]

(N. Car. Code (1883), § 909, No. 2.)

North Carolina, *Macon* County, *Franklin* Township.

John Doe
against
Richard Roe.
} Before *Abraham Kent*, Justice of the Peace.

Whereas *John Doe*, plaintiff above named (or *Richard Roe*, *defendant above named*), has applied by affidavit, which is filed, for a rehearing in the above entitled action; wherein judgment was rendered

1. **For the formal parts** of an affidavit in a particular jurisdiction see the title Affidavits, vol. 1, p. 548.

2. *North Carolina.* — When a judgment has been rendered by a justice in the absence of either party, where such absence was caused by the sickness, excusable mistake or neglect of the party, such absent party, his agent or attorney, may, within ten days after the date of such judgment, apply for relief to the justice who awarded the same, by affidavit setting forth the facts, which affidavit must be filed with the justice. Code (1883), § 845.

3. *North Carolina.*—Code (1883) § 845.

against the said plaintiff (or *defendant*) in his absence, at the trial thereof, before the undersigned on the *tenth* day of *June*, 1899; and such application having been allowed, and the cause opened for reconsideration,

Now, therefore, we command you to summon the said plaintiff (or *defendant*) to appear before *Abraham Kent*, Esq., one of the justices of the peace of the county of *Macon*, on the *tenth* day of *October*, 1899, at his office in *Franklin*, in said county; when and where the complaint will be reheard and the same proceedings be had as if the case had not been acted on; and have you then and there this precept, with the date and manner of its service.

Hereof fail not. Witness our said justice, this *tenth* day of *September*, 1899.

Abraham Kent, Justice of the Peace.

2. In Equity.[1]

a. Notice of Application for Rehearing.[2]

Form No. 17439.[3]

(*Title of court and cause as in Form No. 17419.*)

To *Oliver Ellsworth*, Esq., Solicitor for Complainant:

You are hereby notified that on *Tuesday*, the *twentieth* day of *August*, 1898, at *ten* o'clock in the *fore*noon, or as soon thereafter as counsel can be heard, at the state-house in the city of *Trenton*, the undersigned will apply to the chancellor of this state by petition, a copy of which is annexed hereto and served upon you, for an order that the prayer of said petition be granted and that the enrollment of the decree in the above cause and all further proceedings thereon be stayed pending said rehearing.

Jeremiah Mason, Solicitor for Defendant.

Dated the *twentieth* day of *July*, 1898.

b. Petition for Rehearing.[4]

1. **Rules of Court.** — In many states, rehearing in courts of chancery is governed by rules of court, to wit:

Alabama. — Ch. Ct. Rules, No. 82.

District of Columbia. — Supreme Ct. Eq. Rules, No. 88.

Maine. — Supreme Jud. Ct. Ch. Rules, No. 39.

Michigan. — Ch. Ct. Rules, Nos. 24, 25.

New Jersey. — Ch. Ct. Rules, Nos. 142–147.

Pennsylvania. — Eq. Ct. Rules, No. 15, § 86.

Rhode Island. — Eq. Ct. Rules, No. 55.

Vermont. — Ch. Ct. Rules, No. 36, §§ 2, 4.

2. **Notice of application** must be served upon the adverse party. French *v.* Chittenden, 10 Vt. 127.

See also rules of court cited *supra*, note 1, this page.

For the formal parts of a notice in a particular jurisdiction see the title NOTICES, vol, 13, p. 212.

3. See, generally, *supra*, note 1, this page.

4. **Petition.** — Application for rehearing must be by petition and not by motion. Boucher *v.* Boucher, 3 MacArthur (D. C.) 453; Hughes *v.* Jones, 2 Md. Ch. 289; Trevelyan *v.* Lofft, 83 Va. 141; Armstead *v.* Bailey, 83 Va. 242.

In *Pennsylvania*, the application should be by petition to the court for

leave to file a supplemental bill, setting forth newly discovered evidence, for a rehearing of the cause at the time when the supplemental bill may be ready for hearing. Reeves *v.* Keystone Bridge Co., 11 Phila. (Pa.) 498, 33 Leg. Int. (Pa.) 149.

Requisites of Petition, Generally. — For the formal parts of a petition in a particular jurisdiction see the title PETITIONS, vol. 13, p. 887.

Address. — Petition must be addressed to the chancellor. Boucher *v.* Boucher, 3 MacArthur (D. C.) 453.

By Whom Presented. — Petition must state by whom it is presented. Heermans *v.* Montague, (Va. 1890) 20 S. E. Rep. 899.

Interest of petitioner must be stated. Heermans *v.* Montague, (Va. 1890) 20 S. E. Rep. 899.

Circumstances of case must be incorporated in the petition. Boucher *v.* Boucher, 3 MacArthur (D. C.) 453. And the facts upon which decree was founded must be stated. Heermans *v.* Montague, (Va. 1890) 20 S. E. Rep. 899.

Grounds of Objection. — The grounds of objection to the decree must be stated in the petition. Boucher *v.* Boucher, 3 MacArthur (D. C.) 453; Wiser *v.* Blachly, 2 Johns. Ch. (N. Y.) 488. To show that injustice was done is not enough: that it has been done under circumstances which authorize the court to interfere must be shown. Walsh *v.* Smyth, 3 Bland (Md.) 9.

Newly Discovered Evidence, Generally. — The petition should set forth the new facts or the newly discovered evidence of facts which, at the hearing, were unknown to the party. McDowell *v.* Perrine, 36 N. J. Eq. 632. Corey *v.* Moore, 86 Va. 721; Whitten *v.* Saunders, 75 Va. 563; McLeod *v.* New Albany, 66 Fed. Rep. 378. And that the new evidence is material must be shown. Gillette *v.* Bate Refrigerating Co., 12 Fed. Rep. 108.

The new matter must be so stated as to enable the court to see, on inspecting it, that if it had been brought forward it would probably have changed the effect of the decree; and it should be so stated that the opposite party can answer understandingly and present a direct issue. Whitten *v.* Saunders, 75 Va. 563.

That petitioner expects to prove certain facts is not sufficient. Whitten *v.* Saunders, 75 Va. 563.

Diligence to Discover Evidence — *Generally.* — Petition must show that the new evidence was discovered after the rendition of the decree. Corey *v.* Moore, 86 Va. 721. And could not have been produced by the party by reasonable diligence on the previous hearing. Mays *v.* Wherry, 3 Tenn. Ch. 219; Armstead *v.* Bailey, 83 Va. 242; Summers *v.* Darne, 31 Gratt. (Va.) 791; Hicks *v.* Otto, 85 Fed. Rep. 728.

Facts showing diligence used to discover the evidence must be stated with fairness and fullness. Owens *v.* Love, 9 Fla. 325; McLeod *v.* New Albany, 66 Fed. Rep. 378; Gillette *v.* Bate Refrigerating Co., 12 Fed. Rep. 108.

Where the application merely asserts that the facts had not come fully to the knowledge of the party at the time of the hearing, it is not sufficient. McLeod *v.* New Albany, 66 Fed. Rep. 378.

Nature of Evidence. — A petition on the ground of newly discovered evidence must state the nature of the evidence. Allis *v.* Stowell, 85 Fed. Rep. 481.

Relief sought must be stated in the petition. Heermans *v.* Montague, (Va. 1890) 20 S. E. Rep. 899.

Signature. — Petition must be signed by the counsel or by the party. Boucher *v.* Boucher, 3 MacArthur (D. C.) 453; Allis *v.* Stowell, 85 Fed. Rep. 481.

Certificate of Solicitors. — The English rule in chancery has been to grant a rehearing in equity, when demanded by the circumstances of the case, upon certificate of disinterested solicitors that error exists in the decree, and this rule seems to be substantially the same in America. Handy *v.* Andrews, 52 Miss. 626.

For substance of petition for rehearing held insufficient see Owens *v.* Love, 9 Fla. 325.

Affidavit Supporting Petition — *Of Petitioner.* — Were rehearing is desired for the purpose of introducing additional evidence, the petition must be accompanied by the affidavit of the petitioner verifying the facts set forth in the petition, and affirming that they were discovered since the date of the decree or at a time when they could not be introduced into the cause at the former hearing. Boucher *v.* Boucher, 3 MacArthur (D. C.) 453.

The affidavit must, by distinct and positive allegations, be made part of the petition. Allis *v.* Stowell, 85 Fed. Rep. 481.

The affidavit must show that the

Form No. 17440.[1]

(*Title of court and cause, and address as in Form No. 4267.*)

The petition of the above named defendant respectfully showeth:

That your petitioner finds himself much aggrieved by a decretal order made by your honor in this cause on the *tenth* day of *June last*, whereby it was, among other things, ordered that (*insert the part of the decree complained of*); and your petitioner submits that so much of the said decree is erroneous as directs that (*Here set out that part of the decree claimed to be erroneous*), because your petitioner shows unto your honor that (*Here state facts showing wherein decree was erroneous*).

And your petitioner further submits that so much of the said decree is erroneous as relates to the house and lot in *Greenwich* street, therein mentioned, and that he is aggrieved thereby, because your petitioner shows unto your honor that at the hearing of the said cause it was alleged, and strongly urged and insisted on, on the part of the complainant, that the deed in the said decree mentioned had been duly executed by your petitioner, and that at the said hearing the said deed was produced and read, whereby it appeared that your petitioner was a trustee of the said house and lot in *Greenwich* street, and under the impression that your petitioner was such trustee, your honor, as your petitioner conceives, made the decree in relation to the said house and lot; but your petitioner now shows unto your honor that he has since the said hearing discovered that a defeasance to the said deed had been duly executed by *Samuel Short* many years before the said hearing, and that the said deed had become null and void, and that your petitioner, through inadvertence or forgetfulness, had neglected to take back the said deed and have the same cancelled (*setting out other facts, if any there be, showing the error in the decree*).

And your petitioner further shows that the said decretal order has been settled and entered, but has not yet been enrolled, whereupon your petitioner prays that your honor will be pleased to vouchsafe a rehearing of this cause before your honor, your petitioner submitting to pay such costs as the court shall award in case this complaint shall be found groundless, and your petitioner will ever pray, etc.

Jeremiah Mason,
Solicitor and of counsel for complainant.

We certify that we have examined the case referred to in the fore-

newly discovered evidence could not have been procured by the use of diligence in time to have been used before the decree was entered. Corey *v.* Moore, 86 Va. 721; Trevelyan *v.* Lofft. 83 Va. 141; Armstead *v.* Bailey, 83 Va. 242: Hicks *v.* Otto, 85 Fed. Rep. 728.

Where defendant states in his affidavit that "he has been eager to collect all material evidence," and "has made great exertion and every reasonable effort to defend the suit," he states conclusions merely. He must state facts, so that the court may be able to determine whether or not reasonable diligence has been used. Hicks *v.* Otto, 85 Fed. Rep. 728.

Of Witness. — Where the application is for the purpose of introducing new evidence, it must be accompanied by the affidavit of the witness showing what he expects to prove. Mays *v.* Wherry, 3 Tenn. Ch. 219; Whitten *v.* Saunders, 75 Va. 563.

1. See, generally, *supra*, note 4, p. 1005.

This form of petition is set out in 3 Barb. Ch. Pr., 457.

going petition, and are of opinion that the decretal order therein mentioned is erroneous in the particulars specified in the said petition.

Oliver Ellsworth,
John Hancock, } Counsel.

c. Order Granting Rehearing.[1]

Form No. 17441.[2]

In Chancery of *New Jersey.*

Between
John Doe, plaintiff,
and
Richard Roe, defendant } On bill, etc. Order for rehearing.

Upon reading the petition of *Richard Roe*, the above named defendant, filed in the above entitled cause, praying for a rehearing of said cause, and it satisfactorily appearing that due notice of this application has been given, and upon hearing *Jeremiah Mason*, of counsel with petitioner, in support of said application, and *Oliver Ellsworth*, of counsel with complainant (or *no one appearing*), in opposition thereto, it is, on motion of *Jeremiah Mason*, of counsel with said petitioner, on this *eleventh* day of *April*, 1899,

Ordered, that a rehearing of said cause be granted.

It is further ordered that upon the above named defendant depositing with the clerk of this court the sum of *one hundred* dollars to answer such costs as this court shall award in event that the said petitioner's complaint be found groundless, the clerk of this court refrain from enrolling the final decree in said cause, and that all further proceedings in said cause on the part of the above named complainant be stayed until the further order of this court.

Entered by (*concluding as in Form No. 10627*).

II. In Appellate Court.[3]

1. **For the formal parts** of an order in a particular jurisdiction see the title Orders, vol. 13, p. 356.

2. See, generally, *supra*, note 1, p. 1005.

3. **When Application may be Made.** — An application for rehearing on appeal cannot be made after the expiration of the term at which the judgment was entered. Selby *v.* Hutchinson, 10 Ill. 261; Bushnell *v.* Crooke Min., etc., Co., 150 U. S. 82.

Rules of Court. — In many states, rehearing upon appeal is governed by rules of court, to wit:

Alabama. — Supreme Ct. Rules, No. 41.

Colorado. — Supreme Ct. Rules, Nos. 25–27.

Florida. — Supreme Ct. Rules, No. 27.

Illinois. — Supreme Ct. Rules, Nos. 41–44; App. Ct. Rules (1st Dist.), Nos. 28, 29.

Indiana. — Supreme Ct. Rules, Nos. 37, 38; App. Ct. Rules, No. 36.

Iowa. — Supreme Ct. Rules, Nos. 88–93.

Kansas. — Supreme Ct. Rules, No. 23.

Louisiana. — Supreme Ct. Rules, No. 9, §§ 1–7.

Maryland. — Ct. of App. Rules, No. 15.

Michigan. — Supreme Ct. Rules, No. 51.

Minnesota. — Supreme Ct. Rules, No. 37.

Montana. — Supreme Ct. Rules, No. 8.

New Jersey. — Ch. Ct. Rules, Nos. 148–151.

New York. — Ct. of App. Rules, No. 20.

1. Notice of Motion.[1]

Form No. 17442.[2]

(*Title of court and cause as in Form No. 14509.*)

Please take notice that a motion will be made by the undersigned, at the appellate division of the *Supreme* Court of the state of *New York* appointed to be held in and for the *second* judicial department, at the court-house in the borough of *Brooklyn*, in the city of *New York*, in said judicial department, commencing on the *tenth* day of *September*, 1899, on the opening of the court on said day, or as soon thereafter as counsel can be heard, for an order allowing the appeal to be taken from the judgment entered in this cause on the *tenth* day of *June*, 1899, to be reargued on the following grounds (*stating grounds*), and to stay the entry of judgment pending such reargument, and for such further and other relief as may be just.

(*Signature and office address of attorney, date and address as in Form No. 6954.*)

2. Motion.[3]

North Dakota. — Supreme Ct. Rules, No. 29.

Oklahoma. — Supreme Ct. Rules, Nos. 21–23.

Utah. — Supreme Ct. Rules, No. 20.

Virginia. — Supreme Ct. of App. Rules, No. 18.

Washington. — Supreme Ct. Rules, No. 13, §§ 1–3.

1. Requisites of Motion Papers. — On a motion for reargument, the papers should be sufficient to enable the court to determine whether or not the decision requires correction. Anderson *v.* Continental Ins. Co., 106 N. Y. 661.

Affidavit in Support of Motion. — The affidavit filed with the motion for reargument on appeal must specify the facts overlooked by the court, and a general statement that important facts have been overlooked is insufficient. Van Wagener *v.* Royce, (Supreme Ct. Gen. T.) 21 N. Y. Supp. 191.

2. See, generally, *supra*, note 3, p. 1008.

3. Requisites of Motion, Generally. — For the formal parts of a motion in a particular jurisdiction see the title MOTIONS, vol. 12, p. 938.

In making a motion for rehearing, it will ordinarily be entirely sufficient to point out in the motion some mistake or misconception of law or fact into which the court has fallen, as exhibited in the opinion, with such reference to the record or to authorities as will call it to the attention of the court without labor and expense on the part of counsel and a full reargument upon all the points. Hurt *v.* Evans, 49 Tex. 311.

Grounds of Motion. — A motion for rehearing must distinctly specify the grounds upon which it is based. Spencer *v.* Thistle, 14 Neb. 21.

Reference to Record. — The motion should refer to that part of the record upon which the moving party relies to support his opinion that there was error in the finding of fact. Alvord *v.* Waggoner, (Tex. Civ. App. 1895) 29 S. W. Rep. 797.

Name of Adverse Counsel. — Motion for rehearing should state the name and residence of counsel of the adverse party. Houston, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1895) 32 S. W. Rep. 163.

Precedents. — In Gibson *v.* Chouteau, 39 Mo. 536, the motion, on which a rehearing was granted, was as follows:

"The defendant in this cause now comes and moves the court to grant a rehearing herein, and in doing so he does not propose to ask the court to review any of the questions which in the opinion given in this cause have been examined, but upon one upon which the court have pronounced no opinion, and the determination of which affects not only the land in controversy, but necessarily involves the very grave question whether — in the case of confirmations under different acts of Congress, which acts provide for the issuing of a patent — the statute of limitations does not commence running

until the patent actually emanates from the United States. There are many lots of ground in the city and its vicinity confirmed under various acts of Congress, where no patent has ever issued; and yet where actions of ejectment have been under our statute maintained, and the statute of limitations as a defense has been set up and admitted to be a good defense, we apprehend that it is certain that this judgment cannot be allowed to stand without directly reversing the cases of *Cabanne* v. *Lindell*, *12 Mo. 184*, and that of *Givens* v. *Gray*, *26 Mo. 300*, both decided by the *Supreme* Court of the State, and commencing as far back as the year 1848, as well as the cases of *Bagnell* v. *Broderick*, *13 Pet. 436; Barry* v. *Gamble*, *3 How. 51; Lessieur* v. *Price*, *12 How. 74*, which cases in the United States Courts conclusively hold that the right to the newly located land passed by operation of law when the survey of newly located land was filed in the office of the Recorder of land titles, and that at the same time the title to the injured land passed to the United States, thus effecting, as the court have said, an exchange of land between the two proprietors — the *United States* on the one hand, and *James Y. O'Carroll's* legal representatives on the other. The question becomes the more grave, because by the decision in this case no notice has been taken of it, and it will be said in the *Supreme* Court *of the United States* that the *Supreme* Court of the State have virtually if not directly overruled the cases of *Cabanne* v. *Lindell* and *Gray* v. *Givens*; and that as this was a decision of the highest court of the State upon a local statute, that decision is conclusive upon the Courts of the United States. Again, in order to give the *Supreme* Court *of the United States* jurisdiction, the decision must be against the validity of some act of Congress, etc.

I. The action of ejectment would lie, under our statute, (tit. Ejectment) on a *New Madrid* location. By all the authorities, State and Federal, the location became perfect on the return of the survey to the Recorder of land titles. See cases above cited.

II. In the decision filed in this case, it is held that the return of the survey in 1841 to the Recorder was operative, and that the proceedings subsequent to annul the patent certificate of 1841 were simply void. See opinion.

The exchange of the new location for the lands injured by earthquakes was effected in 1841. Mr. *Chouteau* was then in possession of the locus in quo by color of title, by recorded deeds; and whosoever held the title, right or claim to the new location in 1841, Mr. *Chouteau* held adversely to him by substantial inclosures and houses. From that day, in 1841, to the day this suit was commenced in 1862, the defendant continued in possession, a period of *20* years, open, notorious and adverse. *Gray* v. *Givens*, *26 Mo. 300* (*approving Lindell* v. *Cabanne*, *12 Mo. 184; Biddle* v. *Mellon*, *13 Mo. 335;* and basing the decision on the case of *Bagnell* v. *Broderick*, *13 Pet. 436*, *Barry* v. *Gamble*, *3 How. 51*, and *Lessieur* v. *Price*, *12 How. 60*).

The constitutional question is fully considered, and the right of the State to pass laws for the limitations of actions of ejectment in such cases is distinctly affirmed. Altogether the cases of *Gray* v. *Givens* and *Cabanne* v. *Lindell* cannot stand if the case at bar be held not to furnish a defense under the statute of limitations. *Gray* v. *Givens*, *26 Mo. 300*, expressly decides that in this case the statute is a complete defense.

III. The logical conclusion to be drawn from the cases is that the new location being perfected in 1841, the exchange by operation of law was concluded between the United States and the legal representatives of *Jas. Y. O'Carroll*, and the United States had no further interest, and the issue of the patent in 1862 was a mere form, and it related back to the day of the exchange in 1841, and passed the title to the legal representatives of *Jas. Y. O'Carroll* as of that day. See *Landes* v. *Brant*, *10 How.* 348, where the *Supreme* Court *of the United States* held that a patent issued to *J. Clamorgan* in 1845, related back to the inception of the proceedings in 1806, and passed the title as of that date.

IV. The equitable title or claim would, under our statute, pass by limitations as perfectly as the legal estate. Whatever equity *McRee* had in 1838, when he made the deed to *Chouteau* for a part of the certificate, to wit, 64 acres, passed by the deed, and *McRee* had the same equity then that he had in 1846, when the decree was entered. Mr. *Chouteau's* possession under that deed, for *twenty* years ad-

Form No. 17443.[1]

(Precedent in Wilson *v.* State, 37 Tex. Crim. 375.)[2]

[*Willis Wilson* against *The State of Texas.*] No. *793.* ——— Assignment.

In the Court *of Appeals* of *Texas, Austin* Term, A. D. 1897.][3]

Now comes the State by attorney, and moves the court to set aside its judgment of reversal rendered herein, and grant it a rehearing. Because the court erred in holding that term of court at which appellant was tried was not a legal term, in this, said term was properly held under the old law, that is, the Act of 1892, because the day the Act of 1895 (April 1, 1895) took effect was the day that *District* Court should have convened in *Greer* County, under the provisions of the Act of 1892. Whereas the Act of 1895 fixed a time for holding the spring term of the *Greer* County *District* Court at a date already past, that is, on the sixth Monday after the first Monday in February (Act 1895, p. 34). It is therefore apparent that, if it be held that the Act of 1895 should govern, *Greer* County would have been deprived of one of its two terms of court allowed by the Constitution. In such case the new law should not be held effective until after the expiration of *ninety* days after its passage. This construction would allow the respective counties in the *Forty-sixth* Judicial District two terms of *District* Court for the year 1895. *Ex parte Murphy, 27 Tex. Crim. App. 492.* To hold otherwise would be to deprive some of the counties of two terms of *District* Court for the year 1895. Wherefore the State prays that the judgment of reversal be set aside, and that it be granted a rehearing herein.*

[The appellee states that the names of the opposing counsel in this cause are *Stanlee and Green*, and that they reside in the city of *Austin*, in the county of *Traverse* and state of *Texas*, and the appellee prays that notice of this motion may be served according to law. (*Signature of attorney.*)][4]

Form No. 17444.[5]

(Precedent in Wilson *v.* State, 37 Tex. Crim. 375.)[6]

joining the said *McRee* and his devisee, operates (as under the case of *Biddle* v. *Mellon, 13 Mo. 335*) to give Mr. *Chouteau* a title to everything that *McRee* might have conveyed. If *McRee* had an equity, it passed — if he or any one else had a legal estate, it passed — by force of the possession for *twenty* years.

We sincerely hope that a rehearing in this case may be ordered, so as to give us an opportunity of considering the questions at issue, which are of such magnitude as to demand a most thorough and exhausting examination."

Other motions for rehearing on appeal are set out in the following cases: Richmond *v.* Wardlaw, 36 Mo. 313; Spencer *v.* Thistle, 14 Neb. 21; Clough *v.* State, 7 Neb. 351.

1. See, generally, *supra*, note 3, p. 1009.

2. Judgment was reversed and a rehearing granted in this case.

3. The matter enclosed by [ ] will not be found in the reported case.

4. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

5. A rehearing in this case was granted.

6. See, generally, *supra*, note 3, p. 1009.

[(*Title of court and cause as in Form No. 17443.*)][1]

Now comes *Willis Wilson*, appellant in the above entitled cause, and moves the court to grant him a rehearing in said cause, and reverse and remand the same for the following reasons, to-wit:

The Court *of Criminal Appeals* erred in failing to reverse and remand this cause on the grounds set out in the appellant's proposition under his fifth assignment of error, the same being in words and figures as follows:

"The evidence of *John Gamble* and *W. T. Dunn* was only admissible to discredit the witness, *Alex. Wilson*, but by reason of the fact that such evidence tended to show defendant's guilt, the failure of the trial court to instruct the jury that such evidence could only be considered for the purpose of discrediting said *Alex. Wilson* is such error as requires a reversal of the case."

Wherefore appellant prays judgment that a rehearing be granted and the cause reversed and remanded.

[(*Concluding as in Form No. 17443, from* *.)][1]

3. Petition.[2]

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **Petition.** — Application for rehearing on appeal must be made by petition. Willson *v.* Broder, 24 Cal. 190; Goodwin *v.* Goodwin, 48 Ind. 584; Lacroix *v.* Camors, 34 La. Ann. 639.

Requisites of Petition, Generally. — For the formal parts of a petition in a particular jurisdiction see the title PETITIONS, vol. 13, p. 887.

Ground for Rehearing — *Generally.* — All grounds on which the rehearing is claimed must be stated in the petition. Willson *v.* Broder, 24 Cal. 190; Finley *v.* Cathcart, 149 Ind. 470; Louisville, etc., R. Co. *v.* Carmon, 20 Ind. App. 471. And the petition must point out any misapprehension of the record by the court, or any mistake in law in the case. Arizona Prince Copper Co. *v.* Copper Queen Copper Co., (Ariz. 1886) 11 Pac. Rep. 396.

Acts or Omissions. — The petition must present some act or omission for which the judgment is supposed to be erroneous. Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co , 27 Fla. 157; Florida First Nat. Bank *v.* Ashmead, 23 Fla. 379; Jones *v.* Fox, 23 Fla. 462; Finley *v.* Cathcart, 149 Ind. 470; Reed *v.* Kalfsbeck, 147 Ind. 148; Fertich *v.* Michener, 111 Ind. 472; Western Union Tel. Co. *v.* Hamilton, 50 Ind. 181; Goodwin *v.* Goodwin, 48 Ind. 584.

Where the petition suggests nothing that has not been carefully considered by the court, it is insufficient. Sauls *v.* Freeman, 24 Fla. 225.

Where the petition is in substance a reargument with citation of authorities, it will not be considered. Jones *v.* Fox, 23 Fla. 462.

Statement of Points and Authorities. — A printed statement of all points and authorities on which the party founds his application must accompany the petition, Lacroix *v.* Camors, 34 La. Ann. 639.

Opinion of Court. — The petition must present the opinion of the court on the first hearing or refer to the volume and page of the report where it may be found. Kervick *v.* Mitchell, 68 Iowa 273.

New Matter. — The petition for rehearing must be confined to matter already considered by the court: no new matter can be introduced. Gregory *v.* Pike, 67 Fed. Rep. 837.

Affidavit in Support of Petition.—Where the petition involves matters of fact, it should be supported by affidavit. Winchester *v.* Winchester, 121 Mass. 127.

Signature. — Where the application is signed by a person not a party, without any designation, prefix or addition to indicate that he is attorney for a party, the application will not be considered. Apple *v.* Atkinson, 34 Ind. 518.

Certificate of Counsel. — A petition for rehearing must be supported by the

a. In General.

certificate of counsel. Hinds *v.* Keith, 57 Fed. Rep. 10.

The certificate of counsel should distinctly specify the ground upon which the petition rests, and should be annexed to the petition. Winchester *v.* Winchester, 121 Mass. 127.

Precedents. — In Wilson *v.* Hayward, 6 Fla. 171, the petition was as follows:

"Petition for Rehearing.

Richard Hayward, appellee in this case, asks the court for a rehearing of this cause, on the following grounds:

I. The appellee's counsel in this case supposed the case as was ordered by the decree of the court below, would be referred to a master, to ascertain the amounts due respectively to *Hayward* and to *Wilson and Herr*, when it could be shown that nothing was really due to the latter, and therefore he did not think it proper to discuss it here. But as the court orders the bill to be dismissed, appellee respectfully asks the court to open the judgment in this case, that he may now be permitted to show that the debt to *Wilson and Herr* was fully paid before they obtained their foreclosure at law.

II. The debt due for which *West* assigned the notes to *Wilson* as collateral security, has been paid.

It appears from the answers of *D. C. Wilson*, and of *Wilson and Herr*, that on the *16th* day of *September*, 1840, *West* owed *Wilson and Herr* only $2,723.49, for which amount they drew a draft on *West* in favor of *D. C. Wilson*, and which draft was accepted by *West*. No other evidence of indebtedness exists in the record. *Wilson* states in his answer that 'on the *first* day of *June*, 1841, *West* being indebted in the sum of $2,723.49, for which amount *West* had accepted their draft, and being desirous to secure it and upon such security being given to obtain further credit,' etc. *Wilson and Herr* says that the sum of $2,723.49, the amount of the draft, was the sum due for goods, etc., furnished before that time. From all this, it is clear, that no other sum was due from *West* than the amount of said draft. There is no pretense that there was any other sum due to which any subsequent payment by *West* could be applied. Certainly there is no proof of any other indebtedness. Neither *Wilson* nor *Wilson and Herr* pretend or allege that there was any other indebtedness. See the answer of *D. C. Wilson* and of *Wilson and Herr*. To secure then the only indebtedness from *West* to *Wilson and Herr*, on the *1st June*, 1841, *West* assigned the notes mentioned in the record as collateral security, which notes were to be returned when the draft for which they were a security should be paid. We repeat there is neither proof nor pretense that there was any other indebtedness from *West* on the *first* day of *June*, 1841, than the draft for $2,723.49.

Now if that sum was all he owed them at that time, the next question is what has he paid them since the draft was given which ought to be credited on it.

The first payment of which we have any evidence is that of $661.43, made on the *30th January*, 1841, as appears from their accounts filed with their answers. This credit, it is true, is placed on account for $2,027.84, but let it be recollected that this account is all for goods furnished before the date of the draft for $2,723.49, and which latter amount, by the answers of *Wilson and Herr* and *D. C. Wilson*, was all that was due *Wilson and Herr* at the date of the draft, viz: *16th September*, 1840. This account, it will be seen, was for 1839, etc., and consequently does not and did not constitute any evidence of debt, especially as the defendants themselves do not claim any other indebtedness up to *16th September*, 1840, than the amount of the draft. It was asked why was this amount of $661.43 not credited on the draft?

Can it be said that it was appropriated by *Wilson and Herr* to the payment of an indebtedness other and anterior to the draft, for goods sold before the date of the draft? We answer that there is no evidence or even pretense of any such indebtedness, but on the contrary, *Wilson and Herr* in their answer say that the draft was the amount in which *West* stood indebted for goods furnished previous to its date. No witness swears to any debt, nor does *West* acknowledge any but the draft. The simple presentation of an account subsequently, without any evidence, and against their own statements, does not authorize them to apply a payment made subsequently to the date of the draft, which they acknowledge was all that was due to them.

The account is evidence of the payment to them, but no evidence of indebtedness. Even if the account was correct, it should have been proved, but we cannot presume it to be true, when the parties themselves say the draft was all that was due. But if it is claimed that this account is just and correct, let us inquire if it was not itself also paid. By it it appears that in *August*, 1840, *West* paid *D. C. Wilson* $1,366.46, and by the receipts in the record, it is seen that *Thompson and Hagner* paid to *Wilson 7 August*, 1840, $952, and *10 August*, 1840, $700 by order of *West*. These last *two* sums together, make $1,652, yet we find no credit for them anywhere. This will go to strengthen the declaration of *Wilson and Herr* themselves, that on *16th September*, 1840, the amount of the draft was all that was due to them. Again, the item in said account, (dated *27 August*, of '5 p. c. exchange on amount of our bill of *13 November*, 1839'). The very date of this account, 'paid at *Florida*,' shows that this bill or account was paid when the draft of *16 September*, 1840, was accepted, and furnishes still stronger proof (although there is no proof of such indebtedness) that *Wilson and Herr* were right when they say in their answer that the amount of the draft was all that was due them.

But why multiply instances when the parties themselves make no pretense of such a claim? There being no such claim, then the payment of $661.43, as of *30th January*, 1841, should go as a credit on the draft. We cannot go behind the draft of *16th September*, 1840, to inquire into the state of the accounts before that time. The defendants say themselves that the draft was for $2,723.49, 'that being the amount in which he stood indebted for goods furnished previous to that time.' But if they had not said so, the presumption of law would be the same, for the law will not presume that a creditor will do so foolish a thing as to take the acceptance or promissory note of his debtor for a subsequent debt, and leave a prior debt unprovided for. The law presumes a prior debt, in such a case, to have been paid.

We will take the *16 Sept.*, 1840, as our starting point. At that date *West* owed *D. C. Wilson* or *Wilson and Herr* a sum which with interest on it for *six* months (the time when the draft became due), made it amount to $2,723.49 for which *West* accepted a draft. *One* month *and half* before the maturity of the draft, to wit: *30 January*, 1841. *West* made a payment of $661.43-100, he is entitled to interest on this payment until the maturity of the draft, to wit: $2.29, which, with the principal, makes $663.63. Deduct this from the draft and it leaves on the draft $2,059.86, due *16 March*, 1841.

The next payment (see *Wilson's* receipt in the record), was made on *23 October*, 1841, amounting to $1,000.00. *Wilson* in his answer to the *fourth* interrogatory, states that he is satisfied this payment was made, for and on account of a draft for $2,336.26, and yet his receipt shows the contrary.

On the production of this receipt, *Wilson's* counsel abandoned such application, and yielded the point that the payment was made on the draft for $2,723.49. This shows how much *Wilson's* recollections are to be relied on. Add now the interest ($97) from *16 March*, '41, to *23 October*, '41, to $2,059.86, the balance due on the draft on *16 March*, and we have $2,156.86, and then credit the payment of $1,000.00, there remains $1,156.86 due on the draft on *23 October*, 1841.

The next credit we contend for, is that of $1,000.00 made *January 6th*, 1842. It is true of this payment as of the other that *D. C. Wilson* denies that it was made as a payment on this draft. Being mistaken as to the other we will show that he is equally so as to this. But before discussing his testimony in regard to this payment, I premise that his testimony should be entirely rejected —

1. Because he is a party to the record, etc.

2. Because of his interest in the case.

The objection to *Wilson's* competency was made before he was examined, as the record will show. A party to the record is sometimes allowed to be examined as a witness, but only where an order of court for that purpose is first had and obtained.

Again, he is clearly interested. He claims a right here by his own testimony, of appropriating to himself a payment which *West*, who made it, swears was appropriated by him, at the time, to the draft, or to *Wilson and Herr*.

If the court shall decide upon his

testimony that he properly retained for himself the payment, he makes a *thousand* dollars. If the court shall decide on the testimony of *West*, that the payment was on the draft to *Wilson and Herr* then he loses a *thousand* dollars. I can imagine no clearer case of interest. But let us continue to pursue the facts.

We have in evidence a check drawn by *E. M. West* on *D. C. Wilson* for the amount of this last payment in favor of *A. K. Allison* who endorses on it, 'pay to the order of *R. K. West.*' Then we have the positive assertion of *R. K. West* that his order was that it should be applied in payment of the draft to secure which the *Lunn* notes were assigned. *West* in answer to the *nineteenth* cross interrogatory, says: 'It was not used by me in a settlement with *D. C. Wilson*, but was given to pay the *Lunn* notes.' Again, in answer to the *4th* question, he says: 'on the same day a few minutes after the cotton transaction, I called on *D. C. Wilson* and demanded the notes already referred to. *Wilson* refused to give them up, saying that there was a balance of over *three hundred* dollars yet due.' This makes out a plain case. The check is endorsed to pay to the order of *R. K. West*, and *West* swears that his order was that it should be paid on the *Lunn* notes. A debtor has the right to apply a payment to whatsoever debt he pleases. This principle is always recognized in every court. *David C. Wilson*, without denying this, seeks to justify the appropriation to himself by speaking of some transaction between himself and *Edward M. West* and *A. K. Allison*. But it is submitted that what occurred between himself and *Allison* and *E. M. West* has nothing to do with the question. Here then is the undenied oath of *R. K. West*. *West* never consented that the check to *Allison* should go to an alleged indebtedness by him to *D. C. Wilson* nor does *Wilson* pretend that he ever did. A further evidence of the fact that he did not consent is the pregnant fact that he did not at that time or at any time subsequent, take up the notes which *Wilson* alleges he held against him and produced in evidence by *Wilson* himself with his own endorsement on them. *West* not only had the right to order the *Allison* check to be applied to the draft secured by the *Lunn* notes, but did absolutely so order. It is presumed that his testimony is entitled to more weight on this point than that of any other person, particularly *Wilson*, who, it is shown, is deeply interested. *West's* testimony, it is believed, is on this point, uncontradicted.

Add then to the sum due *$1,156.86*, interest to *6th January*, 1842, *$19.28*, and we have *$1,176.14*, from which deduct the payment of a *thousand* dollars and it leaves due only *$176.14*, *6th January*, 1842.

The next payment of which we have any evidence is that of *June 24*, 1842, as shown by the account in the record, viz: 'by nett proceeds of cotton per *Kennebeck* to *Boston* his proportion' *$243.47*. I know no reason why this amount should not be credited on the draft of *16 September*, 1840, at least enough of it to pay the balance due on said draft. That balance as we have seen was *$176.14* on *6th January*, 1842. Add interest $6.36 and it makes *$182.50* due on *24th June*, 1842, on which day *$243.47* were paid, which paid the whole balance of principal and interest due on said draft of *16 September*, 1840, and left *$60.90* overplus.

It is true there is no direct testimony in the record of the specific application of this last payment, to the balance due on the draft of *$2,723.49*. The only application as shown by the record is to the joint amount of the two drafts, viz: the one for *$2,723.49*, and the one for *$2,336.26*.

According to this application, *one-half* of the payment of *$243.47* belongs to the balance due on the draft, viz: *$182.50*, which would leave due only *$60*.

But we maintain that the whole of the *$253* or so much thereof as was sufficient should be applied to extinguish the balance of *$182.50*, due on the draft of *$2,723.49*, according to the principle admitted by this court, in the case of *Smith and Paramore* v. *Randall*, *1 Florida*, *428*, and cases there cited. In the case of *Devane* v. *Noble*, cited by the court, *1 Merivale 606*, the master of the rolls says: The debtor has first the right to apply. If he does not, then the creditor. If neither apply the payment, the law makes the appropriation; and the rule of law is, to apply to the most burdensome debt, — one that carries interest rather than one that does not. And if the debts are equal, then to that which has been first contracted. And if there are other parties

interested, the justice of the case requires that the application should be made for the benefit of such other parties. So that in whatever light this last payment is viewed, the conclusion must be that it extinguished the whole of the draft for $2,723.49, for which the *Lunn* notes were transferred as collateral security.

It thus seems most incontrovertibly that the claim of *Wilson and Herr* on the *Lunn* notes ceased before they instituted their suit for a foreclosure, and they ought to have returned those notes to *West* according to the agreement of *Wilson* in the record.

Hayward had no opportunity in the suit of *Wilson and Herr* v. *D. C. Wilson*, administrator of *Lunn*, to show these facts, as he was not made a party. *Wilson*, who conducted the whole affair for both parties, was interested in the whole business, and if *Hayward* is not permitted to claim that the foreclosure decree is all wrong, in a proceeding in which he makes all persons concerned parties, then there is no remedy left him, and no means allowed to show that when the foreclosure was obtained *Wilson and Herr* had not a particle of interest in the mortgage; for let it always be remembered, that the *Lunn* notes were not assigned out and out in payment of *Wilson and Herr*, but only as collateral security, and by agreement they were to be returned when the draft of $2,723.49 was paid.

We are not left to the deductions I have made from the whole evidence to show that nothing was due on the draft of $2,723.49. *West*, in his evidence, says, that that draft was fully paid by him. Is this statement of *West* a simple, wanton assertion? The facts in the record distinctly show that his statement is correct. This statement of *West* goes further, and shows that he intended the last payment of $243.47 to be applied to pay off the final balance due on that draft. *West* says that the draft was paid. This is his testimony, as positive as any declaration made by him, and the other separate facts in this record prove the same thing, notwithstanding the statement of *D. C. Wilson*, who is deeply interested in this cause.

Counsel for appellee, begs leave to present another point not presented in the argument, viz: That if he is right in the position that the foreclosure at law was not warranted by law, even if there was any balance due on the draft, then we say that *Wilson and Herr* having taken possession of the mortgaged property, have been paid more than was due to them, and more than the value of the improvements by the receipts of rents and hires.

Let us next inquire whether *Wilson and Herr* had really any interest in the *Lunn* notes. The draft for $2,723.49 was in favor of *D. C. Wilson* individually. The acceptance of said draft by *West* made it a debt to *D. C. Wilson*, and to *D. C. Wilson* did *West* assign the *Lunn* notes as collaterals. This being so, *D. C. Wilson*, and not *Wilson and Herr*, could foreclose the mortgage. But *D. C. Wilson* could not sue himself, as adm'r of *Lunn*, and he procured a lawyer to bring suit against himself, in favor of *Wilson and Herr*. Here is the anomaly of a person holding a debt against himself, procuring a suit to be brought in the name of a third person, without making anybody parties, or giving them an opportunity to show that really there was nothing due.

If I have succeeded in showing that the draft for which the *Lunn* notes were collateral security had been duly paid before the foreclosure suit, then I maintain that *Richard Hayward* has in this proceeding the right to have the decree of foreclosure aforesaid set aside and a decree in his favor to foreclose the mortgage. Any other result, under such a state of things, would be grossly unjust, and would be a premium to men to act wrongfully.

For these reasons, counsel for appellee respectfully prays the court for a rehearing in this case."

A rehearing being granted, it was held that the complainant had not made out or sustained his position, and it was ordered that the petition be dismissed and that the decree theretofore entered in the case stand.

In Hart *v.* Metcalfe, Litt. Sel. Cas. (Ky.) 354, the petition was as follows:

"As this cause has been decided on a point not stirred in argument, and not noticed by the counsel of either party, the defendants respectfully ask leave of the court to present their view of the case.

Strip this cause of incumbering facts not material to this point, and it is a bill filed by a purchaser who has paid part, and has a judgment against him for the balance, to enjoin that judgment and recover back his deposit,

because the purchaser has made no title, and cannot make title to 'the land sold.'

The answer admits a sale of what? Of the land. Of what land, is it asked? Of the land in question, is the answer which the context gives. The answer then attempts to make out title, and relies on the title asserted. If title is not made out, his contract creates no liability.

Can there, in such a case, be a reasonable doubt of what the import of the answer is; and is it not in the common mode of reference to a given subject? It is, therefore, respectfully contended that this answer does admit the sale of the land described in the bill, and that the agreement relates to facts or matters not answered to, and not to matters to which the answer did respond.

But another view of this subject, it is hoped, is unanswerable. The answer admits a sale to us of land; the contract is a sale of land; an obligation to convey, etc., is admitted (in this view of the subject, I will only say of the thing sold). We, by the bill, deny his ability to convey (what was sold), or, if you please, to convey to us any land, and, out of abundant caution, we set forth why he cannot convey. Now, it is admitted we prove that he never can convey the land we allege he sold, and as to which we show a valid title in another. Now, does this allegation and proof of ours (if it were conceded ever that it related to other land) destroy our allegation that he cannot convey?

Strike all our allegations of title in another, and proof to support it, out of the cause, and we, as purchasers, demand of the seller to show title and convey. He has not done either; he can do neither; and it follows that the complainants should have relief.

The court are, therefore, respectfully asked to grant a reargument of the cause. *Hardin*,

for defendants in error."

A rehearing was granted, but afterward the former opinion was sustained.

Other precedents of petitions for rehearing upon appeal, which, in most cases, were denied, are set out in the following cases, to wit:

Shear *v.* Robinson, 18 Fla. 379; Tate *v.* Jones, 16 Fla. 216; La Fayette Bank *v.* Stone, 2 Ill. 424; Funk *v.* Cresswell, 5 Iowa 62; Miller *v.* Chittenden, 4 Iowa 252; Chapline *v.* Moore, 7 T. B. Mon. (Ky.) 150; Waggener *v.* Waggener, 3 T. B. Mon. (Ky.) 542; Durrett *v.* Simpson, 3 T. B. Mon. (Ky.) 517; White *v.* Prentiss, 3 T. B. Mon. (Ky.) 449; Ward *v.* Trotter, 3 T. B. Mon. (Ky.) 1; Botts *v.* Chiles, 2 T. B. Mon. (Ky.) 36; Davis *v.* Young, 2 T. B. Mon. (Ky.) 60; Smith *v.* Moreman, 1 T. B. Mon. (Ky.) 154; Goodloe *v.* Ross, 9 Dana (Ky.) 553; McKee *v.* Hann, 9 Dana (Ky.) 526; Johnson *v.* Yates, 9 Dana (Ky.) 491; Shackleford *v.* Miller, 9 Dana (Ky.) 273; Chiles *v.* Jones, 7 Dana (Ky.) 528; Guyton *v.* Shane, 7 Dana (Ky.) 498; Singleton *v.* Cogar, 7 Dana (Ky.) 479; Jewell *v.* Blandford, 7 Dana (Ky.) 472; Luckett *v.* Stith, 7 Dana (Ky.) 311; Stapp *v.* Phelps, 7 Dana (Ky.) 296; Goring *v.* Shreve, 7 Dana (Ky.) 64; Buckner *v.* Morris, 7 J. J. Marsh. (Ky.) 648; Outen *v.* Graves, 7 J. J. Marsh. (Ky.) 629; Hickman *v.* McCurdy, 7 J. J. Marsh. (Ky.) 555; Talbot *v.* Todd, 7 J. J. Marsh. (Ky.) 456; Crowdus *v.* Hutchings, 7 J. J. Marsh. (Ky.) 43; Greathouse *v.* Throckmorton, 7 J. J. Marsh. (Ky.) 16; Com. *v.* Moore, 5 J. J. Marsh. (Ky.) 655; Henderson *v.* Richards, 5 J. J. Marsh. (Ky.) 531; Bradberry *v* Keas, 5 J. J. Marsh. (Ky.) 446; Scott *v.* Marshall, 5 J. J. Marsh. (Ky.) 435; Finn *v.* Stratton, 5 J. J. Marsh. (Ky.) 364; Mitchell *v.* Sproul, 5 J. J. Marsh. (Ky.) 264; Loudon *v.* Warfield, 5 J. J. Marsh. (Ky.) 196; Palmateer *v.* Stout, 5 J. J. Marsh. (Ky.) 51; Wallace *v.* Twyman, 3 J. J. Marsh. (Ky.) 457; Curd *v.* Letcher, 3 J. J. Marsh. (Ky.) 443; Norton *v.* Sanders, 3 J. J. Marsh. (Ky.) 396; Smart *v.* Baugh, 3 J. J. Marsh. (Ky.) 363; Trabue *v.* Smeltzer, 3 J. J. Marsh. (Ky.) 333; Allnut *v.* Winn, 3 J. J. Marsh. (Ky.) 304; Honore *v.* Colmesnil, 1 J. J. Marsh. (Ky.) 506; Henderson *v.* Richards, 1 J. J. Marsh. (Ky.) 490; Lampton *v.* Preston, 1 J. J. Marsh. (Ky.) 454; Thompson *v.* Clay, 1 J. J. Marsh. (Ky.) 413; Lillard *v.* Field, 1 J. J. Marsh. (Ky.) 275; Breckenridge *v.* Ormsby, 1 J. J. Marsh. (Ky.) 236; Fishback *v.* Woodford, 1 J. J. Marsh. (Ky.) 84; Rowland *v.* Garman, 1 J. J. Marsh. (Ky.) 76; Clarke *v.* Castleman, 1 J. J. Marsh. (Ky.) 69; Gordon *v.* Ryan, 1 J. J. Marsh. (Ky.) 55; Swartzwelder *v.* U. S. Bank, 1 J. J. Marsh. (Ky.) 38; King *v.* McLean, 1 J. J. Marsh. (Ky.) 32; Coleman *v.* Henderson, 1 A. K. Marsh. (Ky.) 412; Dorsey *v.* Dougherty, 1 A. K. Marsh. (Ky.) 182; Bell *v.* Morehead, 3 A. K. Marsh. (Ky.) 158; Ewing *v.*

Form No. 17445.[1]

(Precedent in Whitesides *v.* Collier, 7 Dana (Ky.) 288.)[2]

[In the Court *of Appeals* of *Kentucky.*

John Whitesides, plaintiff in error,
against
Thomas Collier, defendant in error.
} Petition for Rehearing.

To the Honorable the Judges of the Court *of Appeals*:][3]

The undersigned, counsel for the defendant in error, respectfully asks for a rehearing of this case.

The true state of the case, as exhibited by the record, is this: *Thomas Collier* had in his possession, on his premises in *Shelby* county, *two hundred and twenty-four* hogs, which he claimed as his own property. *Whitesides* took them away and detained them. *Collier* filed his declaration in replevin, in the usual form, executed his bond, according to the statute, and sued out his writ of replevin, in conformity to his declaration. Whereupon, the sheriff levied upon *one hundred and eighty-six* of the hogs so taken by the defendant, *Whitesides*, and they were redelivered to *Collier*. At the trial, *Whitesides* avowed the taking of the hogs in the declaration mentioned; because that, before the time of the taking mentioned in the declaration, he and the plaintiff entered into partnership in the buying and selling of hogs, and, as partners, they, some time before said taking, had bought and acquired said hogs, and so held and possessed them until the time of said taking; when, the hogs being on the premises of the plaintiff, and in his possession, as aforesaid, the defendant, being partner and joint owner of the said hogs with the plaintiff, did

Handley, 4 Litt. (Ky.) 364; Martin *v.* M'Cargo, 5 Litt. (Ky.) 293; Meriwether *v.* Booker, 5 Litt. (Ky.) 254; Nelson *v.* Clay, 5 Litt. (Ky.) 150; Cochran *v.* Davis, 5 Litt. (Ky.) 118; Harris *v.* Paynes, 5 Litt. (Ky.) 105; Blair *v.* Williams, 4 Litt. (Ky.) 87; Farmers', etc., Bank *v.* Butler, 3 Litt. (Ky.) 498; Elmondorff *v.* Carmichael, 3 Litt. (Ky.) 472; Grey *v.* State Bank, 2 Litt. (Ky.) 378; Frazier *v.* Harvie, 2 Litt. (Ky.) 180; May *v.* Marshall, 2 Litt. (Ky.) 147; Farmers', etc., Bank *v.* Turner, 2 Litt. (Ky.) 13; Wright *v.* Wright, 1 Litt. (Ky.) 179; Johnson *v.* Moore, 1 Litt. (Ky.) 372; Redd *v.* Martin, 1 Litt. (Ky.) 399; Bibb *v.* Pickett, Litt. Sel. Cas. (Ky.) 309; Ormsby *v.* Lynch, Litt. Sel. Cas. (Ky.) 303; Nicholson *v.* Howsley, Litt. Sel. Cas. (Ky.) 300; Madison *v.* Owens, Litt. Sel. Cas. (Ky.) 281; M'Nitt *v.* Logan, Litt. Sel. Cas. (Ky.) 60; Portevant *v.* Pendleton, 23 Miss. 25; Bell *v.* Tombigbee R. Co., 4 Smed. & M. (Miss.) 549; Tunstall *v.* Walker, 2 Smed. & M. (Miss.) 638; Dean *v.* State, 2 Smed. & M. (Miss.) 200; Martin *v.* Martin, 13 Mo. 36; Hussey *v.* Hill, 120 N. Car. 312; Kirby *v.* Boyette, 118 N. Car. 244; Beaufort County Lumber Co. *v.* Dail, 112 N. Car. 350; Wilson *v.* Lineberger, 94 N. Car. 641; Carlisle *v.* McDonald, 7 Ohio (pt. 1) 267; McCullough *v.* Barr, 145 Pa. St. 459; Hodges *v.* New England Screw Co., 3 R. I. 9; Doak *v.* Stahlman, (Tenn. Ch. 1899) 58 S. W. Rep. 741; Green Bay, etc., Canal Co. *v.* Patten Paper Co., 173 U. S. 179; Richards *v.* Chase Elevator Co., 159 U. S. 477; Bushnell *v.* Crooke Min., etc., Co., 150 U. S. 82; Telephone Cases, 126 U. S. 577; Andrews *v.* Hovey, 124 U. S. 694; Sun Mut. Ins. Co. *v.* Kountz Line, 123 U. S. 65; Maxwell Land-Grant Case, 122 U. S. 365; Porter *v.* Pittsburg Bessemer Steel Co., 122 U. S. 267; Saxlehner *v.* Eisner, etc., Co., 63 U. S. App. 145; Post *v.* Beacon Vacuum Pump, etc., Co., 89 Fed. Rep. 1.

1. See, generally, *supra*, note 2, p. 1012.

2. On this petition, a rehearing was granted. At a subsequent hearing, the former opinion and decision of the court was ordered to stand unaltered.

3. The matter enclosed by [ ] will not be found in the reported case.

take said hogs and remove them to another place in the county, and held them as partner, etc. This avowry concludes with a verification and prayer, that he have judgment for a return of the said hogs. To this plea the plaintiff demurred, and his demurrer was overruled by the court. He then filed his plea, No. *1*, "alleging that the said hogs were, at the time of the taking of the same by the defendant, the property of him, the plaintiff." To this plea the defendant demurred, and his demurrer was sustained. The plaintiff then filed his plea, No. *2*, "asserting absolute and exclusive property and possession in the said hogs, that he did not hold the same as partner with the avowant." Upon this plea, issue was joined, and the jury brought in their verdict in these words: "We, of the jury, find for the defendant, *Whitesides*." *Collier* moved the court to set aside the verdict, and for a new trial, upon various grounds filed. The defendant, *Whitesides*, moved the court for a judgment upon the verdict, and that he should have a return of the hogs, of which he avowed the taking. The court took time until the ensuing term of the court, to consider of this motion, and finally overruled it, and refused to render judgment for a return to the avowant of the hogs taken under the plaintiff's writ, but rendered for the costs only.

The only error assigned is in the refusal of the court to render the judgment asked for by the avowant, *Whitesides*. The evidence given in to the jury does not appear in the record.

It has so happened, that *Collier* has not been heard; and the record presenting, as it is admitted, a novel case, I confidently rely that the court will perceive nothing in the motives prompting this petition, incompatible with the most profound respect due to it. I am the more solicitous that the defendant in error should be heard, as from an examination of the brief filed by *M. D. McHenry*, as attorney for the plaintiff in error, and from a careful reading of the opinion delivered by the court herein, it is evident that the attorney for the plaintiff in error and the court assume, for a fact, that which does not appear in the record, and which never appeared in evidence to the jury, and which never, in truth, existed. The attorney for the plaintiff, in his statement of the case, says: "*Collier* and *Whitesides* entered into partnership in buying and selling hogs; a large number of the hogs being in the possession of *Whitesides*, who claimed to hold them as partnership property, *Collier* set up exclusive claim to them, and replevied them from *Whitesides*," etc. Thus assuming, not only that the verdict of the jury had "ascertained" and found the fact of an existing partnership between *Collier* and *Whitesides* in the hogs, but that *Whitesides* was the partner with whom the possession of the hogs continued after they were purchased, as alleged in his avowry, and excluding from his brief the fact, as it appears by the avowry of *Whitesides* himself, that his client, *Whitesides*, took the hogs from *Collier*, who had them in his possession on his own premises. The court, in its statement of the case, say: "*Whitesides* and *Collier* entered into partnership in buying and selling hogs. *Collier* had possession of a parcel of the partnership hogs, and *Whitesides*, as partner, took them into his possession," etc. Thus, in terms, stating that the *two hundred and twenty-four* hogs taken from *Collier* by

Whitesides was but a parcel of the partnership hogs. No such fact appears in the record, and is wholly without foundation.

The undersigned regrets that the evidence given to the jury in this case, is not presented in the record. If it were, he is convinced that the improper impressions which, from a perusal of the opinion of the court, it would seem the court had received, of the conduct of *Collier*, and which has induced the court to intimate that he was guilty of abusing the process of the law, to recover possession of property to which *Whitesides* had the right of possession, and that he had wrongfully sued out his writ, and had made false claim of absolute right to the property replevied, would be speedily removed. So far as presumptions are to be indulged, they ought, in my opinion, to be favorable to *Collier*, from all that appears in the record. The right of property is universally inferable from the fact of possession. The law will not permit the possession of property to be disturbed and arrested, however wrongfully acquired or persisted in, unless by due process of the law. Notwithstanding *Collier* had possession of the hogs in his declaration mentioned, on his own farm, when *Whitesides* took them away, the court in its anxiety to prevent the writ of replevin from being used as an instrument of injustice, overlooks those maxims which protect and afford respect to such possession, and, as it appears, is mainly anxious to restore and to preserve to *Whitesides* the possession of the hogs.

Feeling the force of the principle that one partner cannot maintain trespass, trover, or replevin against his copartner, for the partnership effects, the court discovers that the law will be chargeable with the glaring injustice of permitting itself to be used as the instrument to obtain the possession of property without the ability to sustain the possession though afterward, upon a full trial of the case, it should be made manifest that the defendant had the right to the possession, and the plaintiff had no cause of action which could be sustained, and wrongfully sued out his writ, under false claim of absolute right to the property. Thus making the determination of the error assigned by the avowment to depend upon the right to the possession, and other assumed facts. It nowhere appears in the record that the defendant, *Whitesides*, had the right to the possession of the hogs, exclusive of *Collier*. The defendant, in his avowry, has not shown that he had any more right to their possession than the plaintiff in the replevin. If that fact is to have any influence, the inference is irresistible that *Collier* had the right to the possession of the hogs. The verdict of the jury does not find any fact in issue between the parties. It is wholly vague, uncertain, and inconclusive; and for that reason, also, the court below was induced not to render the judgment asked for. Hence, all the conclusions drawn by the court, from the assumption that *Whitesides* had the right to the possession, entirely fail. The undersigned confesses he does not well perceive the propriety of the distinction between the right of possession and the right of property, as applied to remedies for the recovery of personal chattels. The right of property carries with it the right of possession, and the right of possession implies the right of property, for the time being, where personal effects are the subjects of contro-

versy. The avowry of *Whitesides* justifies the taking, because, as he alleges, he enjoyed a joint property with the plaintiff, *Collier*, in the hogs. The verdict of the jury, if it means, or can be construed to mean, anything, certainly finds no fact not contained in the avowry. Now, I contend that the avowry itself was insufficient, and that the demurrer to it ought to have been sustained, and that the court did not err in refusing the judgment moved for by the avowant. The reasons and principles which would and do sustain the demurrer, justify also the judgment of the court upon the verdict. The writ of replevin is founded on a taking, and the right which the party, from whom the goods are taken, has to have them restored to him, until the question of title to the goods is determined. It lies only for him who has property, either general or special, in the goods taken; and, as regulated by the statute of this state, *Collier* must have had, also, possession of the hogs when they were taken from him, to entitle him to this writ. *Collier* had possession of the hogs, which *Whitesides* took away and removed from his premises, and had a general property in them. The avowry admits all this, and the court has a right, as it has done, to look to that part of the record in support of that fact. *Collier* then was entitled to the writ, and to have the hogs restored to him, until the question of title should be determined; not the question of right of possession, but of title to the goods or chattels replevied. I insist that, when the plaintiff in replevin has acquired possession of the goods taken from him, he cannot be compelled to return them to the defendant until, in the course of the action, the defendant shows he is entitled to a return; and the defendant, to have a return, must in his pleadings claim a return, in addition to the matter he pleads. If the defendant justifies the taking, and does not claim a return, he is not entitled to a return, and, strictly, only defends his conduct in the case. *Whitesides*, by his avowry, has assumed the character of plaintiff, in addition to justifying, claiming also a return of the property. If he had omitted in his plea to claim a return of the property, and the fact of a partnership had been found by the verdict of the jury, as is alleged, he would unquestionably have been exempt from damages, and the property been permitted to remain with *Collier*, the original possessor; and no inconvenience whatever would have resulted to either party. But, instead of this, he claims a return of the property — becomes thereby a plaintiff, seeking to recover from his alleged partner the joint property. The court say that *Whitesides* has established his right to the possession, being, as I understand the court, a joint owner with *Collier* of the hogs; and because *Whitesides* was guilty, as the court say, of no wrong in the withholding them from *Collier*, and as *Collier* has failed to show in himself an exclusive right to the property, and by his writ of replevin has ousted his partner, and gained exclusive possession, it is proper that, when the issue is found against his exclusive right, and in favor of the justification of the defendant, the property should be absolutely restored to the defendant. Thus making *Collier* the original possessor, whose rights are, at least, commensurate with those of *Whitesides*, restore to *Whitesides* the partnership effects, because he has failed to show an exclusive right to them. He must restore them,

not because, from the verdict of the jury, which should be the only guide to the court, and from which the law should arise, it appears *Whitesides* was entitled to the possession, but because *Whitesides*, when he had possession, was guilty of no wrong in withholding them; and because *Collier* has ousted *Whitesides*, by his writ, and gained, as they say, the exclusive possession, the court, to punish him, must, in turn, by its judgment, determine that the property shall be returned to *Whitesides*, oust *Collier* of his present possession, and give the exclusive possession to *Whitesides*; for in either event, the possession must be exclusive. The fact of the partnership is assumed to be established; and there cannot be any more danger that *Whitesides* may be injured by permitting *Collier* to remain in possession, than that *Collier* should suffer by restoring the property to *Whitesides*. These considerations ought not, however, to have entered into the view of the court. Nor ought the court to have been influenced, in its decision, by looking to the probable effect of a suit upon the bond, if a return should not be adjudged. The court, in this part of its opinion, say the plaintiff has failed to establish his right to the property, though, he has established a partnership right with the defendant. Is not this a right which this court will not undertake to molest — a right which gives to *Collier* equal right of possession with *Whitesides*? When the court determines that *Collier* shall restore the possession to *Whitesides*, is not its judgment founded on the avowry in the form and nature of a declaration, asserting title, and claiming the possession, and upon the verdict of the jury upon the issue joined? Will not this unsettle forever the relations and rights existing between partners, and break down the principle, recognized by the court itself, that trespass, trover, or replevin, can not be maintained by one partner against another? Let it be remembered that it is at the suit of the avowant, claiming a return, that this judgment is rendered. The court decide that *Collier*, because he was partner of *Whitesides*, could not maintain replevin; yet sanction the avowry of *Whitesides*, suing *Collier*, his partner, for a return to him of the joint property. The defendant can have no return when the avowry is ill, though the replevin is ill. *Vin. Ab.*, *title Replevin*, The ground of objection in the court below, to rendering judgment for a return of the property, was the uncertainty and vagueness of the verdict. The court cannot give judgment upon an ambiguous finding, but the matter must be positively found. *Show. 539.* If the verdict doth not, in all things, answer the issue, it is a void verdict. It is error to give judgment against the defendant, upon a verdict that finds him guilty of the premises. *Pr. Dec. 69*; *4 Bibb 144*; *2 ibid. 178*, *429*; *1 Bibb 248*; *Lit. Sel. Ca. 367.* It is essentially necessary, in replevin, that the verdict should be certain and positive, where the thing or goods are to be delivered according to the finding.

All the points involved in the present question necessarily arise upon the demurrer to the avowry. The court below did not perceive the defect in the avowry, wherein the avowant prays a return of the property. It was this prayer that converted him into a plaintiff; and there is, I acknowledge, evident inconsistency in the court below, in

refusing the judgment asked for, if it were not that the ambiguousness of the verdict rendered it impossible for the court to give a judgment for a return of the property.

James C. Sprigg, Attorney for defendant in error.

Form No. 17446.[1]

(Precedent in O'Bannon *v.* Relf, 7 Dana (Ky.) 321.)[2]

[(*Title of court and cause, and address as in Form No. 17445.*)][3]

The counsel for the plaintiffs in error earnestly desire a rehearing of this case.

This is an action of covenant, founded upon an agreement under the seal of the parties thereto, wherein the plaintiffs in error agree to purchase from *Relf* and *Bledsoe* all the bagging and bale-rope which said *Relf* and *Bledsoe* had then, at the date of said agreement, on hand, that is, on the *seventh* of *April*, 1835, and all which they might manufacture from said day until the *first* day of *October*, 1835, at the rate of *twenty-seven* cents per yard for bagging, and *six and a half* cents per pound for bale-rope; *O'Bannon* and *Bradshaw* agreeing to pay, on the *20th* of *May*, 1835, for all the bagging and bale-rope they might receive up to that time, and the other payments to be on the *20th* of *June*, *July* and *August* of the same year, and on the *first* of *October*, 1835, according to the amount of bagging and bale-rope received up to the above-specified dates. *Relf* and *Bledsoe* agree to deliver the bagging and bale-rope at their factory in *Shelbyville*, and they oblige themselves to deliver "good, heavy, merchantable bagging and bale-rope, of the usual size and quality." *O'Bannon* and *Bradshaw*, in their declaration, allege that, after the making of the said agreement, to wit, from the date thereof until the *first* of *October* following, *Relf* and *Bledsoe*, from time to time, delivered to them, at the factory of the defendants in *Shelbyville*, divers parcels and quantities of bagging and bale-rope, manufactured by the said defendants, amounting in all to *nineteen thousand six hundred and twenty-nine* yards of bagging, and ——— pounds of bale-rope, at the said rates and prices per yard and per pound. The plaintiffs allege, also, that they had well and truly performed and fulfilled all things which, by the terms of their said agreement, they were bound to perform. They allege, further, that the defendants, *Relf* and *Bledsoe*, had broken their covenant in this: the aforesaid quantity of bagging which they had delivered to the plaintiffs was not "good, heavy, merchantable bagging, and that no part of the same was good, heavy, merchantable bagging." This is the breach assigned. The defendants demurred, thus admitting the allegations in the declaration, and the breach of the covenant assigned; the demurrer was sustained, and this court has affirmed the judgment, because the bagging was accepted by the plaintiffs, and because, in their declaration they do not show either that they had no opportunity of inspecting it at the time of delivery,

1. See, generally, *supra*, note 2, p. 1012.

2. A rehearing of this case was granted, but the former judgment was allowed to stand.

3. The matter to be supplied within [ ] will not be found in the reported case.

or that they did not then know, or might not, from the nature of the goods and of the transaction, have known, of the defects now alleged, by reasonable diligence; and as the declaration does not show when the defects were discovered, or that, when discovered, the defendants were notified or the return of the goods tendered, nor any reason why this was not done, the court is of opinion, upon the whole declaration, the presumption is, that the acceptance was a discharge of the defendants' covenant; and, therefore, that no cause of action is shown.

I have thought proper to state, with some particularity, the true character of the case, and to recite the opinion of the court upon it. I am convinced that no case has recently, if ever, been brought within the investigation of this court, and its attendant lawyers, which required closer examination and scrutiny than this very case. The manufacturing, commercial, and all the solid interests of the commonwealth, depend upon the principles and rules of law to be established in this case. The attendant attorneys of the court, and the court itself, if it were possible, might have acquired additional and increased reputation by extracting from the appropriate authorities the true principles which should govern it. Yet the attorneys for the defendants describe it as an action of assumpsit; and the court, in its opinion, suggests defects in the declaration, which, it appears to the undersigned, will require a new form of declaring in actions of covenant. I know of no exception to the rule that, in a case like the present, after setting out the contract, only requires of the plaintiff to assign breaches in the words of the covenant sued on. The defendants, by their written covenant, bound themselves to deliver to the plaintiffs bagging of a certain quality. The plaintiffs say the bagging delivered was not of the quality stipulated, but was of a contrary quality. To this declaration the defendants demur, thereby confessing that they had broken their covenant, as is alleged. Upon the whole declaration, say the court, the presumption is, that the acceptance was a discharge of the defendants' covenant. The discharge of the defendants' covenant, by the act of the plaintiffs, is a fact to be pleaded and proved. This court cannot presume it. The defendants have not pleaded a discharge, yet the court presume it from the declaration of the plaintiffs! Does the court mean that, by accepting the bagging the plaintiffs lost, by operation of law, their right to recover from the defendants in this case? This position stands rebuked by public policy and a mutiplicity of authorities. The court from its reasoning, and the conclusion thereon, evidently have had in view exclusively those cases which involved the rights of vendees who purchased without any express warranty, on the part of their vendors, as to the quality of the goods purchased; and in regard to whom it often becomes a matter of difficulty with the courts to determine whether or not, under the facts in evidence, in such cases, they are exempt from the operation of the maxim caveat emptor. The courts have felt it their duty, in administering the law, to lay down rules calculated to prevent fraud, to protect persons who are necessarily ignorant of the qualities of a commodity they purchase, and to make it the interest of manufacturers and those who sell to

furnish the best article that can be supplied. From this disposition of the courts arises the doctrine of implied warranties as to the quality of goods sold. Yet this court has, in this case, adopted a mode of reasoning which converts those principles, which were laid down as a protection for purchasers, into a sword against the rights of the present plaintiffs. I will relieve this case of all difficulty by reference to authority and to law. The rule is universal that, by requiring a warranty, a purchaser is understood as accepting to all terms but such as are stipulated in the contract. And it is equally an invariable rule that, when there is an express warranty in the sale of goods, the purchaser may retain the goods and maintain his action against the seller, if they should not be of the quality stipulated to be delivered, and he will be entitled to such damages as he may sustain by their not answering the description in the contract.

Goods sold by sample is one mode of warranty. Yet, in the case of *Yates* v. *Penn*, referred to in *Comyn on Contracts*, *p. 112*, the plaintiffs, who brought their action on the warranty, recovered, although they had on two occasions inspected the bacon purchased by them, and made no objection, and claimed no allowance for spoiled bacon, and afterward accepted and paid the bills drawn upon them for the price.

The purchaser of a warranted article has a right to keep it, and recover damages for the breach of a warranty, or he may return it, and still maintain an action for breach of warranty. He may even prove the inferiority of the article, in diminution of damages in an action brought by the vendor to recover the stipulated price, instead of compelling him to pay the whole stipulated price in the first instance, and to leave him to sue on his warranty, for the breach thereof, in another action. *Germaine* v. *Burton*, *3 Stark N. P. Rep. 32; Chit. on Cont. 136, 137.* If a merchant buy goods, the seller warranting them to be of a certain description of quality, and the merchant, without examining, sends them to the West Indies, where, upon opening, he finds them not to be of the quality warranted, he may store them, give notice to the seller, and recover back the money paid for them, in an action for money had and received; or he may bring his action on the special agreement of warranty, and recover damages for the full amount of the injury he has received. *12 Wheaton 193.* It is not necessary, to entitle a vendee to an action for the breach of an express warranty, to offer to return the property. This is the invariable principle in this country in regard to sales of horses, and has been over and over acted upon and recognized by this court. No case can be found contrary to it.

Is not the agreement alleged to be broken an express warranty? To create an express warranty, the word warranty need not be used, nor is any precise form of expression required; any affirmation of the quality of the thing sold amounts to a warranty. Will this court reverse long-established principles, and deprive these merchants, the plaintiffs in this writ of error, of the benefit of the warranty contained in the agreement of sale, and by which they were induced to purchase of the defendants their bagging and bale-rope? The plaintiffs, before they would agree to buy of the defendants, and accept

their fabrics, required them to stipulate that it should be of a certain quality — that it should be "good, heavy, and merchantable." It is received, from time to time, as manufactured, from *April* to *October*, sent to the south, and is found to be unmerchantable; and because the plaintiffs performed their part of the agreement, by accepting the bagging, they thereby discharge the defendants from their covenant! Such is the doctrine settled by the court. The law for the protection of the purchaser, and the advancement of the arts, implies that the grower or manufacturer of an article warrants it to be good and merchantable on the sale of it, and makes him liable for defects in the article, although accepted by the purchaser; and yet the purchaser, who takes the precaution to require an express warranty, is presumed to have discharged his vendor by accepting the manufactured article. The establishment of such doctrine would be generally detrimental to trade and to manufacturers; and, in this instance, would assail the obligation of contracts. The keeping of goods a length of time, without objection, will sometimes be evidence that the goods delivered are of the sort sold to the purchaser; but never has been construed as charging an express agreement as to their quality. Whether the goods are or are not of the quality stipulated to be delivered, is a question which should go to the jury. But, notwithstanding the defendants in error have admitted and confessed that the bagging delivered by them was not of the quality they agreed to deliver, the court interposes a "presumption" which cuts off the plaintiffs from all redress for the injury they have sustained, and apply the maxim of caveat emptor to protect the defendants, and to shield them from all responsibility for a breach of their express written warranty. The inferences of the decision are, that every individual in a vast community knows, by inspection, the quality of all the innumerable products of the earth and of the ocean, and of all that are created by human art, and in any form are circulated through the channels of trade and commerce. Of what avail will it be to the merchant, who, perhaps, never saw a cotton plant, and who knows not what sort of bagging the planter prefers, and who is no judge of the fabric, to require an express warranty from the manufacturer, upon purchasing his fabrics? I beseech the court to reflect, lest it adopt a rule which, instead of preventing, will be a protection to fraud; which, instead of "protecting persons who are necessarily ignorant of the quality of a commodity they purchase," will commit them to the mercy of mercenary men, and which makes it the interest of manufacturers and those who sell to put off upon ignorant and unwary purchasers the most defective articles, by warranting them to be good and merchantable. It should be borne in mind that the liability of the defendants arises out of their agreement with the plaintiffs, and does not result from the fact that the plaintiffs had, or had not, an opportunity to inspect the bagging at the time of delivery, or from any of the reasons suggested by the court, as affording a presumption that the covenant of the defendants was discharged. When the defendants have tendered an issue to the plaintiffs' declaration, and the jury are sworn to try the cause, then the fact of the plaintiffs having inspected the fabrics might be received, and have

force as testimony conducing to show that they were of the quality stipulated to be delivered. But the court requires the plaintiffs to aver, in their declaration, matters that can only operate as a defense for the defendants, upon their plea of covenants performed. The court say, in effect, that it was the duty of the plaintiffs, when the defects were discovered, to have notified the defendants, or tendered a return.

The court, in this, confounds with the present case those cases where the purchaser brings his action to recover the price paid, or defends the suit of the vendor for the purchase-money, thereby seeking a rescission of the contract, which is only allowable in cases of implied warranties. When there is an express warranty, the doctrine is, that, where the property in the specific chattel has passed to the vendor, and the price has been paid, he has no right, upon the breach of warranty, to return the article, and revest the property in the vendor, and recover the price as money paid on a consideration which has failed; but must sue on his warranty, unless there has been a condition in the contract authorizing the return, or the vendor has consented to rescind the contract. *1 Doug. 23*; *Towers* v. *Barrell*, *1 T. R. 133*; see note, *Chitty on Contracts*, *138–9*. I repeat, the record shows a breach of the defendants' covenant: will the court presume that they have been discharged from their covenant, without even a plea filed on their part, alleging the fact, and, in despite of this suit, praying damages for the breach thereof, and in defiance of the law as settled in the foregoing authorities, that compels the plaintiffs to sue upon the warranty? The court should reflect, that, from the terms of the contract, and from the necessity of the case, the bagging was delivered at different intervals, as manufactured, and consequently sent, from time to time, by the plaintiffs to the destined and distant market; and that it was doubtless for the convenience, and security, and advantage of both parties, that the fabrics should be received without inspection, and the plaintiffs left to rely upon the warranty. I sincerely believe the law has not been properly administered in the present instance, and feel confident that a court of acknowledged reputation, feeling solicitous that its decisions should be satisfactory to all, will indulge a rehearing of the case.

James C. Sprigg, Attorney for Plaintiffs.

Form No. 17447.[1]

(Precedent in Rust *v.* Larue, 4 Litt. (Ky.) 418.)[2]

[(*Title of court and cause, and address as in Form No. 17445.*)][3]

The appellee, *Hardin*, for himself and also for *Larue*, respectfully solicits of the court a rehearing of this cause. The contract between *Hardin* and *Rust*, this court has, in substance, decided void, because the same amounts to champerty.

Hawkins defines that offense in the following words: "And now we

1. See, generally, *supra*, note 2, p. 1012.

2. A rehearing was granted in this case.

3. The matter to be supplied within [ ] will not be found in the reported case.

are come to the second species of maintenance, called champerty, which is the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it." *1 Haw. 545.* The same definition is given by *Coke, 368. Viner* gives the same definition, *15th volume, 149. Blackstone, 4th volume, page 135,* gives in substance the same definition, except that he says that the champerter is to carry on the suit at his own expense.

Now, although the definition of Blackstone is much more favorable to prove the position hereafter attempted to be established, than Hawkins's, etc., yet it is believed that Hawkins is correct, because whatever act would amount to maintenance, would, if the person guilty of the maintenance were to get, as a consideration therefor, part of the thing sued for, amount to the offense of champerty. The converse of the proposition (whatever fugitive dicta there may be to the contrary), must be equally true, that no agreement for a part of the thing in dispute can be champerty, unless the consideration given for such part be maintenance.

To enumerate all the intermeddlings in a suit, which amount to maintenance, is surely unnecessary. The object both of the common law and the statutes of England, was to prevent the officious interference of a person in a suit to which he was no party, and to prevent powerful men from so interfering as to pervert justice. Hence we see that it was not maintenance for a person to assist his relation, whether by blood or affinity, or a master his servants, etc. Nor was the rule intended to prevent a person involved in law to obtain advice and the assistance of persons learned in the law. See *15th vol. Viner, 148.*

It will be contended that this contract does not come within the common law nor the statutes of England, because there must be the lis pendens at common law. See *Haw. 537.* Although Hawkins seems to suppose money advanced before suit commenced is within the mischief, yet he admits the same is not within the law. The different statutes of England, which the court will see, in *1 Hawkins, 547,* expressly speak of the suit then pending. The court will see from the contract that the same was made before suit commenced.

The next position which will be attempted to be supported is, that the consideration *Hardin* was to give *Rust,* was not maintenance; but was such duties as professionally he could legally render. Although the situation of a lawyer in this country is widely different from either a counsellor or an attorney in England, because it embraces part of both characters, with no law prescribing the limits of his fees, or out of what fund the client shall pay, leaving the same free like other contracts; yet it is believed that, from a careful examination of the English authorities, keeping always in mind the reason upon which the doctrine of maintenance is founded, the court will perceive that this contract does not come within the definition of champerty. The common law gave the right of a counsellor to argue his causes in court; and to the statute of the 28th Ed., c. 11, there is this proviso: "But it may not be understood hereby that any person shall be prohibited to have counsel of pleaders, or of learned men in the law, for his fee, or of his parents and next friends." In *1 Hawkins, 548,* it is said, that giving part of the land in suit, after the end of it, to a

counsellor for his wages, is not within the meaning of it, if it evidently appears that there was no kind of precedent bargain relating to such gift. There appears to be no adjudged case to support this; but it is taken from *2 Institutes, 564.* In *5 Comyns, 18*, we see the same text, and from the same authority. Every research has been made which has been practicable, and no other dictum can be found to the same effect, either in England or America.

In opposition to that text of law, we find, in *15 Viner, 149*, an adjudged case, the 32 Charles II., "a counsellor took a bond of his client, conditioned to convey one half to him of the estate, on recovering the whole. The court declared that the bond ought to secure what was actually disbursed, and make a reasonable allowance for care, etc., in the recovery."

The court will see, from the principle of the above case, that the court did not consider it champerty; because, if they had, they must have declared the bond void. They declare that the bond shall secure what ought justly to be paid; and on account of the undue advantages taken by the counsellor of his client, the chancellor prevents the further enforcement of the contract in the same case cited, in *Newland on Contracts, page 457*, when the author is investigating the power of the chancellor over contracts unfairly made between a counsellor and his client. In *5 Comyns, 18*, it is said, that it is not maintenance for a father to enfeoff his son of the land, pendente lite, for his assistance. What is the reason of this rule? Answer: because it is not maintenance for the son to assist the father, and he is expressly within the exception to the statute above cited.

Upon the score of authority, it is believed not to be champerty, for a counsellor to get part of the thing in suit for his fee; upon principle, there can be no reason for it. Cannot the person about to go to law, sell the property in dispute, or any part of it? He certainly can. Does the law, authorizing a man to engage counsel for his fee, restrict him as to the fund out of which he shall be paid? It does not. Is he, then, not at liberty to select that fund from which to make compensation that will best suit his convenience? But lastly and emphatically, does the counsellor give unlawful maintenance as the consideration for an interest in the matter in dispute; for without that, it cannot be champerty? The answer must be, that he does not; but gives a consideration as lawful as that of money.

There can be no reason for extending the law of champerty, to counsellors, when in the discharge of their professional duties. If they be evil disposed persons, they will encourage litigation as well for a fee in money or other thing, as a part of the matter in dispute. It is frequently more convenient for the litigant to give, contingently, part in contest; because he may not have anything else to give, and without the aid of the matter in contest, he can never sue for his right, not having otherwise the means to employ counsel, the precise case here. *Rust* declares that he had tried to employ counsel, and for want of funds he could not do it; and *Hardin* was the only man he could meet with, who would undertake it for a part of the matter in dispute.

There is yet another point of view in which this question ought to be considered. Is it maintenance for a person to assist in the prosecution of a suit, when he has an interest in the subject-matter sued for, before the suit was commenced, whether that interest be equitable or legal? The answer must be in the negative: See *8 Johnson, 170.* Now, in this case, *Hardin* had an interest in the equity of redemption of these negroes, before the suit was commenced, and that interest for services which, in his profession, he had a right to render.

The court will see, that the statutes against champerty in England so far as the same respect land, are re-enacted in New York.

The case relied on by the court in their opinion, is taken from *2 Atkins*, it being the same relied on by Maddocks. That was a contract which related, in part, to a large landed estate, and the person purchasing was neither an attorney nor counsellor.

There is yet another consideration, worthy the attention of the court. At common law, it was maintenance to buy a thing in suit or a chose in action; yet these contracts have ever been held valid in equity, and at law they are now recognized. Is not the whole common law doctrine of champerty and maintenance, as it respects the buying and selling of every thing not connected with land, whether the title to the same be legal or equitable, in suit or not, virtually and substantially overruled and rendered entirely obsolete? No case can be found, unconnected with land, either in England or America, for the last one hundred and fifty years, declaring those contracts void; but on the other hand, numerous cases, both in law and equity, supporting them. As it respects the selling land, when the grantor was out of possession, there was an express statute of Henry VIII. against it. A reference is made to *Chitty on Bills, pages 9 to 13; 1 Fonblanque, 213 to 216;* and *4 Dunford and East, 340.* The court is also referred to the different suits of *Rogers* v. *Conner*, and *Conner* v. *Rogers*. They will see, that *Rogers* purchased from *Henning's* heirs, their interest in their father's estate, with a view to sue for the same, and agreed to give for it *£100.* Both those contracts were supported in the first instance, by the court of appeals. After an interlocutory decree, *Conner* amended his answer, and stated a purchase from one of the heirs, who, at the time he sold to *Rogers*, was an infant. The court permitted the amendment, and altered the decree as to one half the estate. The purchase of *Rogers* would, according to the notions of the common law, have been maintenance; yet this court sustained it. The contract between *Hardin* and *Rust* does not come within the statute of Edward; for, in the language of the statute, the suit must be hanging in court when the bargain is made. So has it been expounded in *2 Institutes, 564*, above referred to. Not so in this case. If tested by the common law, it is not within the same; first, because the matter must be in plea; secondly, equity, and the courts of common law following its rules, has overruled that part of the common law.

Is not the usage and custom of this country and Virginia, nay, all America, against it for a number of years back, and is that to have no weight with the court? What is that gives, in nine tenths of the

cases, liens general and particular, when none exist at common law? Are they given by statute? No; but by usage and custom. What statute authorized a court of equity and then a court of law to recognize an assignment of choses in action in England, and some of the states of America? Answer; none but the usage and custom of trade. According to the fair exposition of the common law, after the statute made a bond assignable, the assignor would not be liable if the obligor proved insolvent, unless it was so agreed in the assignment; yet the usage, custom and universal understanding to the contrary, has induced the courts of this country to decide differently. A statute has ever been considered as virtually repealed, if there be no instance of the same having been enforced for a series of years; and I ask the court, with great deference for the opinion given by them, if a single adjudged case can be found, applying the law of maintenance and champerty to a counsellor, since the statutes were enacted, or applying the statutes to any purchase unconnected with land, for the last two hundred years? If there be such an one, your petitioner has not been able to find it; and has not this court repeatedly said, that an obsolete statute shall not be enforced?

The opinion given by the court, intimates that the amended answer of *Larue* is, in fact, a supplemental answer, for a specific execution of a contract. Your petitioner is not advised sufficiently to say, that in any case, an amended answer is ever called a supplemental answer. Waiving the question whether the same be an amended or supplemental answer, what is the substance and object of it? Is it to obtain a specific execution of the contract between *Hardin* and *Rust*? I answer no; because *Larue*, who was entitled to *Hardin's* claim, was in possession of the negroes. If *Hardin* had obtained possession of the negroes, could he have filed a bill for a specific execution of the contract between him and *Rust*? Certainly not; because being entitled to a *third*, and having them in possession, there would be nothing to sue about. What was it, then, that made it necessary for *Larue* to amend his answer? Nothing but to obtain an alteration of the decree as to *one third* in dispute; and it was only the decree that was already pronounced, which made it necessary for him to bring his claim under *Hardin* before any court, because his title to *one third* under the claim was complete when coupled with possession; but the decree would have wrongfully taken the negroes out of his possession, unless he exhibited this new matter to the court.

The court, too, decided every part of this contract on the part of *Hardin*, to be fair and correct. That it was an advantageous one for *Rust*, he admits; because it gave him *two thirds* of the negroes when he could not engage counsel upon any other terms; that he had nothing else to give, he declares himself; and that for want of other means, he could get no other lawyer to undertake it; and it is apparent, from the whole case, that it was from his own importunity, *Hardin* engaged in it. In this kind of case, thus situated, it is believed that the court will not feel disposed to apply the old, forgotten and obsolete doctrine of champerty and maintenance to it, unless the very letter of the law is so imperative, that the court can-

not do otherwise. To turn the party round to a court of law, is at once, to decide against him, particularly as the court give him no lien upon the property, until the suit at law is decided; because the whole record shows *Rust* insolvent, and contesting this claim of *Larue* under his contract with *Hardin*, shows that he will do any and everything within his power to defeat the claim entirely.

Your petitioner would have bowed with submission to the opinion of the court, and not have solicited a rehearing of this cause, had the point upon which the court decided been made in the pleadings, or moved in argument, in either court; but as yet, he has had no opportunity of being heard upon a point deeply implicating his character and feelings. Because, there is some reproach to be attached to the commission of the offense of which the court has said he is guilty; and if he must go out of court under the chagrin, mortification and humiliation of such a decision, yet the anguish would be greatly mitigated by the consolation and reflection, that he has been heard in his own defense. Upon an argument of the question he cannot promise much; but yet it will be recollected, that some of the greatest inventions now known to the world have commenced from rude and simple hints. One thing he will promise, that labor and diligence shall not be wanting on his part, to investigate and develop this old obsolete doctrine, buried under the rubbish of two hundred years.

Your petitioner, although ever the advocate for the rights of the judiciary, believing the independence of the bench to be the sheet-anchor of all our liberties, civil, religious and political, and at all times disposed to treat the bench with the highest respect; yet he hopes that it will not be construed to be a departure from the above feelings and principles, if he should ask the court, if a reargument ought not to be desirable to themselves; first, because the point was not made in the pleadings or argument; secondly, the decision was given upon law, against the usage and custom of this country, upon a point never yet directly decided by any court; thirdly, there was not a full court, and the appellees have literally never been heard upon the question.

For the above reasons your petitioner humbly conceives that it is due to the appellees that the court should give them a rehearing; but if not due to them as a matter of right, he asks it as a matter of favor. *Benj. Hardin.*

Form No. 17448.[1]

(Precedent in Pollock *v.* Farmers' L. & T. Co., 158 U. S. 602.)[2]

[(*Title of court and cause as in Form No. 17450.*)][3]

To the Honorable the Justices of the *Supreme* Court *of the United States*:

Charles Pollock and *Lewis H. Hyde*, the appellants in these causes, respectfully present their petition for rehearing, and submit the following reasons why their prayer should be granted:

1. See, generally, *supra*, note 2, p. 1012.

2. A rehearing in this case was granted.

3. The matter to be supplied within [ ] will not be found in the reported case.

I. The question involved in these cases was as to the constitutionality of the provisions of the tariff act of August 15, 1894 (sections 27 to 37), purporting to impose a tax upon incomes. The court has held that the same are unconstitutional, so far as they purport to impose a tax upon the rent or income of real estate and income derived from municipal bonds. It has, however, announced that it was equally divided in opinion as to the following questions, and has expressed no opinion in regard to them:

(1) Whether the void provisions invalidate the whole act.

(2) Whether, as to the income from personal property as such, the act is unconstitutional as laying direct taxes.

(3) Whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity.

The court has reversed the decree of the *Circuit* Court and remanded the case, with directions to enter a decree in favor of complainant in respect only of the voluntary payment of the tax on the rents and income of defendant's real estate and that which it holds in trust, and on the income from the municipal bonds owned or so held by it.

While, therefore, the two points above stated have been decided, there has been no decision of the remaining questions regarding the constitutionality of the act, and no judgment has been announced authoritatively establishing any principle for interpretation of the statute in those respects. *Etting* v. *Bank of the United States*, *11 Wheat. 59*, *78*; *Durant* v. *Essex Co.*, *7 Wall. 107*, *113*.

This court, having been established by the constitution, and its judicial power extending to all cases in law and equity arising under the constitution and laws of the United States, must necessarily be the ultimate tribunal for the determination of these questions. In all cases in which such questions may arise, there can, therefore, be no authoritative decision in reference to the same except by this court.

II. The court early in its history adopted the practice of requiring, if practicable, constitutional questions to be heard by a full court in order that the judgment in such case might, if possible, be the decision of the majority of the whole court.

In *Briscoe* v. *Commonwealth Bank*, *8 Pet. 118*, and *City of New York* v. *Miln*, *8 Pet. 120*, *122*, this rule was announced by *Chief* Justice *Marshall* in the following language:

"The practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless *four* judges concur in opinion, thus making the decision that of a majority of the whole court. In the present cases *four* judges do not concur in opinion as to the constitutional questions which have been argued. The court therefore direct these cases to be reargued at the *next* term, under the expectation that a larger number of the judges may then be present."

The same cases were again called at the *next* term of the court, and the *Chief* Justice said the court could not know whether there would be a full court during the term; but as the court was then composed, the constitutional cases would not be taken up (*9 Pet. 85*).

In a note to the cases upon that page, it is stated that during that term, the court was composed of *six* judges, the full court at the time being *seven*; there was then a vacancy occasioned by the resignation of Mr. Justice *Duval*, which had not yet been filled.

The rule laid down by *Chief* Justice *Marshall* has been frequently followed. Reference may be made to the case of *Home Insurance Company* v. *New York*, *119 U. S.*, *129*, *148*. Mr. *Chief* Justice *Waite* there announced that the judgment of the *Supreme* Court of the State of *New York* was affirmed by a divided court. At the time, Mr. Justice *Woods* was ill and absent during the whole of the term, and took no part in any of the cases argued at that term. There were, therefore, only *eight* members of the court present. A petition for reargument was presented upon the ground that the principle announced by Mr. *Chief* Justice *Marshall* should be followed, and that the constitutional question involved was sufficiently important to demand a decision concurred in by a majority of the whole court. The petition was granted, *122 U. S. 636*, and the case was not reargued until the bench was full. *134 U. S. 594*, *597*. This practice is recognized as established in Phillips' Practice, at page 380.

III. It is respectfully submitted that no case could arise more imperatively requiring the application of the rule than the present. The precise question involved is the constitutionality of an act of Congress affecting the citizens of the country generally. That act has been held unconstitutional in important respects; its constitutionality has not been authoritatively decided as to the remaining portions. These complainants and appellants may well urge, that these serious constitutional questions should be finally decided before their trustee expends their funds in voluntary payment of the tax. In addition, it is manifest that, until some decision is reached, the courts will be overwhelmed with litigation upon these questions, and the payment and collection of the tax will be most seriously embarrassed.

Every taxpayer to any considerable extent will pay the tax under protest and sue to recover the same back, and if necessary sue out his writ of error to this court. The court will of necessity be burdened with reargruments of these questions without number until they are finally settled. Still further, as the matter now stands, it has been decided that a tax upon the income of land is unconstitutional, while the court has made no decision as to the validity of the tax upon income of personal property. Serious questions have, therefore, already arisen as to what is, in fact, to be deemed the income of real estate, and what is the income of real and what of personal property, in cases where both are employed in the production of the same income.

Your petitioners, therefore, respectfully pray that these cases be restored to the docket and a reargument be ordered as to the questions upon which the court was evenly divided in opinion. In case, however, this motion should be denied, your petitioners pray that the mandate be amended by ordering a new trial in the court below, so that the court below may now determine the questions (1) whether or not the invalidity of the statute in the respects already

specified renders the same altogether invalid, and (2) whether or not the act is constitutional in the respects not decided by this court.

[(*Signatures of Petitioners.*)][1]

The undersigned, members of the bar of this honorable court, humbly conceive that it is proper that the appeals herein should be reheard by this court, if this court shall see fit so to order, and they therefore respectfully certify accordingly.

Washington, April 15, 1895.

Joseph H. Choate, *William D. Guthrie,*
Clarence A. Seward, *David Wilcox,*
Benjamin H. Bristow, *Charles Steele,*
Of counsel for appellants.

b. For Limited Rehearing.

Form No. 17449.[2]

(Precedent in New Orleans *v.* Warner, 176 U. S. 93.)[3]

[(*Title of court and cause as in Form No. 17450.*)][1]

To the Honorable the *Supreme* Court of the *United States*:

The undersigned, with respect, desire to make the following suggestion in the nature of a petition for a limited rehearing herein, with a view to the correction of what we think is an error as to the date from which interest is allowed by the court in this suit.

In the court's opinion it is declared, and it is the fact, that both the statutes and the warrants provide that said warrants shall bear interest at the rate of *8* per cent. per annum "until paid," and that it was the opinion of the court that complainant was entitled to that rate of interest from *November 26, 1894* — the date of filing the bill and issuance of the subpœna. This date from which interest is to begin we think is an error, because the contract — both the said drainage warrants and the statute under which they were issued — fix in unmistakable terms the date on which the interest is to begin to run, to wit, from the date of the presentation of the warrant to the administrator of finance, *June 6, 1876*, of which presentation full proof was made.

First. The statute under which the sale and purchase was made, act of the Legislature No. 16 of the sessions of 1876, approved February 24, 1876, provided:

"That all amounts to be paid, when agreed upon, shall be paid in drainage warrants by the city of New Orleans, which said warrants shall be issued in the same form and manner as those heretofore issued to the transferee of the said company under Act No. 30 of Acts of 1871, for work done."

And Act No. 30 of 1871, in the 8th section thereof, after provid-

1. The matter to be supplied within [ ] will not be found in the reported case.

2. See, generally, *supra*, note 2, p. 1012.

3. In this case it was ordered that the decree heretofore entered be vacated and set aside, and that a new decree be entered *nunc pro tunc* as of March 13, 1899, affirming the decree of the circuit court of appeals in all respects.

ing for the measurement of the work to be done, by an engineer to be appointed, and the certification of the amount thereof, further provided:

"It shall be the duty of the administrator of accounts, on the presentation to him of the said certificate of the city surveyor or other engineer appointed by the board of administrators, by the president of the said Mississippi and Mexican Gulf Ship Canal Company, to draw a warrant or warrants on the administrator of finance, in payment of the work so done, at the rate of fifty (50) cents per cubic yard of excavation, and fifty (50) cents per cubic yard for protection levee, the said warrants to be of such denomination as may be required by the president of said company. These warrants it shall be the duty of the administrator of finance to pay on presentation to him, in case there be any funds in the city treasury to the credit of said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash the said warrant or warrants, then the administrator of finance is hereby required to indorse upon the same the date of presentation, after which date the said warrant or warrants shall bear interest at the rate of eight per cent. per annum until paid, which condition shall be set forth in the form of the said warrant or warrants."

Second. And the warrants in suit provide as follows:

"No. *379.* Department of Public Accounts.
$*2000.00.* *New Orleans, June 6,* 1876.
To the Administrator of Finance, City of *New Orleans*:
Ordinance 3539, A. S.

Pay to the order of *W. Van Norden*, transferee of *Mississippi and Mexican Gulf Ship Canal Company, two thousand* dollars out of any funds in the city treasury to the credit of said company.

This warrant is issued in accordance with the provisions of Act 30 of the session of the General Assembly of the State of Louisiana, held in the year 1871, and the administrator of finance, on presentation to him of this warrant, will pay the same in cash, in case there be any funds in the city treasury to the credit of the said *Mississippi and Mexican Gulf Ship Canal Company*; but should there not be sufficient funds to cash this warrant, then the administrator of finance is required to indorse upon the same the date of presentation, and this warrant shall bear interest at the rate of *eight* per cent. per annum from and after the date of such presentation and indorsement until paid. Charge *Mississippi and Mexican Gulf Ship Canal Company.*

(Signed) *J. G. Brown,*
Administrator of Accounts.

Presented for payment *June 6,* 1876.

(Signed) *E. Pilsburry,*
Administrator of Finance.

(Indorsed) *W. Van Norden*, Transferee." See Record, p. *109.*

And this warrant (a specimen copy of the others sued on, see agreement, page *213* of Record), together with the acknowledgment of presentation by said administrator of finance on the *6th* day of *June*, 1876, was duly offered in evidence in the *Circuit* Court, as will fully and conclusively appear from complainant's note of evidence taken

down by the clerk of said *Circuit* Court, in open court, to be found on page *205* of this record, item *2d*, at the bottom of said page, which reads as follows:

"*2d.* Complainants offer in evidence the drainage warrants sued in this case Nos. ———, together with the presentation of said warrant at the bottom of each.

And thus interest at *8* per cent. per annum from *June 6*, 1876 (date of presentation), until paid, was specially set up and prayed for in an amendment to the bill of complaint, duly allowed by the court." See Record, pp. *184* and *185*.

We therefore submit, that it is perfectly clear that interest, under the contract of the parties, is to be computed from the date of presentation of the warrants on *June 6*, 1876, and that such presentation for payment was made on that date is proved by the warrant itself and the indorsement of presentation thereon, and there is not even an intimation of any proof to the contrary, or any absence of the proof here contended for.

And that the holders of drainage warrants are entitled to interest at *8* per cent. per annum from *June 6*, 1876, has been decided as follows:

The suit of *Peake* v. *New Orleans*, *139 U. S.*, p. *342*, was based on a judgment at law rendered on warrants issued under the same statute, where interest was allowed at *8* per cent. per annum from the date of presentation, and this court, at page *349* of said report, said this judgment was undoubtedly correct.

A like judgment at law was rendered on warrants of *James Jackson*, where interest was allowed from *June 6*, 1876 (date of presentation for payment to said administrator of finance. See the record of this case, pages *360* to *363*.

And like judgments at law have been rendered on warrants of the same class here sued on, allowing interest from the date of said presentation until paid.

And in the efforts of holders of drainage warrants to collect the same, they have always been diligent. Record, pp. *114*, *122*, *126* (still pending and undisposed of by agreement of counsel), *142*, in addition to protracted litigations in the state courts.

The matter of the date from which interest was to be computed was not specially considered in our brief, because appellant (petitioner) made no complaint as to this part of the decree, the assignment of error merely setting up want of power in the city to make any contract for interest. We perhaps should have noted the date of demand of presentation with more particularity in our brief. We submit, however, that the decree should be amended so as to allow the interest complainant is entitled to, and he prays that a limited rehearing be granted and that the decree entered may be amended so as to allow interest from *June 6*, 1876.

Respectfully submitted.

Richard De Gray,
J. D. Rouse,
William Grant,
Solicitors for Complainant and Respondent.

We certify the foregoing petition is in our opinion well founded and is not made for the purpose of delay.

Richard De Gray.
William Grant.

4. Suggestion to Petition.[1]

1. Response to Petition. — In Luckett *v.* Stith, 7 Dana (Ky.) 311, the response to the petition was as follows:

"One of the grounds assumed in the petition is, that the decision in this case concludes the rights of the parties as to the title of the land, under a late act of assembly. We understand that act of assembly differently. It, according to our reading, applies only to cases where two originally adversary titles are litigated. Here but one original title is litigated, under which both parties claim the land.

But we controvert the position that, even in cases embraced by the act of assembly, the verdict and judgment are made conclusive in a future controversy, except between the plaintiff and defendant. It was never intended by the legislature, in the passage of that act, to change the law of ejectment as between co-lessors, or co-plaintiffs.

It is also contended, on the part of the plaintiff, that the verdict and judgment are conclusive evidence of the right of *W. F. Luckett* to control the judgment; to take possession; release the judgment; is conclusive in his favor, in an action for mesne profits.

There is some doubt whether or not any of these positions be entirely correct; and we contend that, if they are all correct, they do not prove that the plaintiff has a right to maintain a writ of error to reverse his own judgment. It is very questionable whether, in a court of law, a release of all the lessors of the judgment could be used or set up by the defendant. It is well settled that a deed of conveyance, pending the action, from the lessor to even the defendant, cannot be set up in the defense, on the ground that the court is bound to consider the lease a real one. In this case, the lessors and defendant have all admitted on record that there was a lease; and, for the purpose of a trial, in this as well as in the *circuit* court, are concluded by that admission. They are estopped from denying it.

The same reasoning conduces to show that *W. F. Luckett* alone has not the exclusive right to control the judgment, or to sue for mesne profits. Suppose, on his attempting to control it, a person of the name of the plaintiff were to appear and object to his control, and produce and prove an actual lease, such as is named in the declaration, and claim to control it: who would have the right? No one will contend that the lessee would not; it would be indisputable that he would. So, in the action for mesne profits, the defendant might plead that the lease laid in the declaration was a real, a bona fide lease, and that the lessee had released, receipted, etc. Would not this plea be good? Now, in the action of ejectment, as before stated, both parties, for the purposes of that action, admit a real lease, and are concluded from denying it. It is right and proper that the plaintiff, who states his own case, should be bound by it, and not be permitted to controvert his own solemn admissions in his own pleadings of record.

But, suppose that all the results would ensue, as contended for by the plaintiff in error: is it for this court to extricate the plaintiff from the dilemma that his lessors have gotten into? If their interests were antagonistical, why did they join in an action against us, to try which of themselves owned the land? They had a right to have brought separate actions — one on each of their pretended claims. They chose to unite in joint and several leases to the plaintiff, and to attack the defendant, on all their claims, in one action. They did so, and succeeded, and now say on the wrong title: to which we reply, that is a matter among yourselves, and with which we have no concern, and assuredly should be put to no expense in settling.

The plaintiff has recovered all he sued for, and full costs; and, because he thinks that he recovered on the wrong claim — having three claims — he desires a reversal, not for the purpose of getting more than he has recovered, but that another of his claims

may be established, and not the one on which he succeeded. It is admitted that no such case as that of the plaintiff can be found in the history of judicial proceedings; and we think that this admission in the petition for a rehearing is very strong evidence that the law of the case is against the plaintiff. The plaintiff in error cites authority to show that either the plaintiff in ejectment, or the lessor of the plaintiff, may prosecute a writ of error. There is great doubt on principle, whether this be or not good law. The authority cited is an elementary work, and not a book of reports; hence, it may be a mere dictum. The difficulty in the case is, that in such case, to enable the lessor to prosecute the writ of error, it is necessary for the court, in the teeth of the record, to decide a matter of fact, and not of law; that is, that the lease is a fiction, and never was in fact made, although the plaintiff has so stated on record, and the defendant has been forced to admit it.

It is admitted, in all the authorities, that the lease may be, and sometimes is, a real one. Now, can the court judicially say when the lease is real and when fictitious? The record does not state; and how can a judge of an appellate court decide, except upon matters apparent in the record?

But suppose the lessor of the plaintiff can prosecute a writ of error; then we say that he has not done so here. The plaintiff below is plaintiff here, and he is not wronged, but has recovered all he sued for.

If the lessors, or part of the lessors, can prosecute a writ of error, then this is a proper case for that portion of the lessors who think they are wronged, to come forward as plaintiffs in a writ of error, and seek redress; but then they should not make *Stith* a defendant, but *W. F. Luckett*, who they claim is about to wrong them.

It is contended for them, that, as the action of ejectment is used to try the title, therefore this writ of error can be maintained, not to try whether any of the lessors have a better title than the defendants, but to try which of the lessors has, as between themselves, the better title. Now, we reply that, by the principles of the common law, the decision of one action of ejectment is no evidence between any of the parties in another action; and this is still the law in this case. It is preposterous to contend that, if I am in possession, and stand in relation to one lessor so that I am estopped to deny his title, and the other lessor has actually a better title than the first lessor or me, and, upon the trial of an action of ejectment on their joint and several demises, the court determines that the plaintiff can recover on that first named, and a recovery is had, the lessor, having in fact the better title, must lose it, or reverse the judgment. The court will see, in the case put, that, on either demise, the plaintiff could recover, and if he does recover, according to the doctrine contended for by the plaintiff, the suit must still go on until it is decided between the lessors, which has the better title, and that, in an action against me, in a contest after the judgment in the inferior court, in which I am not interested, and ought not to be put to cost about. Indeed, in the case put, the holder of the better title would not reverse it; because the decision in favor of the other lessor, on the ground of estoppel, would be correct.

Had the plaintiff wished to try the question on the merits presented in the record, he should not have insisted on a recovery in opposition to the strenuous efforts of the defendant, on the demise of *W. F. Luckett*, but have stricken that out; or he should, in the first instance, have only laid a demise in the name of *Levin Luckett's* heirs, as such. He had it in his power to have taken either course; he elected to take the one he has taken; the difficulty he is in is of his own seeking, and we do not think that we should be run to costs to extricate him.

If writs of error are to be prosecuted to settle rights between co-lessors, how are they to be argued? Must each set of lessors have counsel to argue against the others? How should such cases be docketed? Certainly not as this is. The question here is, *W. F. Luckett* and the other heirs of *Levin Luckett* against *William F. Luckett*. *John Doe* is dismissed from the case, and *William F. Luckett*, in the new controversy, is both plaintiff and defendant. In the case of *Bonta* v. *Clay*, *5 Litt. 129*, it was decided that this court could not judicially know when a lease was real, and when fictitious, and that the court was bound so far to treat the lease as real, as to reverse a judgment that the lessor of the plaintiff recover, instead of the

Form No. 17450.

(Precedent in Pollock *v.* Farmers' L. & T. Co., 158 U. S. 605.)[1]

[In the *Supreme* Court *of the United States*, *April* Term, 1895.

Charles Pollock and *Lewis H. Hyde*
against
The Farmers' Loan & Trust Company.
Lewis H. Hyde
against
The Continenta Trust Company.
} Nos. *893*, *894*.][2]

The United States respectfully represents that, if a rehearing is granted in the above-entitled cases, the rehearing should cover all the legal and constitutional questions involved, and not merely those as to which the court are equally divided.

I. Whether a tax on incomes generally, inclusive of rents and interest or dividends from investments of all kinds, is or is not a direct tax within the meaning of the Federal Constitution is a matter upon which, as an original question, the government has really never been heard.

Its position at the argument was that the question had been settled — by an exposition of the Constitution practically contemporaneous with its adoption — by a subsequent unbroken line of judicial precedents — by the concurring and repeated action of all the departments of the government — and by the consensus of all text writers and authorities by whom the subject has heretofore been considered.

II. The importance to the government of the new views of its taxing power, announced in the opinion of the chief justice, can hardly be exaggerated.

First. Pushed to their logical conclusion, they practically exclude from the direct operation of the power all the real estate of the country and all its invested personal property. They exclude it because, if realty and personalty are taxable only by the rule of apportionment, the inevitable inequalities resulting from such a plan of taxation are so gross and flagrant as to absolutely debar any resort to it.

That such inequalities must result is practically admitted, the only suggestion in reply being that the power to directly tax realty and personalty was not meant for use as an ordinary every-day power; that the United States was expected to rely for its customary revenues upon duties, imports, and excises; and that it was meant it should impose direct taxes only in extraordinary emergencies and as a sort of dernier ressort.

It is submitted that a construction of the Constitution of such vital importance in itself and requiring in its support an imputation to its framers of a specific purpose which nothing in the text of the Consti-

plaintiff. The court, in that case, seems to think that you cannot get along with the action of ejectment, without keeping up the lease.

All which is respectfully submitted.

Turner, P. D."

A rehearing was granted, but the former judgment was affirmed.

1. A rehearing was granted in this case.

2. The matter enclosed by [ ] will not be found in the reported case.

tution has any tendency to reveal, cannot be too carefully considered before being finally adopted.

Second. Though of minor consequence, it is certainly relevant to point out that, if the new exposition of the Constitution referred to is to prevail, the United States has under previous income-tax laws collected vast sums of money which on every principle of justice it ought to refund, and which it must be assumed that Congress will deem itself bound to make provision for refunding by appropriate legislation.

Respectfully submitted.

Richard Olney, Attorney General.

5. Order.[1]

a. Denying Rehearing.

Form No. 17451.

(Precedent in Jennings *v.* Parr, 54 S. Car. 112.)

[*Supreme* Court of *South Carolina.*

Robert H. Jennings, as Clerk of the Court *of Common Pleas* for the county of *Fairfield* in the state of *South Carolina*, plaintiff,
against
Henry L. Parr, defendant.][2]

A petition for a rehearing of this case was filed by the said *Henry L. Parr* upon the grounds which are set forth in the petition. The first ground will be first considered. The *eleventh* paragraph of the complaint alleges, inter alia, that no part of said bond has been paid, except the interest thereon up to the *20th* day of *November*, 1874, paid by the said *Henry W. Parr*, and interest paid thereon by the said *Henry W. Parr* on the *6th* day of *February*, 1876. The *fourth* paragraph of the answer denies these allegations. The *Circuit* Judge, under the view which he took of the case, did not think it necessary, and, therefore, did not pass upon said issues. The question as to the partial payments mentioned in said first ground was not before the *Supreme* Court for its consideration. This Court, in stating that the mortgage should be credited with the proceeds arising from the sale of the *181* acres, to wit, $*726*, and with $*172* of the proceeds arising from the sale of the "*Mill*" tract, did not intend to render a decision as to other payments, which were not presented for its consideration; and as the partial payments mentioned in said first ground were not before this Court for consideration, of course, the judgment of this Court cannot be construed as affecting the question of such partial payments. We will next consider the other grounds urged for a rehearing. It is sufficient to say that the respondent did not give notice that he would ask this Court, if it should find it necessary to sustain the judgment of the *Circuit* Court

1. **For the formal parts** of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

2. The matter enclosed by [ ] will not be found in the reported case.

on the grounds mentioned in said petition, and the questions raised by said grounds were not before the *Supreme* Court for consideration It is, therefore, ordered, that the petition for a rehearing be dismissed, without prejudice to the right of the defendant to have the question, as to the partial payments mentioned in the first ground aforesaid, passed upon by the *Circuit* Court, and that the remittitur be forthwith sent down to the *Circuit* Court.

Dated [(*concluding as in Form No. 11876*)].[1]

Form No. 17452.

(Precedent in Texas, etc., R. Co. *v.* Murphy, 111 U. S. 488.)

[In the *Supreme* Court of the State of *Texas*, *December* Term, 1883.][2]

Appeal from *Harrison.*

The Texas Pacific Railroad Company v. *James Murphy.* } No. *422.* Case *1111.*

Opinion of the court delivered by Mr. Justice *Slayton.* Mr. *Chief* Justice *Willie* not sitting in this cause.

Motion of the appellant for a rehearing in this cause came on to be heard, and the same having been considered by the court, it is ordered that the motion be overruled and the rehearing refused; that the appellant, the *Texas Pacific Railroad Company*, pay all the costs of this motion.

b. Granting Rehearing.

Form No. 17453.

(Precedent in Union Pac. Town-Site Co. *v.* Page, 54 Kan. 371.)

[In the *Supreme* Court of the state of *Kansas.*][2]

The Union Pacific Town-Site Company, Plaintiff in Error, v. *Page & Greenfield*, Defendants in Error.

Now comes on for decision the motion for a rehearing of this cause; and thereupon it is ordered that the said motion be allowed; that the judgment of reversal heretofore entered be vacated and set aside, and that this cause be remanded with the order to enter judgment, with the consent of the plaintiffs below, for $725.75, the claim for which amount was undisputed on the trial, with interest thereon from *August 29*, 1887, at the rate of 7 per cent. per annum, and that the judgment be affirmed for that amount, and for costs. It is further ordered, that the costs of this case in this court, taxed at $———, be equally divided between the parties, plaintiff in error and defendants in error, and hereof let execution issue.

Form No. 17454.

(*Title of court and cause as in Form No. 9760.*)

Upon reading and filing (*Here enumerate the motion papers*), and upon hearing *Jeremiah Mason*, attorney for the above named appel-

1. The matter to be supplied within [ ] will not be found in the reported case.

2. The matter enclosed by [ ] will not be found in the reported case.

lant, in argument in support of said motion, and *Oliver Ellsworth*, attorney for respondent, in opposition, now, on motion of *Jeremiah Mason*, attorney for appellant,

Ordered, that the said motion be granted, and that the appeal from the judgment heretofore entered in this cause (*if necessary, here describe the judgment*) be reargued.

And it is further ordered that the entry of the said judgment heretofore rendered be stayed until the decision of this court on such reargument.

Enter:

(*Signature as in Form No. 9760.*)

Form No. 17455.

(Precedent in Yardley *v.* Cuthbertson, 108 Pa. St. 444.)

[In the *Supreme* Court of the Commonwealth of *Pennsylvania*.

John S. Yardley, et als.
against
James Cuthbertson, et als.][1]

And now, *7th April*, 1884, a re-argument of this case is ordered. While we intend this order to apply to the whole case, yet we invite especial attention to the *eleventh*, *twelfth* and *sixteenth* specifications of error.

Per Curiam.

1. The matter enclosed by [ ] will not be found in the reported case.

INDEX TO FORMS.